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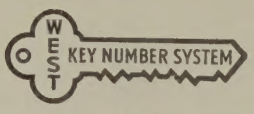

35 P.2d – 36 P.2d

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1941

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Pacific Reporter, Second Series, Vol. 35, Nos. 1-4;
Vol. 36, Nos. 1-6.

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CAL.REP.35-36 P.2d
5th Reprint—1974

CASES REPORTED

	Vol.		Page
Ackles v. Lane, two cases, App.	35	P.2d	200
Aguilar; People v., Sup.	35	P.2d	142
Aguilar; People v., App.	35	P.2d	137
Alameda Park Co.; Chardon v., App.	36	P.2d	136
Allen; City of Los Angeles v., Sup.	36	P.2d	611
Allen v. Payne, Sup.	36	P.2d	614
Allen; Salmon v., App.	36	P.2d	153
American Employers' Ins. Co.; Maurice Mercantile Co. v., App.	35	P.2d	1047
American Employers' Ins. Co. v. Maurice Rosenthal, Inc., App.	35	P.2d	1047
American Legion Post No. 222 of Laguna Beach; City of Laguna Beach v., App.	35	P.2d	341
American States Public Service Co. v. Rath, App.	35	P.2d	145
Ammerman; McIntee v., App.	35	P.2d	385
Anderson v. Geo. L. Barney Co., App.	36	P.2d	717
Arthur R. Lindburg, Inc.; Robinson v., App.	35	P.2d	1057
Austin v. Burns; App.	35	P.2d	142
Avenell; People v., App.	35	P.2d	1057
Azevedo v. Azevedo, App.	36	P.2d	1078
Bailey; Whelan v., App.	36	P.2d	709
Baker v. Peck, App.	36	P.2d	401
Bank of America Nat. Trust & Savings Ass'n; Hoover v., App.	35	P.2d	188
Bank of America Nat. Trust & Savings Ass'n; Hoover v., App.	35	P.2d	193
Bank of America Nat. Trust & Savings Ass'n v. Pendergrass, App.	35	P.2d	346
Baranov; Norton v., App.	35	P.2d	640
Baxter; Security-First Nat. Bank of Los Angeles v., App.	35	P.2d	403
Becker; People v., App.	35	P.2d	196
Belden v. California Fireproof Storage Co., App.	35	P.2d	1034
Bellon v. Fox West Coast Theatres, App.	36	P.2d	672
Berkeley Motors; Riley v., App.	36	P.2d	398
Bernfield; People v., App.	35	P.2d	585
Bertelson; Hendrickson v., Sup.	35	P.2d	318
Bianchi; People v., App.	35	P.2d	1032
Bierlich v. Unger, Sup.	36	P.2d	374
Bill; People v., App.	35	P.2d	645
Biltmore Garage; C. I. T. Corporation v., Super.	36	P.2d	247
Biscailuz; Coon v., App.	36	P.2d	430
Black, Ex parte, App.	35	P.2d	355
Blaine v. Board of Sup'rs of Alameda County, Sup.	35	P.2d	517
Blodgett; Losson v., App.	36	P.2d	147
Board of Police Com'rs of City of Los Angeles; Smith v., App.	35	P.2d	555
Board of Police Com'rs of City of Los Angeles; Smith v., App.	36	P.2d	670
Board of Sup'rs of Alameda County; Blaine v., Sup.	35	P.2d	517
Board of Sup'rs of City and County of San Francisco; Holmes Inv. Co. v., Sup.	35	P.2d	542
Boyd; Illingsworth v., App.	36	P.2d	659
Boyd v. Jordan, Sup.	35	P.2d	533
Bridges; Williams v., App.	35	P.2d	407
Briggs; Trowbridge v., App.	35	P.2d	426
Brite; Goodall v., Sup.	36	P.2d	190
Brooks v. City of Monterey, App.	35	P.2d	636
Brooks; People v., App.	35	P.2d	583
Brown; People v., App.	36	P.2d	194

	Vol.		Page
Brown; Smith v., App.	36	P.2d	1081
Browne v. Fernandez, App.	36	P.2d	122
Bruck v. Henn, App.	35	P.2d	431
Bruck's Estate, In re, App.	35	P.2d	431
Brunig v. Pacific Gas & Electric Co., App.	35	P.2d	226
Bruno; People v., App.	35	P.2d	391
Bryan v. Pasadena Holding Co., App.	35	P.2d	334
Burbank Mut. Life & Benefit Ass'n; Combs v., App.	35	P.2d	132
Burnham; Rogers v., App.	35	P.2d	329
Burns; Austin v., App.	35	P.2d	142
Busing v. Pierson, Sup.	36	P.2d	116
Busing v. Pierson, Sup.	36	P.2d	118
C. A. Hooper & Co. v. Freeman, Smith & Camp Co., App.	36	P.2d	146
California Fireproof Storage Co.; Belden v., App.	35	P.2d	1034
California Nat. Bank of Long Beach; Spencer v., Sup.	36	P.2d	1073
California Pacific Title & Trust Co. v. MacArthur, App.	36	P.2d	413
California Savings & Commercial Bank of San Diego; Camerer v., App.	35	P.2d	422
California Sec. Loan Corporation; Hammel Radiator Corporation v., App.	35	P.2d	353
Callahan v. Hahnemann Hospital, Sup.	35	P.2d	536
Camerer v. California Savings & Commercial Bank of San Diego, App.	35	P.2d	422
Campbell; People v., App.	36	P.2d	198
Capron v. Pacific Southwest Discount Corporation, App.	36	P.2d	664
Carey v. Douthitt, App.	35	P.2d	632
Carrey; Lees v., Sup.	36	P.2d	1069
Carter v. J. W. Silver Trucking Co.; App.	36	P.2d	837
Casey v. Gritsch, App.	36	P.2d	696
Cauzza; Kramer v., App.	36	P.2d	215
Cauzza; Kramer v., App.	36	P.2d	219
Cazaurang's Estate, In re., Sup.	36	P.2d	1069
Cerrato; Creamer v., App.	36	P.2d	1094
Chamberlain; City of Pasadena v., Sup.	36	P.2d	392
Chamberlain; City of Pasadena v., App.	36	P.2d	387
Chamberlain; Hammett v., App.	35	P.2d	548
Chapman v. Goldberg, App.	35	P.2d	641
Chapman v. Superior Court in and for Los Angeles County, App.	36	P.2d	1093
Chardon v. Alameda Park Co., App.	36	P.2d	136
Choy Sun; People v., App.	35	P.2d	643
Ciani v. Dubuque Fire & Marine Ins. Co., App.	36	P.2d	658
C. I. T. Corporation v. Biltmore Garage, Super.	36	P.2d	247
Citizens' Nat. Trust & Savings Bank of Los Angeles; Miller v., App.	36	P.2d	1088
City Council of Tujunga; Gardner v., two cases, App.	35	P.2d	562
City of Calipatria; Myers v., App.	35	P.2d	377
City of Fullerton v. Orange County, App.	35	P.2d	397
City of Glendale; Smith v., App.	36	P.2d	1083
City of Laguna Beach v. American Legion Post No. 222 of Laguna Beach, four cases, App.	35	P.2d	341
City of Los Angeles v. Allen, Sup.	36	P.2d	611
City of Monterey; Brooks v., App.	35	P.2d	636
City of Mountain View v. Southern Pac. R. Co., App.	36	P.2d	650
City of Pasadena v. Chamberlain, Sup.	36	P.2d	392
City of Pasadena v. Chamberlain, App.	36	P.2d	387
City of San Diego; Lowe v., App.	36	P.2d	658
City of Santa Barbara; Porter v., App.	35	P.2d	207
Clark v. Mountain States Life Ins. Co., App.	36	P.2d	848
Clay & Co. v. Shafer, App.	35	P.2d	572
Clutter v. Superior Court in and for Los Angeles County, App.	35	P.2d	152
Coffelt; People v., App.	35	P.2d	374

	Vol.		Page
Collins; Lesser v., App.	36	P.2d	411
Collins; Meis v., App.	36	P.2d	662
Colonial Mut. Compensation Ins. Co. v. Mitchell, App.	36	P.2d	127
Combs v. Burbank Mut. Life & Benefit Ass'n, App.	35	P.2d	132
Combs; Olson v., App.	36	P.2d	708
Conklin v. Superior Court in and for Los Angeles County, Sup.	36	P.2d	386
Consolidated Furniture Mfrs. v. Goldstein, App.	35	P.2d	627
Consolidated Inv. Corporation; Southern Glass Co. v., App.	36	P.2d	1077
Consolidated Pipe Co. v. Gunn, App.	35	P.2d	350
Consolidated Title Securities Co. v. Hopkins, Sup.	35	P.2d	320
Cook; Easterly v., App.	35	P.2d	164
Coon, In re, App.	36	P.2d	660
Coon v. Biscailuz, App.	36	P.2d	430
Costa; Martin v., App.	35	P.2d	362
County Clerk of Merced County; Hutchins v., App.	35	P.2d	563
Crawford v. Southern Pac. Co., App.	35	P.2d	577
Creamer v. Cerrato, App.	36	P.2d	1094
Crossley, In re, Sup.	35	P.2d	513
Crossley v. Eliel, Sup.	35	P.2d	513
Cutler, Ex parte, App.	36	P.2d	441
Dady v. Superior Court in and for Los Angeles County, App.	36	P.2d	1092
Dam; Ferguson v., App.	35	P.2d	1072
Danforth; Hosking v., App.	36	P.2d	427
Daniel v. Jones, App.	35	P.2d	198
d'A Philippo; People v., App.	35	P.2d	134
Davis; People v., App.	36	P.2d	715
Davis; Pleaters' & Stitchers' Ass'n v., App.	35	P.2d	401
Davis v. Security-First Nat. Bank of Los Angeles, Sup.	36	P.2d	649
De Brincat v. Mogan, App.	36	P.2d	245
De Brincat v. Swart, App.	36	P.2d	247
Delorey v. Superior Court in and for Los Angeles County, App.	35	P.2d	634
Department of Public Works; East Bay Municipal Utility Dist. v., Sup.	35	P.2d	1027
De Van; Webb v., App.	35	P.2d	208
Di Giacomo v. Southern Pac. Co., App.	36	P.2d	427
Dillon; People v., App.	36	P.2d	416
Division of Motor Vehicles of State of California; Sheehan v., App.	35	P.2d	359
Dixon v. Eckenroth, App.	35	P.2d	614
Douthitt; Carey v., App.	35	P.2d	632
Dryden v. Western Pac. R. Co., App.	36	P.2d	394
Du Bain Realty Corporation; Greenberg v., App.	35	P.2d	579
Dubuque Fire & Marine Ins. Co.; Ciani v., App.	36	P.2d	658
Du Fault; People v., App.	36	P.2d	196
Duncan v. Standard Accident Ins. Co.; Sup.	35	P.2d	523
Dunn; People v., App.	36	P.2d	1096
Duran v. Pickwick Stages System, App.	35	P.2d	148
Eagle's Home Ass'n of Los Angeles v. Industrial Accident Commission, App.	35	P.2d	591
East Bay Municipal Utility Dist. v. Department of Public Works, Sup.	35	P.2d	1027
Easterly v. Cook, two cases, App.	35	P.2d	164
Easton's Estate, In re, App.	35	P.2d	614
Eckenroth; Dixon v., App.	35	P.2d	614
Eliel; Crossley v., Sup.	35	P.2d	513
Elk Grove Union High School Dist.; Kerby v., App.	36	P.2d	431
England; People v., App.	35	P.2d	565
Enright; People v., App.	35	P.2d	1033
Erickson's Estate, In re, App.	35	P.2d	628
Evans; North v., App.	36	P.2d	133
Eyre, Ex parte, App.	36	P.2d	842
Fairbanks; Mortensen v., Sup.	35	P.2d	1030

	Vol.		Page
Ferguson v. Dam, App.	35	P.2d	1072
Fernandez; Browne v., App.	36	P.2d	122
Ferran v. Southern Pac. Co., App.	35	P.2d	1076
Fierro; People v., App.	35	P.2d	573
Fiore; People v., App.	35	P.2d	369
First Church of Christ, Scientist, in Boston, Mass., v. Gilbert, App.	35	P.2d	335
First Nat. Trust & Savings Bank of San Diego; Nicoll v., App.	35	P.2d	392
Fisher, Ex parte, App.	36	P.2d	841
Flagg v. Sloane, App.	36	P.2d	129
Fleming v. Flick, App.	35	P.2d	210
Flick; Fleming v., App.	35	P.2d	210
Flores; People v., App.	36	P.2d	239
Ford Motor Co.; Martinsen v., App.	35	P.2d	1034
Forward; Muehleisen v., App.	36	P.2d	141
Fowler; Meek v., App.	35	P.2d	410
Fox West Coast Theatres; Bellon v., App.	36	P.2d	672
Francis v. Superior Court in and for Los Angeles County, App.	35	P.2d	634
Free; Lovelace v., App.	35	P.2d	342
Freeman, Smith & Camp Co.; C. A. Hooper & Co. v., App.	36	P.2d	146
Fresno County; Hill v., App.	35	P.2d	593
Friedman & Co. v. Sterling Furniture Co., App.	35	P.2d	1064
Fritz' Estate, In re, App.	35	P.2d	643
Fruit Growers' Supply Co.; Smarda v., App.	36	P.2d	701
Fullerton, City of, v. Orange County, App.	35	P.2d	397
Gallucci v. San Diego Electric R. Co.; App.	35	P.2d	1038
Gardner v. City Council of Tujunga, two cases, App.	35	P.2d	562
General Ins. Co. of America; McDanels v., App.	35	P.2d	394
General Ins. Co. of America; McDanels v., App.	36	P.2d	829
Geo. L. Barney Co.; Anderson v., App.	36	P.2d	717
Ghisletta; Soares v., App.	36	P.2d	668
Gilbert; First Church of Christ, Scientist, in Boston, Mass., v., App.	35	P.2d	335
Gilmore v. Jordan, Sup.	35	P.2d	517
Gindraux v. Maurice Mercantile Co., App.	36	P.2d	844
Goldberg; Chapman v., App.	35	P.2d	641
Golden Gate Candy Products Co. v. Superior Court in and for City and County of San Francisco, App.	35	P.2d	372
Golden Gate Candy Products Co. v. Superior Court in and for City and County of San Francisco, App.	36	P.2d	834
Goldstein; Consolidated Furniture Mfrs. v., App.	35	P.2d	627
Goldthwaite v. Johnson, App.	35	P.2d	1050
Goldthwaite's Estate, In re, App.	35	P.2d	1050
Gonzales v. Superior Court in and for Los Angeles County, App.	35	P.2d	556
Goodall v. Brite, Sup.	36	P.2d	190
Gorgas; Skidmore v., App.	36	P.2d	661
Grady; Sanford v., App.	36	P.2d	652
Grana; People v., Sup.	36	P.2d	375
Granillo; People v., App.	36	P.2d	206
Greenberg v. Du Bain Realty Corporation, App.	35	P.2d	579
Greenzweight v. Title Guarantee & Trust Co., Sup.	36	P.2d	186
Griffith v. Superior Court in and for Mendocino County, Sup.	35	P.2d	317
Gritsch; Casey v., App.	36	P.2d	696
Groves; People v., App.	35	P.2d	202
Gue v. Superior Court in and for San Diego County, App.	36	P.2d	202
Guertin, Ex parte, App.	36	P.2d	842
Guiterrez; People v., App.	35	P.2d	1046
Gunn; Consolidated Pipe Co. v., App.	35	P.2d	350
Gutierrez, Ex parte, App.	36	P.2d	712
Gutter v. Niesley, App.	36	P.2d	155
Hahnemann Hospital; Callahan v., Sup.	35	P.2d	536

	Vol.		Page
Hale; Page v., App.	36	P.2d	818
Hammel Radiator Corporation v. California Sec. Loan Corporation, App.	35	P.2d	353
Hammett v. Chamberlain, App.	35	P.2d	548
Hammond Lumber Co.; Withey v., App.	35	P.2d	1080
Harris v. Seidell, App.	36	P.2d	1104
Hartford Accident & Indemnity Co. v. Industrial Accident Commission, App.	35	P.2d	366
Harveld v. Milani, App.	36	P.2d	393
Hendrickson v. Bertelson, Sup.	35	P.2d	318
Henn; Bruck v., App.	35	P.2d	431
Hill v. Fresno County, App.	35	P.2d	593
Hine v. State Life Ins. Co. of Indianapolis, Ind., App.	35	P.2d	1042
Hobart Estate Co. v. State Board of Equalization, App.	36	P.2d	407
Holder; McLennan v., App.	36	P.2d	448
Hollar v. Superior Court in and for Los Angeles County, App.	35	P.2d	417
Holmes Inv. Co. v. Board of Sup'rs of City and County of San Francisco, Sup.	35	P.2d	542
Hooper & Co. v. Freeman, Smith & Camp Co., App.	36	P.2d	146
Hoover v. Bank of America Nat. Trust & Savings Ass'n, App.	35	P.2d	188
Hoover v. Bank of America Nat. Trust & Savings Ass'n, App.	35	P.2d	193
Hoover's Estate, In re, App.	35	P.2d	188
Hoover's Estate, In re, App.	35	P.2d	193
Hopkins; Consolidated Title Securities Co. v., Sup.	35	P.2d	320
Hosking v. Danforth, App.	36	P.2d	427
Howard's Estate, In re, App.	36	P.2d	852
Howe; People v., App.	36	P.2d	820
Huberty; Vela v., Sup.	35	P.2d	531
Hughes' Estate, In re, App.	35	P.2d	204
Hunt v. Jordan, App.	36	P.2d	828
Hutchins v. County Clerk of Merced County, App.	35	P.2d	563
Illingsworth v. Boyd, App.	36	P.2d	659
Industrial Accident Commission; Eagle's Home Ass'n of Los Angeles v., App.	35	P.2d	591
Industrial Accident Commission; Hartford Accident & Indemnity Co. v., App.	35	P.2d	366
Industrial Accident Commission; Lima v., App.	36	P.2d	223
Industrial Accident Commission; Los Angeles & S. L. R. Co. v., App.	35	P.2d	558
Industrial Accident Commission; Pacific Employers' Ins. Co. v., App.	35	P.2d	366
Industrial Accident Commission; Quigley v., App.	35	P.2d	544
Industrial Accident Commission; Thomas v., App.	35	P.2d	225
Industrial Accident Commission; Walsh v., Sup.	36	P.2d	1072
Industrial Accident Commission of California; Leroux v., App.	35	P.2d	624
Industrial Accident Commission of California; Los Angeles County v., App.	35	P.2d	1035
Irvin v. Superior Court in and for Los Angeles County, App.	35	P.2d	642
Islais Co. v. Matheson, App.	35	P.2d	1051
Islais Co. v. Matheson, three cases, App.	35	P.2d	1055
Islais Co. v. Matheson, three cases, App.	35	P.2d	1056
Jackson, Ex parte, App.	35	P.2d	359
James v. White Truck & Transfer Co., App.	36	P.2d	401
James A. Clay & Co. v. Shafer, App.	35	P.2d	572
Janss Inv. Co.; Lozier v., Sup.	36	P.2d	620
Jansson v. Monten, App.	35	P.2d	628
Johnson; Goldthwaite v., App.	35	P.2d	1050
Johnston, Ex parte, App.	36	P.2d	225
Johnston; People v., App.	35	P.2d	1074
Jones; Daniel v., App.	35	P.2d	198
Jones; Luscher v., App.	35	P.2d	199

	Vol.		Page
Jordan; Boyd v., Sup.	35	P.2d	533
Jordan; Gilmore v., Sup.	35	P.2d	517
Jordan; Hunt v., App.	36	P.2d	828
Jordan; Willett v., Sup.	35	P.2d	1025
Justice's Court of No. 3 Tp., Lake County; Treppa v., App.	36	P.2d	819
J. W. Silver Trucking Co.; Carter v., App.	36	P.2d	837
J. W. Silver Trucking Co.; Pinout v., App.	36	P.2d	837
J. W. Silver Trucking Co.; Von Housebrock v., App.	36	P.2d	837
Karle v. Reed, App.	36	P.2d	150
Katz; Morrison v., App.	36	P.2d	852
Kerby v. Elk Grove Union High School Dist., App.	36	P.2d	431
Kerr; Shea v., Sup.	36	P.2d	189
Kingsbury v. Whitacre, App.	36	P.2d	241
Knoke v. Swan, Sup.	35	P.2d	327
Kocalis; People v., App.	35	P.2d	584
Kramer v. Cauzza, App.	36	P.2d	215
Kramer v. Cauzza, App.	36	P.2d	219
Laguna Beach, City of, v. American Legion Post No. 222 of Laguna Beach, App.	35	P.2d	341
Lami; People v., Sup.	36	P.2d	192
Lamson; People v., Sup.	36	P.2d	361
Lane; Ackles v., App.	35	P.2d	200
Langdon; People v., App.	36	P.2d	424
Lasswell, Ex parte, App.	36	P.2d	678
Lawyer; People v., App.	35	P.2d	1036
Le Ballister v. Redwood Theatres, App.	36	P.2d	827
Lees v. Carrey, Sup.	36	P.2d	1069
Lennon v. Woodbury, App.	36	P.2d	415
Leroux v. Industrial Accident Commission of California, App.	35	P.2d	624
Lesser v. Collins, App.	36	P.2d	411
Lewis v. Memmler, App.	35	P.2d	406
Lewis; People v., App.	35	P.2d	561
Lewis v. Shaw, App.	36	P.2d	668
Lima v. Industrial Accident Commission, App.	36	P.2d	223
Lindley v. Sale, App.	36	P.2d	130
Livingstone v. MacGillivray, Sup.	36	P.2d	622
Lockard v. Matlaw, App.	35	P.2d	591
Long v. Schaub, App.	36	P.2d	660
Los Angeles, City of, v. Allen, Sup.	36	P.2d	611
Los Angeles County v. Industrial Accident Commission of California, App.	35	P.2d	1035
Los Angeles County; Phillips v., App.	35	P.2d	187
Los Angeles County; Thompson v., App.	35	P.2d	185
Los Angeles & S. L. R. Co. v. Industrial Accident Commission, App.	35	P.2d	558
Los Feliz Inv. Co. v. Superior Court of Los Angeles County, App.	35	P.2d	131
Losson v. Blodgett, App.	36	P.2d	147
Lovelace v. Free, App.	35	P.2d	342
Loveless; People v., App.	35	P.2d	574
Lowe v. City of San Diego, App.	36	P.2d	658
Lozier v. Janss Inv. Co., Sup.	36	P.2d	620
Luders v. Security Trust & Savings Bank, App.	35	P.2d	1015
Luscher v. Jones, App.	35	P.2d	199
MacArthur; California Pacific Title & Trust Co. v., App.	36	P.2d	413
McCall v. Superior Court in and for Imperial County, Sup.	36	P.2d	642
McCarthy; People v., App.	35	P.2d	621
McCarty, Ex parte, App.	35	P.2d	568
McCurdy; People v., App.	35	P.2d	569
McDanels v. General Ins. Co. of America, App.	35	P.2d	394
McDanels v. General Ins. Co. of America, App.	36	P.2d	829

	Vol.		Page
McGee; People v., Sup.	36	P.2d	378
MacGillivray; Livingstone v., Sup.	36	P.2d	622
McIntee v. Ammerman, App.	35	P.2d	385
Mackay, Ex parte, App.	35	P.2d	385
McKinley; People v., App.	35	P.2d	572
McLennan v. Holder, App.	36	P.2d	448
McMillan v. Thompson, App.	35	P.2d	419
Maggio; People v., App.	35	P.2d	369
Mahoney v. Murray, App.	35	P.2d	612
Makovsky; People v., App.	36	P.2d	118
Malpas v. Whipple, App.	35	P.2d	204
Marron; People v., App.	35	P.2d	610
Martin v. Costa, App.	35	P.2d	362
Martinsen v. Ford Motor Co., App.	35	P.2d	1034
Maryland Casualty Co.; Woodruff v., App.	35	P.2d	623
Mason v. San-Val Oil & Water Co., Sup.	36	P.2d	616
Matheson; Islais Co. v., App.	35	P.2d	1051
Matheson; Islais Co. v., App.	35	P.2d	1055
Matheson; Islais Co. v., App.	35	P.2d	1056
Matlaw; Lockard v., App.	35	P.2d	591
Maurice Mercantile Co. v. American Employers' Ins. Co., App.	35	P.2d	1047
Maurice Mercantile Co.; Gindraux v., App.	36	P.2d	844
Maurice Rosenthal, Inc.; American Employers' Ins. Co. v., App.	35	P.2d	1047
Meek v. Fowler, App.	35	P.2d	410
Meis v. Collins; App.	36	P.2d	662
Memmler; Lewis v., App.	35	P.2d	406
Metropolitan Water Dist. of Southern California v. Toll, Sup.	35	P.2d	519
M. Friedman & Co. v., Sterling Furniture Co., App.	35	P.2d	1064
Milani; Harveld v., App.	36	P.2d	393
Miller v. Citizens' Nat. Trust & Savings Bank of Los Angeles, App.	36	P.2d	1088
Miller; People v., App.	35	P.2d	229
Miller; People v., App.	35	P.2d	549
Miller; Pioneer Cleaners & Dyers v., Sup.	36	P.2d	622
Miller v. Silvester, App.	35	P.2d	387
Miller; Wilson v., App.	36	P.2d	843
Mirabito v. San Francisco Dairy Co., Sup.	35	P.2d	513
Mitchell; Colonial Mut. Compensation Ins. Co. v., App.	36	P.2d	127
Mogan; De Brincat v., App.	36	P.2d	245
Monten; Jansson v., App.	35	P.2d	628
Monterey County; Raisch v., App.	35	P.2d	587
Morris v. Purity Sausage Co., App.	36	P.2d	126
Morrison v. Katz, App.	36	P.2d	852
Mortensen v. Fairbanks, Sup.	35	P.2d	1030
Motion Picture Publications; Yaguda v., App.	35	P.2d	162
Mountain States Life Ins. Co.; Clark v., App.	36	P.2d	848
Mountain View, City of, v. Southern Pac. R. Co., App.	36	P.2d	650
Muehleisen v. Forward, App.	36	P.2d	141
Mulherin; People v., App.	35	P.2d	174
Muller v. Stiegeler, App.	35	P.2d	643
Municipal Court of City of Los Angeles, Los Angeles County; O'Brien v., App.	35	P.2d	395
Murray; Mahoney v., App.	35	P.2d	612
Myers v. City of Calipatria, App.	35	P.2d	377
Myers; People v., App.	36	P.2d	410
Nash; Quigley v., Sup.	36	P.2d	112
Nelson v. Schoettgen, App.	36	P.2d	665
Neuhaus v. Norgard, App.	35	P.2d	1039
New York Life Ins. Co.; Weir v., App.	36	P.2d	847
Nichols v. Superior Court in and for Los Angeles County, Sup.	36	P.2d	380

	Vol.		Page
Nicoll v. First Nat. Trust & Savings Bank of San Diego, App.	35	P.2d	392
Niesley; Gutter v., App.	36	P.2d	155
Norgard; Neuhaus v., App.	35	P.2d	1039
North v. Evans, App.	36	P.2d	133
North v. San Diego Trust & Savings Bank, App.	36	P.2d	136
Norton v. Baranov, App.	35	P.2d	640
Nye & Nissen; Rubio v., App.	35	P.2d	195
Oakdale Irr. Dist.; Selby v., App.	35	P.2d	125
O'Brien v. Municipal Court of City of Los Angeles, Los Angeles County, App.	35	P.2d	395
O'Brien; Ross v., App.	36	P.2d	1108
O'Donnell; Pozzobon v., App.	36	P.2d	236
Olcese's Estate, In re, App.	36	P.2d	215
Olcese's Estate, In re, App.	36	P.2d	219
Olson v. Combs, App.	36	P.2d	708
Orange County; City of Fullerton v., App.	35	P.2d	397
O'Rourke; Shultz v., App.	36	P.2d	1081
Pacific Automobile Indemnity Exchange; Purefoy v., App.	36	P.2d	1076
Pacific Employers' Ins. Co. v. Industrial Accident Commission, App.	35	P.2d	366
Pacific Gas & Electric Co.; Brunig v., App.	35	P.2d	226
Pacific Greyhound Corporation; Smith v., App.	35	P.2d	169
Pacific Nat. Agr. Credit Corporation v. Wilbur, App.	35	P.2d	206
Pacific Southwest Discount Corporation; Capron v., App.	36	P.2d	664
Page v. Hale, App.	36	P.2d	818
Parente v. State Board of Equalization, App.	36	P.2d	437
Pasadena, City of, v. Chamberlain, Sup.	36	P.2d	392
Pasadena, City of, v. Chamberlain, App.	36	P.2d	387
Pasadena Holding Co.; Bryan v., App.	35	P.2d	334
Payne; Allen v., Sup.	36	P.2d	614
Payne; Rappaport v., App.	35	P.2d	183
Paz; People v., App.	36	P.2d	657
Peck; Baker v., App.	36	P.2d	404
Pendergrass; Bank of America Nat. Trust & Savings Ass'n v., App.	35	P.2d	346
Pendola; Wood v., Sup.	35	P.2d	526
People v. Aguilar, Sup.	35	P.2d	142
People v. Aguilar, App.	35	P.2d	137
People v. Avenell, App.	35	P.2d	1057
People v. Becker, App.	35	P.2d	196
People v. Bernfield, App.	35	P.2d	585
People v. Bianchi, App.	35	P.2d	1032
People v. Bill, App.	35	P.2d	645
People v. Brooks, two cases, App.	35	P.2d	583
People v. Brown, App.	36	P.2d	194
People v. Bruno, App.	35	P.2d	391
People v. Campbell, App.	36	P.2d	198
People v. Choy Sun, App.	35	P.2d	643
People v. Coffelt, App.	35	P.2d	374
People v. d'A Philippo, App.	35	P.2d	134
People v. Davis, App.	36	P.2d	715
People v. Dillon, App.	36	P.2d	416
People v. Du Fault, App.	36	P.2d	196
People v. Dunn, App.	36	P.2d	1096
People v. England, App.	35	P.2d	565
People v. Enright, App.	35	P.2d	1033
People v. Fierro, App.	35	P.2d	573
People v. Fiore, App.	35	P.2d	369
People v. Flores, App.	36	P.2d	239
People v. Grana, Sup.	36	P.2d	375.
People v. Granillo, App.	36	P.2d	206

	Vol.		Page
People v. Groves, App.	35	P.2d	202
People v. Guiterrez, App.	35	P.2d	1046
People v. Howe, App.	36	P.2d	820
People v. Johnston, App.	35	P.2d	1074
People v. Kocalis, App.	35	P.2d	584
People v. Lami, Sup.	36	P.2d	192
People v. Lamson, Sup.	36	P.2d	361
People v. Langdon, App.	36	P.2d	424
People v. Lawyer, App.	35	P.2d	1036
People v. Lewis, App.	35	P.2d	561
People v. Loveless, App.	35	P.2d	574
People v. McCarthy, App.	35	P.2d	621
People v. McCurdy, App.	35	P.2d	569
People v. McGee, Sup.	36	P.2d	378
People v. McKinley, App.	35	P.2d	572
People v. Maggio, App.	35	P.2d	369
People v. Makovsky, App.	36	P.2d	118
People v. Marron, App.	35	P.2d	610
People v. Miller, App.	35	P.2d	229
People v. Miller, App.	35	P.2d	549
People v. Mulherin, App.	35	P.2d	174
People v. Myers, App.	36	P.2d	410
People v. Paz, App.	36	P.2d	657
People v. Pheney, App.	35	P.2d	396
People v. Powell, App.	36	P.2d	201
People v. Quinones, App.	35	P.2d	638
People v. Ramirez, Sup.	36	P.2d	628
People v. Robles, App.	35	P.2d	1035
People v. Rogan, Sup.	36	P.2d	631
People v. Schumacher, App.	35	P.2d	614
People v. Schunke, App.	35	P.2d	388
People v. Semone, App.	35	P.2d	379
People v. Sisson, Sup.	36	P.2d	116
People v. Sonoqui, Sup.	35	P.2d	123
People v. Steele, App.	36	P.2d	40
People v. Torres, App.	35	P.2d	1078
People v. Tully, App.	35	P.2d	353
People v. Twedt, Sup.	35	P.2d	324
People v. Vaile, Sup.	36	P.2d	185
People v. Woods, App.	36	P.2d	212
People v. Young, App.	35	P.2d	354
Peterson v. Taggart, App.	36	P.2d	1086
Pleney; People v., App.	35	P.2d	396
Phillips v. Los Angeles County, App.	35	P.2d	187
Philpott v. Superior Court in and for Los Angeles County, Sup.	36	P.2d	635
Pickwick Stages System; Duran v., App.	35	P.2d	148
Pierson; Busing v., Sup.	36	P.2d	116
Pierson; Busing v., Sup.	36	P.2d	118
Pinout v. J. W. Silver Trucking Co., App.	36	P.2d	837
Pioneer Cleaners & Dyers v. Miller, Sup.	36	P.2d	622
Pleaters' & Stitchers' Ass'n v. Davis, App.	35	P.2d	401
Porter v. City of Santa Barbara, App.	35	P.2d	207
Powell; People v., App.	36	P.2d	201
Pozzobon v. O'Donnell, App.	36	P.2d	236
Prudential Guarantee Building & Loan Ass'n; Ross v., App.	35	P.2d	176
Prudential Guarantee Building & Loan Ass'n; Warner v., App.	35	P.2d	176
Purefoy v. Pacific Automobile Indemnity Exchange, App.	36	P.2d	1076
Purity Sausage Co.; Morris v., App.	36	P.2d	126
Quigley v. Industrial Accident Commission, App.	35	P.2d	544

	Vol.		Page
Quigley v. Nash, Sup.	36	P.2d	112
Quinn v. Recreation Park Ass'n, App.	35	P.2d	602
Quinn v. Recreation Park Ass'n, App.	35	P.2d	605
Quinones; People v., App.	35	P.2d	638
Rabbitt v. Union Indemnity Co., App.	35	P.2d	1066
Raisch v. Monterey County, App.	35	P.2d	587
Ramirez; People v., Sup.	36	P.2d	628
Rappaport v. Payne, App.	35	P.2d	183
Raquet; Robinson v., App.	36	P.2d	821
Rath; American States Public Service Co. v., App.	35	P.2d	145
Recreation Park Ass'n; Quinn v., App.	35	P.2d	602
Recreation Park Ass'n; Quinn v., App.	35	P.2d	605
Redwood Theatres; Le Ballister v., App.	36	P.2d	827
Reed; Karle v., App.	36	P.2d	150
Reliance Rock Co.; Scrimsher v., App.	36	P.2d	688
Riley v. Berkeley Motors, App.	36	P.2d	398
Robinson v. Arthur R. Lindburg, Inc., App.	35	P.2d	1057
Robinson v. Raquet, App.	36	P.2d	821
Robles; People v., App.	35	P.2d	1035
Rogan; People v., Sup.	36	P.2d	631
Rogers v. Burnham, App.	35	P.2d	329
Rose v. Superior Court in and for Los Angeles County, App.	35	P.2d	605
Rose v. Wheeler, App.	35	P.2d	220
Rosenthal; White v., App.	35	P.2d	154
Ross v. O'Brien, App.	36	P.2d	1108
Ross v. Prudential Guarantee Building & Loan Ass'n, App.	35	P.2d	176
Ross v. Ross, Sup.	35	P.2d	316
Rubio v. Nye & Nissen, App.	35	P.2d	195
Sale; Lindley v., App.	36	P.2d	130
Salmon v. Allen, App.	36	P.2d	153
Samuels v. Singer, App.	36	P.2d	1098
Sanborn; Sonoma County v., App.	36	P.2d	419
San Diego Electric R. Co.; Gallucci v., App.	35	P.2d	1038
San Diego Trust & Savings Bank; North v., App.	36	P.2d	136
Sanford v. Grady, App.	36	P.2d	652
San Francisco Chronicle, In re, Sup.	36	P.2d	369
San Francisco Dairy Co.; Mirabito v., Sup.	35	P.2d	513
San-Val Oil & Water Co.; Mason v., Sup.	36	P.2d	616
Schaub; Long v., App.	36	P.2d	660
Schellenberg v. Southern California Music Co., App.	35	P.2d	156
Scherer v. Southern Pac. Co., App.	35	P.2d	356
Schoettgen; Nelson v., App.	36	P.2d	665
Schumacher; People v., App.	35	P.2d	614
Schunke; People v., App.	35	P.2d	388
Schwartz, Ex parte, App.	36	P.2d	445
Scrimsher v. Reliance Rock Co., App.	36	P.2d	688
Security-First Nat. Bank of Los Angeles v. Baxter, App.	35	P.2d	403
Security-First Nat. Bank of Los Angeles; Davis v., Sup.	36	P.2d	649
Security Trust & Savings Bank; Luders v., App.	35	P.2d	1045
Seidell; Harris v., App.	36	P.2d	1104
Seidell v. Tuxedo Land Co., App.	36	P.2d	1102
Selby v. Oakdale Irr. Dist., App.	35	P.2d	125
Semone; People v., App.	35	P.2d	379
Shafer; James A. Clay & Co. v., App.	35	P.2d	572
Shaw; Lewis v., App.	36	P.2d	668
Shea v. Kerr, Sup.	36	P.2d	189
Sheehan v. Division of Motor Vehicles of State of California, App.	35	P.2d	359
Sheets v. Southern Pac. Co., Sup.	35	P.2d	121
Shultz v. O'Rourke, App.	36	P.2d	1081

	Vol.		Page
Sica; Valente v., App.	36	P.2d	1086
Silsbee; Wiley v., App.	36	P.2d	854
Silvester; Miller v., App.	35	P.2d	387
Singer; Samuels v., App.	36	P.2d	1098
Sisson; People v., Cal.	36	P.2d	116
Skidmore v. Gorgas, App.	36	P.2d	661
Sloane Flagg v., App.	36	P.2d	129
Smarda v. Fruit Growers' Supply Co., App.	36	P.2d	701
Smith v. Board of Police Com'rs of City of Los Angeles, App.	35	P.2d	555
Smith v. Board of Police Com'rs of City of Los Angeles, App.	36	P.2d	670
Smith v. Brown, App.	36	P.2d	1081
Smith v. City of Glendale, App.	36	P.2d	1083
Smith v. Pacific Greyhound Corporation, App.	35	P.2d	169
Smith; Vuich v., App.	35	P.2d	365
Smith v. Wilson, App.	36	P.2d	715
Smith's Estate, In re, App.	35	P.2d	335
Soares v. Ghisletta, App.	36	P.2d	668
Sonoma County v. Sanborn, App.	36	P.2d	419
Sonoqui; People v., Sup.	35	P.2d	123
Sontag v. Superior Court in and for Los Angeles County, App.	36	P.2d	140
Sour v. Superior Court in and for San Diego County, Sup.	36	P.2d	373
Southern California Music Co.; Schellenberg v., App.	35	P.2d	156
Southern Glass Co. v. Consolidated Inv. Corporation, App.	36	P.2d	1077
Southern Pac. Co.; Crawford v., App.	35	P.2d	577
Southern Pac. Co.; Di Giacomo v., App.	36	P.2d	427
Southern Pac. Co.; Ferran v., App.	35	P.2d	1076
Southern Pac. Co.; Scherer v., App.	35	P.2d	356
Southern Pac. Co.; Sheets v., Sup.	35	P.2d	121
Southern Pac. Co.; Taylor v., App.	35	P.2d	356
Southern Pac. R. Co.; City of Mountain View v., App.	36	P.2d	650
Speck v. Wylie, Sup.	36	P.2d	618
Spencer v. California Nat. Bank of Long Beach, Sup.	36	P.2d	1073
Stack v. Welder, App.	36	P.2d	850
Standard Accident Ins. Co.; Duncan v., Sup.	35	P.2d	523
State Board of Equalization; Hobart Estate Co. v., App.	36	P.2d	407
State Board of Equalization; Parente v., App.	36	P.2d	437
State Board of Equalization of State of California; Wagner v., App.	36	P.2d	441
State Life Ins. Co. of Indianapolis, Ind.; Hine v., App.	35	P.2d	1042
Steele; People v., App.	36	P.2d	40
Sterling Furniture Co.; M. Friedman & Co. v., App.	35	P.2d	1064
Stiegeler; Muller v., App.	35	P.2d	643
Stratton v. Superior Court of Los Angeles County, App.	35	P.2d	393
Suburban Hospital; Timbrell v., App.	36	P.2d	435
Sunrise Laundry Co.; Treacy v., App.	36	P.2d	244
Superior Court in and for City and County of San Francisco; Golden Gate Candy Products Co. v., App.	35	P.2d	372
Superior Court in and for City and County of San Francisco; Golden Gate Candy Products Co. v., App.	36	P.2d	834
Superior Court in and for Imperial County; McCall v., Sup.	36	P.2d	642
Superior Court in and for Los Angeles County; Chapman v., App.	36	P.2d	1093
Superior Court in and for Los Angeles County; Clutter v., App.	35	P.2d	152
Superior Court in and for Los Angeles County; Conklin v., Sup.	36	P.2d	386
Superior Court in and for Los Angeles County; Dady v., App.	36	P.2d	1092
Superior Court in and for Los Angeles County; Delorey v., App.	35	P.2d	634
Superior Court in and for Los Angeles County; Francis v., App.	35	P.2d	634
Superior Court in and for Los Angeles County; Gonzales v., App.	35	P.2d	556
Superior Court in and for Los Angeles County; Hollar v., App.	35	P.2d	417
Superior Court in and for Los Angeles County; Irvin v., App.	35	P.2d	642
Superior Court in and for Los Angeles County; Nichols v., Sup.	36	P.2d	380

	Vol.		Page
Superior Court in and for Los Angeles County; Philpott v., Sup.	36	P.2d	635
Superior Court in and for Los Angeles County; Rose v., App.	35	P.2d	605
Superior Court in and for Los Angeles County; Sontag v., App.	36	P.2d	140
Superior Court in and for Mendocino County; Griffith v., Sup.	35	P.2d	317
Superior Court in and for San Diego County; Gue v., App.	36	P.2d	202
Superior Court in and for San Diego County; Sour v., Sup.	36	P.2d	373
Superior Court of Los Angeles County; Los Feliz Inv. Co. v., App.	35	P.2d	131
Superior Court of Los Angeles County; Stratton v., App.	35	P.2d	393
Swan; Knoke v., Sup.	35	P.2d	327
Swart; De Brincat v., App.	36	P.2d	247
Taggart; Peterson v., App.	36	P.2d	1086
Tartar, Ex parte, App.	36	P.2d	419
Taylor v. Southern Pac. Co., App.	35	P.2d	356
Thomas v. Industrial Accident Commission, App.	35	P.2d	225
Thompson v. Los Angeles County, App.	35	P.2d	185
Thompson; McMillan v. App.	35	P.2d	419
Three For One Oil Royalties; Young v., Sup.	36	P.2d	1065
Timbrell v. Suburban Hospital, App.	36	P.2d	435
Title Guarantee & Trust Co.; Greenzweight v., Sup.	36	P.2d	186
Toll; Metropolitan Water Dist. of Southern California v., Sup.	35	P.2d	519
Torres; People v., App.	35	P.2d	1078
Town of Emeryville; Tuten v., App.	35	P.2d	195
Treacy v. Sunrise Laundry Co., App.	36	P.2d	244
Treppa v. Justice's Court of No. 3 Tp., Lake County, App.	36	P.2d	819
Trowbridge v. Briggs, App.	35	P.2d	426
Tully; People v., App.	35	P.2d	353
Tuten v. Town of Emeryville, App.	35	P.2d	195
Tuxedo Land Co.; Seidell v., App.	36	P.2d	1102
Twedt; People v., Sup.	35	P.2d	324
Unger; Bierlich v., Sup.	36	P.2d	374
Union Indemnity Co.; Rabbitt v., App.	35	P.2d	1066
Vaile; People v., Sup.	36	P.2d	185
Valente v. Sica, App.	36	P.2d	1086
Vela v. Huberty, Sup.	35	P.2d	531
Von Housebrock v. J. W. Silver Trucking Co., App.	36	P.2d	837
Vuich v. Smith, App.	35	P.2d	365
Wacholder, Ex parte, App.	36	P.2d	705
Wagner v. State Board of Equalization of State of California, App.	36	P.2d	441
Walsh v. Industrial Accident Commission, Sup.	36	P.2d	1072
Warner v. Prudential Guarantee Building & Loan Ass'n, App.	35	P.2d	176
Webb v. De Van, App.	35	P.2d	208
Weir v. New York Life Ins. Co., App.	36	P.2d	847
Welder; Stack v., App.	36	P.2d	850
Western Pac. R. Co.; Dryden v., App.	36	P.2d	394
Wheeler; Rose v., App.	35	P.2d	220
Whelan v. Bailey, App.	36	P.2d	709
Whipple; Malpas v., App.	35	P.2d	204
Whitacre; Kingsbury v., App.	36	P.2d	241
White v. Rosenthal, App.	35	P.2d	154
White Truck & Transfer Co.; James v., App.	36	P.2d	401
Wilbur; Pacific Nat. Agr. Credit Corporation v., App.	35	P.2d	206
Wiley v. Silsbee, App.	36	P.2d	854
Willett v. Jordan, Sup.	35	P.2d	1025
Williams v. Bridges, App.	35	P.2d	407
Williston v. Yuba City, App.	36	P.2d	445
Wilson v. Miller, App.	36	P.2d	843
Wilson; Smith v., App.	36	P.2d	715
Withey v. Hammond Lumber Co., App.	35	P.2d	1080
Wood v. Pendola, Sup.	35	P.2d	526

	Vol.		Page
Woodbury; Lennon v., App.	36	P.2d	415
Woodruff v. Maryland Casualty Co., App.	35	P.2d	623
Woods; People v., App.	36	P.2d	212
Wylie; Speck v., Sup.	36	P.2d	618
Yaguda v. Motion Picture Publications, App.	35	P.2d	162
Young; People v., App.	35	P.2d	354
Young v. Three For One Oil Royalties, Sup.	36	P.2d	1065
Yuba City; Williston v., App.	36	P.2d	445

CALIFORNIA REPORTER

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SECOND SERIES

1 Cal.2d 408

SHEETS v. SOUTHERN PAC. CO. et al.

S. F. 15104.

Supreme Court of California.

July 31, 1934.

Rehearing Denied Aug. 30, 1934.

1. Appeal and error ⇐1097(1)

Supreme Court's decision on former appeal is law of case and binding on parties and such court on subsequent appeal presenting substantially same facts shown on former appeal.

2. Appeal and error ⇐1099(8)

Plaintiff's testimony, on second trial of action for injuries in collision between railroad freight car and truck driven by him, that he paid no attention to wig-wag signal and glanced toward moving freight car before starting across tracks, *held* not so substantially different from his testimony on first trial that he did not notice whether wig-wag was operating and looked in both directions as to justify conclusion that Supreme Court's decision on former appeal that his contributory negligence was for jury was not controlling as law of case.

3. Appeal and error ⇐170(1)

Generally, new points of law may be raised for first time on appeal.

4. Railroads ⇐350(32)

Whether proximate contributing cause of collision between railroad freight car and gasoline truck was truck driver's failure to look in both directions before starting across tracks *held* for jury, in view of brakeman's intervening conduct in leaving crossing and walking toward locomotive after signaling driver to stop (St. 1923, p. 561, § 135).

5. Railroads ⇐331(2)

Railroad brakeman, stopping traffic at crossing while flying switch was being made, participated in such operation, so as to entitle truck driver, suing for injuries in collision between truck and shunted freight car, to prove brakeman's act in leaving crossing before car reached it as negligence under complaint alleging negligent operation of car.

6. Railroads ⇐351(19)

Giving of defendants' instructions on contributory negligence in action for injuries to driver of truck struck by shunted railroad freight car, with modification that jury could consider whether brakeman left crossing after locomotive passed in manner leading ordinarily prudent person to believe that danger from car had passed, *held* not error.

In Bank.

Appeal from Superior Court, San Mateo County; Maurice T. Dooling, Judge.

Action by George L. Sheets against the Southern Pacific Company and others Judgment for plaintiff, and defendants appeal.

Affirmed.

For prior opinion, see 28 P.(2d) 33.

Dunne & Dunne and Dunne, Dunne & Cook, all of San Francisco, and Kincaid & Fitzpatrick, of Redwood City, for appellants.

J. Horton Beeman and George C. Hadley, both of San Francisco, and Norman S. Menifee, of Redwood City, for respondent.

SHENK, Justice.

This is the second appeal in this case. The action was brought to recover damages for personal injuries sustained by the plaintiff when a freight car of the defendant railroad company collided with the gasoline truck which the plaintiff was driving while the train crew was making a "flying switch" at an intersection. On the first trial the jury brought in a verdict of $7,500 for the plaintiff. A motion for a new trial was granted. On appeal the order granting a new trial was affirmed. Sheets v. Southern Pacific Co., 212 Cal. 509, 299 P. 71, 74. On the second trial the jury also returned a verdict for the plaintiff in the sum of $7,500. A motion for a new trial was denied. The defendants now appeal from the judgment entered on that verdict. The opinion on the former appeal is referred to for a more complete statement of the facts. It was contended on that appeal that on the record the plaintiff was guilty of contributory negligence as matter of law. It appeared that the plaintiff had stopped his truck at the appropriate distance from the railroad tracks; that the brakeman who had signalled the plaintiff to stop left the crossing and walked in the direction of the locomotive, and it was then that the plaintiff moved his truck forward; that the plaintiff depended to a certain extent on the action of the brakeman and would not have attempted to cross had the latter remained on the crossing. On those and other facts appearing in the former record the rule was applied that a railroad company will not be permitted to encourage a relaxation of vigilance by assurances that the danger had been minimized and at the same time hold persons to the same quantum of care as if no safety measure (here the signal of the brake-

man to the plaintiff to stop) had been adopted. Decisions were referred to "tending to indicate that, where a plaintiff is thrown off his guard by the conduct of the defendant or is lulled thereby into a sense of security, so that he goes upon the crossing, as the plaintiff here did, he is not chargeable with contributory negligence as matter of law. * * * The fact that the brakeman left the crossing after the engine had passed and before the 'shunted' car had reached the crossing may well have led the plaintiff, acting as a reasonably prudent man, to assume that the danger had passed, thus causing him to relax his vigilance. As stated in the last case above cited [Brown v. New York Cent. Ry. Co., 32 N. Y. 597, 88 Am. Dec. 353], 'it is asking too much to say that it was negligence, as matter of law, not to have anticipated that detached cars were following in the rear of the train that had passed. * * *' Therefore, following the case of Gregg v. Western Pac. Ry. Co., supra [193 Cal. 212, 223 P. 553], we are of opinion that the question whether plaintiff, under all the circumstances, exercised ordinary care for his own safety, was one for the jury."

[1] The decision of the court on the former appeal is the law of the case. It was unquestionably so recognized by the trial court and as such is binding on the parties and on this court on this appeal, provided the state of the facts now presented is substantially the same as shown on the former appeal. Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 P. 876; Ellis v. Witmer, 148 Cal. 528, 83 P. 800; 2 Cal. Jur., pp. 944, 1042.

[2-4] The first question to be determined is whether the evidence at the second trial is so substantially different as to justify a conclusion that the decision on the former appeal that the issue of the plaintiff's alleged contributory negligence presented a question for the jury is not controlling. Two variations in the testimony of the plaintiff are relied upon to create such a substantial difference as to justify the court in declaring that the doctrine of the law of the case is inapplicable and that the conduct of the plaintiff constitutes contributory negligence as a matter of law. On the first trial the plaintiff testified that at the time he started to cross the track he did not notice whether the "wig-wag" was operating; on the second trial he stated that at that time he did not pay any attention to it. On the first trial he stated that he looked to his left and to his right before starting up; on the second trial on direct examination he gave the same testimony, but on cross-examination stated that he looked to his left, and "glanced" to his right, which was the direction from which the freight car was moving. These are the differences which are claimed to be substantial. While there is some change in phraseology, it cannot be said that there is a material change in meaning or substance. Whether the plaintiff took no notice of the "wig-wag" in the one instance or paid no attention to it in the other would seem to make no substantial difference for the reason that the jury was justified in concluding that the plaintiff's action in starting across the track was influenced by the conduct of the company's human signalling agency, the brakeman. The same reason would apply to the difference in wording in the recital of what the plaintiff did in making observations to the right and left before the conduct of the brakeman caused him to relax his vigilance. In this connection the defendants claim that the application of section 135 of the California Vehicle Act (St. 1923, p. 561) is a new question in the case as to which this court may determine that as a matter of law the plaintiff was guilty of negligence contributing to his injuries by conduct which may be construed as a violation of the provisions of that section. That section provides that an operator of a motortruck carrying explosive or inflammable substances shall bring his vehicle to a full and complete stop at a specified distance from any railroad crossing and while stopped shall look and listen in both directions along the tracks for approaching trains or cars. It is admitted that the plaintiff brought his motortruck to a full stop at the required distance and there is testimony that he looked and listened, in both directions; but it is contended that there is no evidence that he looked in both directions along the tracks, and therefore was guilty of a violation of the statute resulting in his contributory negligence as matter of law. The point is now made for the first time. The right generally to raise new points of law for the first time on appeal is not questioned. See Trower v. City and County of San Francisco, 157 Cal. 762, 109 P. 617; 2 Cal. Jur. p. 964. But here the case appears to have been tried on the theory that section 135 was not a factor in the case. If the effect of that section had been relied upon as a defense, it may be that the plaintiff could have met the issue by proper proof. Also, if the claimed lack of evidence had been called to the attention of the trial court an appropriate instruction could have been given advising the jury of

the requirements of section 135. Whether the defendants on this record are now foreclosed from raising the point need not be decided for the reason that it does not necessarily follow that the asserted failure of proof is fatal. The purpose of section 135 is to require extraordinary safety precautions to be taken by the truck driver. But compliance in the respects enumerated in the statute must as to the facts here presented be appraised as of the time of or immediately before the accident. It may be assumed that if the plaintiff had violated the statute without the intervening action of the employee of the company to influence the plaintiff's conduct, the latter would have been guilty of contributory negligence as matter of law. However, since the employee's conduct and reliance thereon by the plaintiff intervened, it was a question for the jury to determine under all the circumstances the proximate and contributing causes of the accident.

[5] The defendants contend that the plaintiff was not entitled to rely on any action of the brakeman in leaving the crossing after the engine had passed and before the "shunted" car had reached the crossing, as constituting evidence of negligence on the part of the defendants, but that the plaintiff was restricted to the issues framed by the complaint and answer. The complaint alleged that the defendants "so negligently and carelessly operated said freight car" as to cause the accident and injuries complained of. The defendants urge that the plaintiff is restricted to proof of the operation of the freight car to sustain his claim of negligence on the part of the defendants, that being the only charge of negligence in the complaint, and that the action of the brakeman in guarding the crossing and stopping traffic while the "flying switch" was being made was no part of the operation of the train or car. This matter was presented to the trial court, which refused the defendant's offered instruction on the subject, but ruled and instructed that the plaintiff "had a right to rely on any conduct of either of the personal defendants." We perceive no error in the ruling and instruction. Under the facts of this case the brakeman was acting as a member of the train crew and any act of his in directing the completion of the "flying switch" was a participation in that operation and within the issues.

[6] The defendants offered instructions on the issue of the plaintiff's contributory negligence. The instructions offered were given with the addition of a qualification which charged in effect that in determining whether the plaintiff acted with ordinary care the jury was entitled to consider whether or not the brakeman left the road after the locomotive passed in such manner as to lead an ordinarily prudent person to believe that the danger had passed. No error can be based upon the inclusion in the instructions offered and given of the substance of the modification. The plaintiff was entitled to have the jury charged in accord therewith. Sheets v. Southern Pacific Co., supra.

We have examined in detail the other assignments of error in the giving of instructions. We find on a review of the entire record that no prejudicial error was committed.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

1 Cal.2d 364

PEOPLE v. SONOQUI et al.

Cr. 3692.

Supreme Court of California.

July 28, 1934.

Criminal law ⇐1083

Where notice of appeal to Court of Appeal from order granting accused new trial was properly given, judgment of conviction, entered on verdict rendered on retrial commenced four days after order was entered dismissing appeal, was subject to motion to arrest, since jurisdiction of case was in appellate court at time retrial was commenced, notwithstanding prosecution had not complied with Supreme Court rule requiring statement of grounds of appeal (Const. art. 6, § 4c; Pen. Code, § 1264, and § 1238, subd. 3; Code Civ. Proc. § 955; Supreme Court Rule 2, § 7).

In Bank.

Appeal from Supreme Court, Los Angeles County; Ruben S. Schmidt, Judge.

Remigio Sonoqui, John Sonoqui, and Martina Ruiz were convicted of murder in the first degree, and the two first-named parties appeal.

Reversed and remanded for new trial.

Prior opinion, 31 P.(2d) 783.

Wm. T. Kendrick, Jr., and L. V. Peterman, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

PRESTON, Justice.

This is an appeal from a judgment of conviction and from order denying motion for new trial; also from order denying motion in arrest of judgment. Our conclusion upon the question of the jurisdiction of the court to try this cause, and enter the judgment complained of on the verdict, will dispose of the appeal.

Defendants were previously put to trial on the present charge of murder, and were, on December 23, 1932, convicted in said court. On January 3, 1933, their motion for new trial was granted by the trial court upon the ground of insufficiency of the evidence. Immediately following this ruling, the people announced their appeal from the order, and caused proper notice thereof to be entered in the minutes of the court. Pen. Code, § 1238, subd. 3. Thereafter, and on February 11, 1933, the District Court of Appeal, having jurisdiction of the appeal, upon motion of the district attorney, with consent of the attorney for defendants, entered its order dismissing said appeal. No attempt was made to secure a remittitur. A certified copy of the order was procured and on February 14, 1933, filed in the court below. On February 16, 1933, four days after entry of the order of dismissal, defendants were again put on trial and thereafter convicted of murder in the first degree. On March 7, 1933, at the time fixed for pronouncing judgment, defendants moved in arrest of judgment on the ground that the court was without jurisdiction to enter same, inasmuch as the order dismissing the former appeal of the people had not become final nor had a remittitur issued thereon.

The said order of dismissal was tantamount to a judgment of affirmance of the order granting a new trial. Section 955, Code Civ. Proc.; Rowland v. Kreyenhagen, 24 Cal. 52; Spinetti v. Brignardello, 54 Cal. 521; Garibaldi v. Garr, 97 Cal. 253, 32 P. 170; Barnhart v. Edwards, 128 Cal. 572, 576, 61 P. 176. Under the Constitution, article 6, § 4c, it did not become final in the District Court of Appeal until the elapse of fifteen days after its entry, nor did it pass beyond the jurisdiction of this court to transfer the cause for determination until the elapse of an additional fifteen days. In point of fact, the remittitur upon said order was not filed in the court below until March 14, 1933, seven days after judgment had been pronounced against defendants. Hence their objection to the jurisdiction of the court must be sustained.

In the case of In re Johannes, 213 Cal. 125, 129, 130, 1 P.(2d) 984, 986, discussing the principle involved, this court said: "An appeal from the judgment or order denying a motion for a new trial removes the subject-matter thereof from the jurisdiction of the superior court. Pending the appeal the superior court has no jurisdiction to vacate the judgment or make any order affecting it. People v. Mayne, 118 Cal. 516, 50 P. 654, 62 Am. St. Rep. 256; Stowe v. Superior Court, 72 Cal. App. 174, 236 P. 985; 8 Cal. Jur. p. 520, and cases cited. The jurisdiction of the court on appeal is not determined by the presence or absence therein of the record on appeal. Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105. The appeal may be subject to dismissal, either by the appellant or by the respondent on proper grounds, or by stipulation, but until it is disposed of the jurisdiction of the subject-matter of the judgment is vested in the appellate tribunal."

In Noel v. Smith, 2 Cal. App. 158, 83 P. 167, the District Court of Appeal duly issued a writ of mandate directed to the court below in the case of Noel v. Noel pending therein, directing the judge to disqualify himself and procure the services of another judge to preside in said cause or else show cause at a time named why he should not so do. On the hearing this writ was discharged, but before the order became final the court below moved to bring certain pending motions in the cause on for hearing. It was held that the court was without jurisdiction to proceed and that the act of the judge in hearing said motions was in technical contempt of court.

In the case of People v. Walker, 76 Cal. App. 192, 244 P. 94, it was held, in a criminal appeal to that court, where an order reversing the cause had been made, that the statutory time for a retrial of the defendant did not begin to run until after the order had become final both in the District Court of Appeal and in the Supreme Court, which time, as the Constitution then read, was sixty days. This decision also interpreted section 1264 of the Penal Code in harmony with the conclusion there reached, which section provides for the time of issue and contents of a remittitur in a criminal case.

On this general subject, see, also, Hubbard v. McCrea, 103 Ga. 680, 30 S. E. 628; Chambers v. Philadelphia Pickling Co., 82 N. J. Law, 1, 81 A. 573.

The fact that the state had taken no steps to comply with rule 2, section 7, of this court, requiring, among other things, a statement of the grounds of the appeal, is wholly immaterial as the notice of appeal invested the District Court of Appeal with jurisdiction of the appeal and divested the trial court of power to move in conflict with such jurisdiction. In re Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105; In re Johannes, supra.

Further supplementing the holding here, it may be noted that it has been held in other jurisdictions that pending an appeal the trial court may not dismiss the action, even with the consent of all the parties. State ex rel. v. District Court, 77 Mont. 214, 250 P. 609. See, also, a similar principle announced in the case of State ex rel. O'Grady v. District Court, 61 Mont. 346, 202 P. 575.

It follows that the judgment and orders of the court below must be reversed, and the cause remanded for new trial, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.

140 Cal.App. 171

SELBY v. OAKDALE IRR. DIST. et al. (WEEDEN et al., Interveners).

Civ. 5080.

District Court of Appeal, Third District, California.

July 25, 1934.

1. Constitutional law ⇐56, 87, 172, 205(1), 309(1)
Statutes ⇐85(4)
Waters and water courses ⇐216

Statute limiting right of bondholders to bring proceeding against board of directors of an irrigation district unless holders of 10 per cent. or more of outstanding and unpaid bonds of the district joined in such action *held* unconstitutional, as denying right of property, impairing obligation of contract, granting special privileges, denying due process, and unconstitutional as a special law regulating practice of courts and as affecting jurisdiction of courts (St. 1931, p. 172, § 52; St. 1933, p. 800, § 113; Const. Cal. art. 1, §§ 1, 16, 21; art. 4, § 25, subd. 3; art. 6, §§ 4, 4b; Const. U. S. Amend. 14).

2. Mandamus ⇐15

In proceeding by holder of matured bonds to compel irrigation district to apply taxes levied for payment of interest on refunding bonds to payment of interest on matured bonds, that bondholder could have maintained proceeding to compel levy of tax for his benefit immediately after tax for payment of interest on refunding bonds was levied would not validate any unauthorized limitation of purposes of the tax levy, or any unauthorized attempted preference (St. 1917, pp. 765, 766, §§ 39b, 39c; St. 1931, p. 122, § 39; St. 1931, p. 172, § 52; St. 1931, p. 778, § 32a).

3. Taxation ⇐297

While tax levy for particular purpose cannot be applied to uses of any other purpose, tax levying body cannot levy taxes so as to give preference or to apply proceeds of levy to purpose which is contrary to express provisions of statute.

4. Taxation ⇐297

Acts of tax levying body which do not comply with statute prescribing certain acts or granting body power to act in particular manner but are dependent upon whim, wish, or determination of tax levying body are ultra vires, and act taken can only stand in so far as it complies with express authority of law.

5. Taxation ⇐297

Where act of tax levying body is void as being ultra vires, its invalidity would not be affected by either good or bad faith of taxing body.

6. Taxation ⇐297

Where Constitution, statute or ordinance provides for levying of tax, specifying the purpose, purpose specified is both mode and measure of power that can be legally exercised by taxing body, and any attempt to go outside such purpose is ineffective.

7. Waters and water courses ⇐227

Directors of an irrigation district have only such powers as are given it by law, and must exercise those powers conferred in manner prescribed.

8. Taxation ⇐297

Power of tax levying body depends upon terms of statute granting power, subject to requirement that all taxes must be for public purpose, and when power to levy is re-

stricted by statute or constitutional provision, tax cannot be levied for any other than purpose specified.

9. Waters and water courses ⇐230(6)

Under statute directing board of directors of irrigation district to levy tax covering all interest coupons falling due, preference created by levying tax covering only interest coupons on refunded bonds was void, and proceeds of levy would be applied to payment of matured bonds and matured interest coupons, irrespective of date of issue (St. 1931, p. 1224, § 39).

10. Waters and water courses ⇐230(6)

Board of directors of irrigation district cannot diminish bond fund or bond interest fund by transfer of moneys from one fund to another (St. 1931, p. 173, § 67).

11. Waters and water courses ⇐230(6)

Changes in Irrigation Act naming different funds did not affect rights of holders of bonds of irrigation district issued prior to change, as law in effect at time of issuance of bonds entered into and became part of contract (St. 1931, p. 173, § 67).

12. Waters and water courses ⇐230(6)

In proceeding to determine rights of holder of matured bonds and refunded bonds of irrigation district to moneys on hand for payment of legal obligations of irrigation district, statute making liens of bonds of any issue preferred liens to those of any subsequent issue, which was later amended by dropping reference to preferred liens, had no application, where matured bonds were acquired prior to amendment, and most of refunded bonds were converted bonds of issues preceding amendment (St. 1917, p. 768, § 40).

13. Waters and water courses ⇐230(6)

Under Irrigation Act, where payment of irrigation district bonds and coupons is not made in order prescribed, payment should be made in the order of registration (St. 1931, p. 172, § 52).

14. Waters and water courses ⇐230(6)

That bonded indebtedness of irrigation district and low price of farm products indicated that bondholders and property owners were both suffering would not be considered in determining rights of respective holders of irrigation district bonds to what moneys were on hand for payment of legal obligations of district.

15. Waters and water courses ⇐230(6)

Equities of holders of bonds of irrigation district who furnished money to complete irrigation works to furnish water to bondholders, without which productivity of lands in district would be lessened, would not be considered in determining rights of matured bondholders to moneys on hand for payment of legal obligations of district, since matured bondholders' rights rested upon Irrigation Act (St. 1931, p. 172, § 52).

Application by Walter J. Selby against the Oakdale Irrigation District and another for writ of mandate, in which Frank Weeden and others, constituting the Oakdale Irrigation District Bondholders' Protective Committee, and another, intervened.

Writ granted.

W. Coburn Cook, of Turlock, for petitioner.

Griffin & Boone, of Modesto, for respondents.

Orrick, Palmer & Dahlquist, of San Francisco, for interveners.

PER CURIAM.

This cause is before us upon the application of the above-named petitioner praying that a writ of mandate issue out of this court directing and commanding the respondents to pay out of the funds held by said district, to the holders of bonds and interest coupons which have become due, in the order in which they have been presented, and in particular commanding the respondents to apply to such purposes the proceeds arising from taxes collected pursuant to a levy made by the board of directors of said district on the 27th day of September, 1933, for the fiscal year 1933–1934, and that such payment be made in accordance with the provisions of section 52 of the California Irrigation District Act (St. 1897, p. 272, § 52, as amended by St. 1931, p. 172), in the order of presentation, whether the presentation be of matured bonds, or of matured interest coupons, and that the same be made without reference to any preference or discrimination, whether the same be classified as refunded or unrefunded bonds, or coupons thereon, and that payment be made in full, in the order of their presentation, upon bonds and coupons which became due on January 1, 1934, before payment be made upon any bonds or coupons maturing after that date.

The petition sets forth that on the 1st day of July, 1910, the Oakdale Irrigation District was a duly organized and existing irrigation district under the laws of the state of California, and on or about said date authorized the issuance of bonds in the sum of $2,320,000; that of said issue of bonds the petitioner is the owner of bonds of the

par value of $15,000, bearing 5 per cent. interest, which bonds of the value of $9,500 matured on July 1, 1932, and of bonds of the value of $5,500, which matured on July 1, 1933; that said bonds were duly presented for payment to Madlyn M. Rydberg, as treasurer of said district, and payment thereof refused, save and except that one-half of the interest due January 1, 1932, and July 31, 1932, was paid, and that there is now due and unpaid on the matured coupons on said bonds the sum of $700, as well as the principal thereof. It also sets forth that the petitioner is the owner of other bonds of the value of $1,000, upon which interest coupons in the sum of $180 is past due; that said coupons have been duly presented to the respondent treasurer, and payment thereof refused, save and except as to one-half of the interest due thereon; that the respondent, as treasurer of said district, has refused, and at the time of the presentation of said bonds and coupons and demand made therefor, refused to register said bonds and coupons as provided for in section 52 of the California Irrigation District Act.

It further appears from the petition that on or about December, 1932, the board of directors of the Oakdale Irrigation District provided for the issuing of refunding bonds, pursuant to the act of the Legislature approved May 12, 1931 (St. 1931, p. 778, § 321a) and that about 96 per cent. of the bonds of said district issued before that date have been refunded; that the refunding bonds are classified in four divisions; divisions 1 and 2 being known as "serial bonds"; divisions 3 and 4 being known as "sinking fund bonds."

It further appears that about 4 per cent. of the original bonds are unrefunded, of which the petitioner is the owner to the extent hereinbefore set forth. The record before us also shows that on or about the 6th day of June, 1933, the board of directors transferred from the bond fund of said district, to the general fund, the sum of $4,367.74.

The record further shows that on or about the 27th day of September, 1933, the board of directors of the Oakdale Irrigation District adopted a resolution fixing the tax rate and making a levy therefor; a part of its resolution is the basis of the controversy in this proceeding, to wit: "Whereas, it appearing to the Board that it is necessary to levy an assessment in an amount sufficient to raise the interest due or that will become due on outstanding bonds of the District on the first day of the next ensuing January, and on the first day of the next ensuing July, which outstanding bonds of the District on which said interest is to be paid are hereby declared to be the following, to-wit: First Refunding Bonds of the Oakdale Irrigation District, Division No. 3; and, First Refunding Bonds of the Oakdale Irrigation District, Division No. 4; and which interest will have to be paid at said times, and said amount of interest, which the Board believes sufficient, and is sufficient to be raised by this assessment for said purposes by this assessment is the sum of $60,000.00, and said assessment is levied for the payment of said interest, and said interest only, and for no other purpose."

The petition further alleges that the officers of said district have entered into a conspiracy for the purpose of compelling the petitioner to accept refunding bonds for the issue of bonds held by him, and have entered into a conspiracy to prevent the petitioner from receiving any payment upon the matured bonds held by him, and also to prevent the petitioner receiving payment upon any of the matured coupons owned by him. Respondents have filed no answer herein, but have appeared and demurred to the petition on the ground that it does not state facts sufficient to constitute a cause of action.

Upon application therefore, Carlton A. Johanson, personally, and Frank Weeden, H. L. Byram, W. E. Cashman, Livingston B. Keplinger, and Charles E. MacLean, constituting the Oakdale Irrigation District Bondholders' Committee, were allowed to appear and intervene in this cause.

While the briefs of counsel have taken a somewhat wider range, only three questions are really presented for determination, to wit: First, the right of the parties to prosecute this action; second, the validity of the limiting clause of the resolution providing for the tax levy under date of September 27, 1933, to wit, first refunding bonds of the Oakdale Irrigation District Division No. 3. and first refunding bonds of the Oakdale Irrigation District, Division No. 4; and third, the right of the petitioner to have unpaid bonds and coupons paid, as provided for in section 52, supra, and if not paid in full, registered.

[1] As to the right of the parties to prosecute this action, we agree with counsel that section 113 (Stats. 1933, p. 800), added to the California Irrigation District Act (St. 1897, p. 254) by an act of the Legislature approved May 9, 1933, is ineffective for any purpose. Its unconstitutionality is so apparent that citation of authority seems needless. However, we refer to section 1 of article 1; sub-

division 3 of section 25 of article 4; sections 4 and 4b of article 6; sections 16 and 21 of article 1 of the Constitution; and the Fourteenth Amendment to the Constitution of the United States. The act in question attempts to limit the right of any one to bring a proceeding such as this or other proceeding against the board of directors of an irrigation district unless the holders of 10 per cent. or more of the duly issued outstanding and unpaid bonds of the district join in such action, etc. It is evident that the Legislature has no power to limit the right of any one whose property interests have been invaded, to seek redress through the courts unless joined by others owning like property.

[2] A reading of the record discloses that the board of directors of the Oakdale Irrigation District, the board of supervisors of the county of Stanislaus, in which said district is situated, and also that the district attorney of said county, have failed and neglected to comply with the provisions of section 39 (amended by St. 1931, p. 122); sections 39b and 39c (St. 1917, pp. 765, 766) of the California Irrigation District Act, and that the treasurer of Stanislaus county has failed and refused to comply with the provisions of section 52 of said act. In these particulars it is urged by the interveners that the petitioner should have instituted mandamus proceedings against the respective officers to compel performance of their statutory duties, and especially should have prosecuted an action against the directors of the district to compel them to levy a tax for the benefit of holders of unrefunded bonds.

We may admit that the petitioner might have maintained such a proceeding against the board of directors immediately after September 27, 1933. This admission, however, does not lead to the conclusion that any unauthorized limitation of the purposes of the tax levy, or any unauthorized attempted preference is thereby conceded to be valid, or that such portion of the attempted levy is legally any part or parcel thereof.

[3, 4] We have read all the acts of the Legislature beginning with the act of 1897, down to and including the acts of the Legislature of 1933, and fail to find a single clause, sentence, or word giving to, or indicating that, the board of directors of an irrigation district is invested with any power or authority to discriminate between bondholders in levying taxes for the payment either of principal or interest; nor has our attention been called to any such provision in the various statutes. Interveners have cited various cases supporting the statement of the law that a tax levy for a particular purpose cannot be diverted and applied to the uses of any other purpose. The conclusion, however, which would seem to be insisted upon by the interveners does not follow that the board of directors or other tax levying body has the power of levying taxes in such a way as to give a preference, or to apply the proceeds of such levy to a particular purpose, contrary to the express provisions of the statutes. The authorities cited and properly analyzed support the conclusion that when the statutes under which the tax levying board has acted prescribe what shall be done, and grants the power to act in a particular manner, all actions different therefrom dependent simply upon the whim, wish, or determination of the tax levying body are ultra vires, and the act taken can only stand in so far as it complies with the express authority given and provided for by law.

[5] While the petition alleges that the preference attempted to be given the resolution of September 27, 1933, was the result of a conspiracy to coerce and defraud holders of unrefunded bonds, we do not deem it necessary to give any consideration to such allegations, for the simple reason that if the attempted preference is void, its invalidity would not be affected one way or the other by either the good faith or the bad faith of the taxing power. If the act is void as being ultra vires, the motive behind the act becomes wholly immaterial.

In the case of City of Austin v. Cahill, 99 Tex. 172, 88 S. W. 542, 544, 89 S. W. 552, relied upon by the interveners to support the preference attempted to be given by the tax levy of September 27, 1933, it appears that the court had under consideration a refunding act, which refunding act expressly provided for the levying by the taxing board of a tax to pay the interest and principal of the refunding bonds. In that case the court quotes language and cites authorities to the effect that a legislative act providing for the levy of a tax for a specific purpose must be followed.

In Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197, it appears that the holders of bonds upon which interest coupons have not been paid, issued by the city of Memphis, had obtained judgments directing the levy of a tax to pay such judgments, and it was held that the funds so obtained could not be diverted to any other purpose.

In Carter v. Tilghman, 119 Cal. 104, 51 P. 34, it was held that money raised from taxes

levied for a particular purpose, pursuant to an affirmative vote of the district, could not be diverted by the directors of the district to other purposes or into other channels than that so specially authorized.

That the legislative act limits, controls, and circumscribes the taxing power of the board of directors is further supported by the following language found in 61 C. J. 521, to wit: "Taxes which are set apart by the Constitution of the state for particular uses cannot be diverted by the legislature to any other purpose. Neither can funds derived from taxes, levied and collected for particular purposes, be legally utilized for, or diverted to any other purpose. * * * Thus, it was held: 'Where the law provides that money raised by the taxation of particular property in a municipality shall be held by the County Treasurer as a sinking fund for the redemption of bonds issued by that municipality in aid of a railroad, the money so raised is appropriated to the specific purpose mentioned, and cannot be diverted to any other.'"

[6] Without reviewing further the authorities cited by the interveners, it is sufficient to say that all of them are to the effect that where the Constitution, statute, or ordinance provides for the levying of a tax, specifying the purpose, the purpose specified is both the mode and the measure of the power that can be legally exercised by the taxing body, and any attempt to go outside thereof is and must be held ineffective.

Beginning with the act of the Legislature approved March 31, 1897 (Stats. 1897, p. 254), section 39, has remained practically unchanged in the power given to the board of directors of an irrigation district to levy taxes, in providing for payment of interest on bonds and the principal of bonds as they mature. As originally adopted, the portion of the section material here reads: "The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and in any year in which any bonds shall fall due must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature." The latest wording of the section as amended March 30, 1931 (Stats. 1931, p. 122), is as follows: "The board of directors shall then, within fifteen days after the close of its session as a board of equalization, levy an assessment upon the lands within the district in an amount sufficient to raise the interest due or that will become due on all outstanding bonds of the district on the first day of the next ensuing January and the first day of the next ensuing July," etc. The verbal change does not alter the legal effect of the language used. The original section read: "Annual interest on the outstanding bonds." The section as it now reads in this particular inserts the word "all," making it read: "On all outstanding bonds." The word "all," expressing the intent of the Legislature more fully, came into the section as early as 1919, and has remained therein ever since.

[7] In 26 California Jurisprudence, page 403, the text, supported by authorities cited in the footnotes, defines the powers of directors of an irrigation district as follows: "An Irrigation District has only such powers as are given it by law, and must exercise those powers conferred, in the manner prescribed." Hewel v. Hogin, 3 Cal. App. 248, 84 P. 1002.

[8] As to how the taxing power shall be exercised is thus further defined in 61 C. J. page 555: "Subject to the requirement that all taxes to be valid must be levied for a public purpose, the particular purpose for which taxes may be levied by the taxing authority depends upon the terms of the statute granting the power, such as for the purpose of paying lawfully contracted debts and expenses, or taxes due to the state. But the power of such authorities to levy taxes may be restricted by statute or a constitutional provision, except for certain specified purposes, and when so restricted, taxes cannot be levied for any other purpose than those specified."

[9] Section 39, supra, specifies that the board of directors shall levy a tax covering all the interest coupons falling due, not a part or parcel thereof, within the discretion of the taxing board. The statute means just exactly what it says—"all," and not a part. Therefore, any attempt at limitation must be held ineffective. The board of directors of the Oakdale Irrigation District had the power to levy a tax. That they did not levy a sufficient tax to meet the requirements, did not follow the statute, and attempted to give a void preference, does not lead to the conclusion that the money so raised may not properly be applied to the payment of either the principal on matured bonds or of the interest on matured coupons. The debt is chargeable against the district; it is money owing to the creditors holding evidences of debt in the form of bonds, and being voluntarily paid, in so far as the same has been paid, constitutes a fund properly applicable to the payment of both the matured bonds of the district and also the matured interest coupons, irrespective of the date of their issue.

[10, 11] That the board of directors has no power to diminish the bond fund or the bond interest fund by the transfer of moneys, is held in the cases of Hewel v. Hogin, supra, and Carter v. Tilghman, supra. This appears to be conceded by all the parties to this proceeding. That the law in effect at the time of the issuance of the bonds, entered into the contract and became a part thereof, is considered at length in the case of Hershey v. Cole, 130 Cal. App. 683, 20 P.(2d) 972, to which we need only refer, and call attention to the authorities there cited.

This disposes of all questions as to the change in section 67 of the Irrigation Act (St. 1897, p. 276, § 67, as amended by St. 1931, p. 173) naming different funds, as under the authorities cited the contractual rights held by the petitioner cannot be affected thereby.

[12] In Bates v. McHenry, 123 Cal. App. 81, 10 P.(2d) 1038, 1040, this court said: "There is no priority given under the statute to any of the bonds issued by the irrigation district." That statement applied strictly to the circumstances there presented. Nor do we think from the record presented in this case that section 40 of the act of 1897 (St. 1897, p. 267) has any application. That section reads: "The assessment upon real property is a lien against the property assessed from and after the first Monday in March for any year, and the lien for the bonds of any issue shall be a preferred lien to that for any subsequent issue, and such lien is not removed until the assessments are paid, or the property sold for the payment thereof." This section was amended in 1917 (St. 1917, p. 768) so as to read: "The assessment upon land is a lien against the property assessed from and after the first Monday in March for any year." In the instant case it appears that the bonds held by the petitioner were issued in 1910, but it also appears that a large percentage of the refunding bonds now held by the interveners and others are simply converted bonds of issues preceding the amendment of the section in 1917, and if justice required, a court of equity would be, we think, justified in holding that the prior lien, if any, given to the issues preceding the amendment, was carried over, entered into, and became a substantive part of the refunding bonds, just as the lien created by an original mortgage is carried over and becomes an integral part of the instrument renewing the security given to insure payment of the original obligation.

As pointed out in Cooper v. Gibson, 133 Cal. App. 532, 24 P.(2d) 952, and followed in Kimball v. Hastings' Tract Reclamation District (Cal. App.) 31 P.(2d) 417, there is a marked distinction between installment calls made on assessments in reclamation districts and taxes levied by a board of directors of an irrigation district. In a reclamation district the installment calls are earmarked by reason of the provisions of the statutes.

[13] Likewise, in the case of Rohwer v. Gibson, 126 Cal. App. 707, 14 P.(2d) 1051, this court held that there being no provision in the law relating to reclamation districts providing for the order in which interest coupons or bonds should be paid, the obligations should be marshaled and the moneys on hand apportioned. Here, again, there is a marked distinction between the reclamation laws and the Irrigation Act. Section 52 of the Irrigation Act, as we held in Bates v. McHenry, supra, provides for the order of payment, and, if not paid, for the registration of both bonds and interest coupons, and that thereafter, payment shall be made in the order of registration.

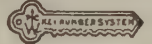
No order directing any priority of payment can be made herein for the simple reason that the stipulation of facts shows that the treasurer of the district has neglected to keep a record of the registration of any interest coupons or bonds, other than of unpaid interest coupons on refunding bonds, and it cannot be determined without the taking of testimony, as to the time when interest coupons were presented by the petitioner and registration thereof demanded and refused. Nor can we, at the present time, by reason of the absence of such facts, determine whether the petitioner has lost his standing or order in the line of payment provided for in section 21, supra.

The petitioner, and as well, the interveners, are entitled to the mandate of this court directing a return of the amount of moneys transferred by the directors of the district from what is called the "Bond Interest Fund," to the general fund. The petitioner is also entitled to an order of this court holding the attempted preference referred to in the tax levy void, and the same is hereby held to be void.

For the purpose of being able to pass definitely upon the rights of the parties hereto, and the order in which payment should be made, it is hereby ordered that the cause be submitted to a referee for the purpose of taking testimony to determine the amount of money on hand, subject to payment of both matured bonds and matured interest coupons outstanding against the district, and the time

when matured bonds and matured interest coupons have been presented to the treasurer for payment and for registration, and to report to this court findings thereon. Counsel for the petitioner will prepare the form of an order for such reference, and until the return of the referee's finding after the taking of such testimony, this cause will stand over for such further orders as may appear to be just and necessary.

[14, 15] Though discussed by counsel, the fact that the bonded indebtedness of the district and the low price of farm products indicate that both bondholders and property owners are suffering, and probably will suffer excessive losses, we do not find that such facts should enter into or determine the rights of the respective bondholders as to what moneys there may be on hand for making payment of the legal obligations of the district. Nor do we consider it necessary to enter into a discussion of the equities urged by the petitioner in favor of bondholders who furnished the money to complete the works carrying out the plans of the irrigation district to furnish water to the respective landholders, without which the productivity of the lands within the district would be materially lessened, as the rights of the petitioner in this proceeding must rest upon the provisions of the Irrigation District Act.



LOS FELIZ INV. CO. v. SUPERIOR COURT OF LOS ANGELES COUNTY.*

Civ. 9810.

District Court of Appeal, Second District, Division 2, California.

Aug. 15, 1934.

Hearing Granted by Supreme Court Oct. 11, 1934.

Courts ⇐207(5)

Where appeal was pending in Supreme Court from judgment of superior court, Court of Appeal would not issue writ of prohibition to prevent superior court from modifying portion of its judgment, since, where an appeal is taken to Supreme Court, petition should be addressed to that court.

Proceeding for writ of prohibition by the Los Feliz Investment Company, a corporation, against the Superior Court of the County of Los Angeles.

Alternative writ discharged, and peremptory writ denied.

Chapman & Chapman, of Los Angeles, for petitioner.

Newlin & Ashburn, of Los Angeles, for respondent.

CRAIG, Acting Presiding Justice.

We have here an application for a writ of prohibition to prevent the superior court of Los Angeles county from modifying what purports to be a portion of its judgment. Petitioner has heretofore appealed from such judgment to the Supreme Court.

Beginning with the case of Collins v. Superior Court, 147 Cal. 264, 81 P. 509, we find no expression of the Supreme Court altering or modifying its brief but clear statement that "when a case is such that an appeal from the judgment of the lower court would properly be taken to the District Court of Appeal, a petition to prohibit the proceeding should be addressed to that court." Further, that by this statement it was the deliberate intention to make a precedent to be followed in like cases thereafter. The only reason indicated for this direction, viz., that the Constitution confers the same authority to issue such writs on the District Court of Appeal as upon the Supreme Court, necessarily requires the conclusion that where an appeal is taken to the Supreme Court the petition should be addressed to that court.

We find no instance where this pronouncement of policy has been disregarded by any District Court of Appeal, except where the record fails to disclose that the question of the propriety of that court entertaining an application for a writ when the appeal would lie to the Supreme Court was called to the attention of the District Court of Appeal or was discussed or considered in its decision. This was the case of Favorite v. Superior Court, 181 Cal. 261, 184 P. 15, 8 A. L. R. 290. The proceeding was begun in the District Court of Appeal and after decision was transferred to the Supreme Court. All that the Supreme Court decision had to say upon the point here under consideration was that the District Court of Appeal has jurisdiction the same as the Supreme Court to issue a writ of prohibition. However, nothing is said as to whether or not such action by the District Court of Appeal in that proceeding was approved by the Supreme Court. The same is

true of Dawson v. Superior Court, 158 Cal. 73, 110 P. 479, and of In re Application of Davidson, 167 Cal. 727, 141 P. 216. On the other hand, we are cited to no decision of the District Court of Appeal in which the question has been called to its attention and given judicial consideration, where the precedent of Collins v. Superior Court and the admonition contained in its decision has not been followed. Cases where that rule has been applied and restated are Estate of Turner, 39 Cal. App. 56, 177 P. 854; Tannahill v. Superior Court, 58 Cal. App. 623, 209 P. 77; and Gunder v. Superior Court, 100 Cal. App. 337, 279 P. 822.

Petitioner attempts to distinguish the Tannahill Case on the ground that the writ there sought was in aid of the appeal, and the Gunder case on the ground that a question involved in the proceeding was one which was contained in the appeal. In Collins v. Superior Court nothing is said by the Supreme Court about these distinctions. It is true that the opinion in the Gunder Case states that if the petition were to be granted questions involved in the appeal would necessarily have been determined by the appellate court. However, it is clear from the language preceding this statement that the decision had been reached in the opinion under the general rule of policy, and the fact that questions involved in the appeal would also require decision if the writ were issued was only an additional reason for refusing to allow it.

The alternative writ is discharged, and a peremptory writ denied.

We concur: DESMOND, J.; WILLIS, Justice pro tem.

140 Cal.App. 139

COMBS v. BURBANK MUT. LIFE & BENEFIT ASS'N.

Civ. 8503.

District Court of Appeal, Second District, Division 2, California.

July 24, 1934.

1. Insurance ⇐645(1)

Answer, alleging that insured's statements in application for life policy as to his age and good health to best of his knowledge were untrue, as he knew, *held* to raise issue whether he believed, with reason, that he was in good health, as required to recover on policy which was incontestable after one year except for fraud (Civ. Code, § 1668; St. 1917, p. 964, § 6).

2. Insurance ⇐267

To render life policy void for falsity of warranty that answers in application therefor are true to best of applicant's knowledge and belief, they must be substantially untrue, not merely in fact, but to best of applicant's knowledge and belief (St. 1917, p. 964, § 6; Civ. Code, § 1572).

3. Insurance ⇐400

Allegation of life insurance applicant's positive assertions in manner not warranted by his knowledge, suggestion of what he did not believe true, or suppression of knowledge of condition but for which policy sued on would not have been issued, amounted to defense not waived by provision declaring policy incontestable after one year except for fraud (St. 1917, p. 964, § 6; Civ. Code, § 1572).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Mabel I. Combs against the Burbank Mutual Life & Benefit Association, a corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

Carlos S. Hardy, of Los Angeles, for appellant.

W. Eugene Craven, Combs & Combs, and Lee Combs, Jr., all of Los Angeles, for respondent.

CRAIG, Justice.

In an action for insurance by the widow of a member of the defendant life and benefit association, both an answer and an affirmative defense were interposed, and judgment being given in favor of the plaintiff on the pleadings, said defendant appealed.

[1] The existence and character of the insurer, application for membership, and issuance of a policy, payment of assessments and charges, and sufficiency of funds with which to pay the full amount, which was refused, were admitted. It was alleged and admitted that pursuant to the constitution and by-laws of the association said policy was issued upon an application in writing, and that no member over fifty-five years of age was entitled to such insurance unless and except by amendment, but that by an amendment

of the by-laws persons beyond such age were made admissible when deemed to the best interests of the association; that decedent represented his age as fifty-nine years. By affirmative allegation the defendant alleged that the decedent so stated his age to the best of his knowledge, and likewise that he was in good health and sound physical condition; but that prior to, at the time of, and since the issuance of said application and policy he was in fact sixty years of age, and was suffering from organic disease; that the applicant knew all of the facts so alleged and that his said statements, representations, and warranties so made were untrue, and were known to him to be untrue; that upon notice of his demise the insurer was for the first time caused to inquire, but had it known that said statements were untrue, or that the applicant was not of sound health or of the age stated, it would not have issued its policy nor accepted him as a member.

The policy, issued some two years before liability was claimed, provided that the same "except for fraud shall be incontestable after one year from its date of issue." It is insisted by the respondent that where an applicant certifies to his good health according to the best of his knowledge and belief, recovery will not be denied if it appear that he had reason to believe and did believe that he was in good health (Couch on Insurance, p. 2725), and said answer failed to raise the issue. By comparison of the language, the question is set at rest. It was charged in the answer in effect that each and every of the conditions requisite to the issuance of a policy were found to have been misrepresented with knowledge of the applicant that the statements were false. Dibble v. Reliance Life Ins. Co., 170 Cal. 199, 149 P. 171, Ann. Cas. 1917E, 34, cited by respondent, held that section 1668 of the Civil Code providing that, "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility from his own fraud * * * are against the policy of the law," does not apply to a case in which the effect of such clause is merely to limit the time within which fraud may be urged as a defense to a reasonable time in the interest of repose and security. By the contract and application it had there been agreed that it "shall be incontestable after one year from its date, except for nonpayment of premiums and except as otherwise provided in this policy. All statements made by the insured in said application shall, *in the absence of fraud*, be deemed representations and not warranties, and no such statement shall avoid the policy unless it is contained in the written application hereof. * * *" (Italics ours.) It was said that the "entire provision, as we read it, so far as applicable here, is that this policy * * * shall be incontestable after one year from its date, *except* for nonpayment of premium and *as otherwise provided* in this policy," and the provision *"in the absence of fraud* all statements in the application shall be deemed representations and not warranties, and no such statement shall avoid the policy unless contained in the written application," had reference to an entirely different matter; there was nothing "otherwise provided" as to false statements.

However, appellant in the instant case relied upon the provision, "there are no restrictions under this policy on travel, residence, occupation, or military or naval service, *and except for fraud* shall be incontestable after one year from its date of issue," and denied that the insured was in good standing. Differing from the case from which we have just quoted, the clause was not made dependent upon a condition which the parties can be said to have omitted so as to leave it ambiguous. The defendant here alleged elements of fraud, except for which the parties stipulated the policy should be incontestable. In Dibble v. Reliance Life Ins. Co., supra, the opinion states there was "no distinction between the condition precedent as to the delivery of the policy while in good health and statements in the application which were made warranties, and that unless expressly excluded they were all covered by the agreement not to contest the policy." The purport of the decision is that the one-year limitation was intended for the purpose of permitting inquiry as to the truth or falsity of representations. In Boyer v. U. S. Fidelity & Guaranty Co., 206 Cal. 273, 274 P. 57, 59, policies were issued upon stated representations, one of which was the relationship of brother and sister between the insured and the beneficiary. Upon receipt of notice of liability, the insurer for the first time "investigated the facts and learned" that the parties were not so related. Stating that the court could "readily perceive of circumstances under which such representation as to the relation sustained between the beneficiary and the assured might be a consideration of considerable moment to the insurer," judgments in favor of the plaintiffs after trial of issues were reversed, and the policies were held voided even as to intentional falsification of immaterial matter by the provisions of section 6 of the act of 1917 (Stats. 1917, pp. 957, 964): "The falsity of any statement in the application for any

policy covered by this act shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer." Both contingencies, "except for fraud" contained in the policy here in controversy, and false statements claimed to have affected the acceptance of the risk as contained in the quoted section of the Insurance Act, are questions of fact presented by appellant's affirmative defense. While in the Dibble Case, as to grounds of contest "unless expressly excluded they were all covered by the agreement not to contest the policy," and the fraud was held through the omission above pointed out not to have been so excluded, the language of the contract herein pleaded, that the same "except for fraud shall be incontestable," would seem clearly to present a different agreement. It is recognized in both of the cases above cited as settled law that: "Insurance policies are governed by the same general rules which pertain to all contracts. There must be a meeting of the minds. Subject to the rule that their provisions must not be against public policy or in contravention of specific provisions of law, parties to the contract may make such agreements as they see fit, and the courts will enforce the terms mutually agreed upon." Boyer v. U. S. Fidelity & Guaranty Co., supra. Any other conclusion as to the provision here under consideration than that which we have indicated would require the clause in question to be read, that the policy "notwithstanding fraud shall be incontestable within one year" from its date.

[2, 3] Nor is the alleged defense in conflict with the rule cited by the respondent that where a warranty is that a statement is true so far as known to the applicant, knowledge of the applicant of its untruthfulness must be shown. Northwestern Mutual Life Ins. Co. v. Gridley, 100 U. S. 614, 25 L. Ed. 746. As otherwise expressed: Where the answers in an application are warranted as true to the best of the knowledge and belief of the applicant, it is not sufficient to void a policy that they be shown substantially untrue in point of fact, but they must be substantially untrue to the best of the knowledge and belief of the applicant. Yeomen of America v. Rott, 145 Ky. 604, 140 S. W. 1018. We are confined to the pleading, and bound by the undisputed charge that the applicant's statements and representations were not only untrue in every respect, but were known to him to be untrue. This is in full accord with Harding v. Robinson, 175 Cal. 537, 166 P. 808, cited by respondent, which was determined upon the basis of the provisions of section 1572 of the Civil Code, though it was found that there had been no misrepresentation. By said section it is provided that actual fraud consists of acts done by a party to the contract to induce another to enter into the same, by: "1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; 3. The suppression of that which is true, by one having knowledge or belief of the fact," etc. By the same rule an allegation of positive assertions, in a manner not warranted by the knowledge of the applicant for insurance, the suggestion of that which he did not believe to be true, or the suppression of knowledge of the existence of a condition, but for which a policy would not be issued to him, amounted to such a defense to an action thereon as the parties agreed to exclude from the defenses waived.

The judgment is reversed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

140 Cal.App. 236

PEOPLE v. d'A PHILIPPO.

Cr. 1389.

District Court of Appeal, Third District, California.

July 30, 1934.

Hearing Denied by Supreme Court Aug. 29, 1934.

1. Criminal law ⇐1188

Where Supreme Court set aside judgment of trial court sentencing defendant convicted of theft and violation of Corporate Securities Act as habitual criminal, Supreme Court had jurisdiction to remand defendant to trial court for resentencing (Pen. Code, §§ 644, 1260; St. 1917, p. 673, as amended).

2. Criminal law ⇐1188

Appellate court has power to remand cause to trial court so that correct judgment may be entered in conformity with verdict of jury or pleas entered by defendant (Pen. Code, § 1260).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Constitutional law ⇐271

Resentencing defendant after Supreme Court on appeal had set aside sentence and remanded him for resentence *held* not denial of due process (Const. U. S. Amend. 14).

4. Criminal law ⇐192

Defendant convicted of theft and violation of Corporate Securities Act, who had sentence pronouncing him an habitual criminal set aside on appeal to Supreme Court, was not placed in double jeopardy, where trial court resentenced him on charges upon which he had been convicted under order of Supreme Court remanding him for resentencing, as original sentence was set aside by defendant's own act (St. 1917, p. 673, as amended).

5. Criminal law ⇐1216(6)

That two years had elapsed during pendency of appeals of defendant during which time he had been confined in prison did not warrant his discharge, where record showing conviction upon nine counts of grand theft and one of violation of Corporate Securities Act and former criminal tendencies called for more than two-year sentence (Pen. Code, § 1484; St. 1917, p. 673, as amended).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Pierre d'A Philippo was resentenced on nine counts charging grand theft and on one count charging violation of the Corporate Securities Act. From an order denying his motion in arrest of judgment, he appeals.

Affirmed.

Pierre d'A Philippo, in pro. per.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us on an appeal by the defendant from an order of the trial court denying his motion in arrest of judgment.

The record before us discloses that the defendant was tried in 1932 upon an indictment charging him with grand theft in seventeen counts, and one count charging violation of the Corporate Securities Act (St. 1917, p. 673, as amended). Upon this indictment the defendant was found guilty on nine of the counts contained in the indictment, and also guilty of the offense of violating the Corporate Securities Act. The indictment also charged certain prior convictions and serving sentences therefor, of which the defendant was found guilty.

Following the return by the jury of the verdict finding the defendant guilty, as just stated, the court pronounced judgment upon the defendant as an habitual criminal under the provisions of section 644 of the Penal Code. Upon a hearing had in the Supreme Court, the judgment of the trial court sentencing the defendant as an habitual criminal was set aside on the ground that the trial court had no jurisdiction to sentence the defendant as an habitual criminal, and in its opinion reversing the judgment of the trial court made the following order: "It appearing, as above stated, that the trial court was without jurisdiction to adjudge defendant an habitual criminal, such judgment is hereby reversed with directions to the court below to resentence defendant, as required by law. 32 P. (2d) 962."

In accordance with the order of the Supreme Court just set forth, the defendant was, on the 9th day of June, 1934, returned to the county of San Joaquin, and by the superior court thereof resentenced on the nine counts charging grand theft, of which the defendant had been found guilty, and also on the one count charging violation of the Corporate Securities Act, of which the defendant had been found guilty. The judgment last pronounced sentenced the defendant to the state's prison for the term provided by law, specifying in the judgment that the sentences should run concurrently.

Upon this appeal it is contended that the Supreme Court had no jurisdiction to remand the defendant to the superior court for resentencing; that the power of the Supreme Court is limited by the provisions of section 1260 of the Penal Code to affirming, reversing, or modifying the judgment originally pronounced following the verdicts finding the defendant guilty of the ten counts referred to.

It is further contended that the last judgment and sentences pronounced are void, in that the defendant is being twice placed in jeopardy. It is also further contended that the judgment pronounced by the court in the first instance was not wholly void but was only partially void, and therefore, as appears to have been held in the case of In re Humphrey, 64 Cal. App. 572, 222 P. 366, and In re Sullivan, 3 Cal. App. 193, 84 P. 781, the jurisdiction of the lower court was exhausted and could not be reinstated warranting the resentencing of the defendant.

It is also contended that the resentencing of the defendant is violative of the Fourteenth Amendment of the United States Constitution. The contention is also made that this court, under the provisions of section 1484 of the Penal Code, should take into consideration the number of months that the defendant has already been confined in the state's prison, and order his discharge.

Without questioning the holding had in either the Humphrey or Sullivan Case, supra, it is evident from the cases having to do with irregular judgments that those cases must be confined strictly to the circumstances upon which the opinions are founded.

[1, 2] That an appellate court has power to remand a cause to the trial court in order that a correct judgment may be entered in conformity with the verdict of the jury or pleas entered by the defendant, is now established we think beyond question by the following cases hereinafter cited: People v. Stratton, 133 Cal. App. 309, 24 P.(2d) 174, where the defendant had entered a plea to an information charging robbery, and no proof was taken fixing the degree of the offense, this court remanded the cause to the trial court with directions to the lower court to take the necessary proof as required by section 1192 of the Penal Code, and resentence the defendant. In support of that holding the following cases were cited: In re Lee, 177 Cal. 690, 171 P. 958; In re Stroff, 132 Cal. App. 351, 22 P.(2d) 770; People v. O'Brien, 122 Cal. App. 147, 9 P.(2d) 902; People v. Scott, 39 Cal. App. 128, 178 P. 298.

[3, 4] In pursuance of the order made by this court in the Stratton Case remanding the defendant to the lower court for the purposes just stated, proceedings were had therein in accordance with the directions of this court, and from the judgment so entered the defendant prosecuted two appeals to this court presenting almost identically the same questions which are tendered in the instant case for our consideration. People v. Stratton (Cal. App.) 28 P.(2d) 695, 698, 699. In both these cases hearing was denied by the Supreme Court. As to "once in jeopardy" this court in the first appeal held as follows: "The law is well settled in this state that, where a defendant procures a reversal of a former judgment, and the cause is remanded for further hearing, the defendant is not entitled to a discharge, even though in his proceeding to obtain a reversal he did not ask for a new trial, and the plea of former jeopardy is no defense to the latter proceeding. See, also, People v. Olwell, 28 Cal. 456; People v. Barrie, 49 Cal. 342; People v. Lee Yune Chong, 94 Cal. 379, 29 P. 776."

The language in the opinion in the Stratton Case just cited, relative to the Fourteenth Constitutional Amendment, is applicable here, to wit: "We have carefully considered the contentions of the appellant based upon the Fourteenth Amendment to the United States Constitution and the United States Supreme Court cases cited in his brief, but, as they do not appear to be pertinent to any of the issues involved herein, we do not deem it necessary to consider them at length in this opinion." As in the Stratton Case last referred to, so it is true here that the original sentence pronounced upon the defendant has been set aside by his own acts and cannot now be pleaded as constituting former jeopardy. In re Fritz, 179 Cal. 415, 177 P. 157. In the case of In re Fritz, supra, and also in the case of In re Lee, supra, the defendant had been erroneously sentenced under the indeterminate sentence law, and in both instances the defendant was remanded to the lower court for resentencing.

[5] In support of his contention that the provisions of section 1484 of the Penal Code should be taken into consideration, the defendant cites the case of In re Bouchard, 38 Cal. App. 441, 176 P. 692, and In re Silva, 38 Cal. App. 98, 175 P. 481. Both of these cases were disapproved in the case of In re Fritz, supra.

Irrespective of the disapproval of the Silva and Bouchard Cases, the record shows that the defendant has been convicted upon ten counts, nine of grand theft, and one for violation of the Corporate Securities Act, and that during the pendency of his appeals, approximately two years have elapsed. The record also shows the former criminal tendencies of the defendant. Such a record calls for a sentence much beyond the limit of the time that the defendant has already been incarcerated, and justice would not be served were the defendant discharged at this early date.

Finding no merit in the appeal, the order of the trial court is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

140 Cal.App. 87

PEOPLE v. AGUILAR.*

Cr. 168.

District Court of Appeal, Fourth District, California.

July 21, 1934.

Hearing Denied by Supreme Court Aug. 20, 1934.

1. Criminal law ⇐519(1)

Statement of accused in prosecution for death arising out of automobile collision, made by him at hospital shortly after accident, was voluntary and admissible, where accused understood questions asked him and there was no persistent questioning and accused was not frightened or unwilling to answer and no duress, intimidation, or threats had induced statement.

2. Criminal law ⇐518(1)

Failure to inform accused in prosecution for death arising out of automobile collision of his right to remain silent and that his statement might be used against him did not affect admissibility of reported statement of accused at hospital shortly after accident which was not made as testimony or under conditions necessarily requiring such specific instructions.

3. Criminal law ⇐519(1)

That counsel or friends of accused in prosecution for death arising out of automobile collision were not present when accused was questioned at hospital shortly after accident did not make reported statement involuntary, and so inadmissible.

4. Criminal law ⇐519(1)

That interpreter was not present when accused in prosecution for death arising out of automobile collision was questioned at hospital shortly after accident did not affect admissibility of statement, where accused understood questions asked and expressed himself without necessity of an interpreter.

5. Criminal law ⇐1169(2)

Inclusion of statement of physician that amounted to accusation that accused was intoxicated in statement of accused in prosecution for death arising out of automobile collision, made in response to questions at hospital shortly after accident, was not harmful to accused, where physician testified independently to same effect and accused did not dispute physician's statement when it was made at hospital.

6. Criminal law ⇐526

That accused in prosecution for death arising out of automobile collision might have been injured or was under influence of intoxicating liquor when he made statement in response to questions at hospital shortly after accident did not affect admissibility of statement, where character of statement clearly indicated accused was not injured or so much intoxicated as to be unconscious of meaning and effect of his words.

7. Criminal law ⇐829(6)

Refusal of instruction that accused, in prosecution for death arising out of automobile collision, was intoxicated when public or persons coming in contact with him could readily see and know that it was affecting him in such respect and was reflected in his walk, acts, and conversation, was not error, where instruction given adequately covered question of intoxication (St. 1929, p. 537, § 112).

8. Criminal law ⇐829(6)

Instruction in prosecution for death arising out of automobile accident adequately covered issue of intoxication and was not error as leading jury to believe that testimony of police officers and experts should be more readily believed than testimony of average person (St. 1929, p. 537, § 112).

> Instruction was that accused was intoxicated if his ability to operate automobile as ordinarily prudent man would operate it under like condition was impaired by liquor, and if liquor so affected his acts, conduct, or movements that public or persons coming in contact with him could readily see and know it was so affecting him.

9. Automobiles ⇐357

Erroneous instruction on second degree murder charge that driving of automobile on public highway while under influence of intoxicating liquor was felony was not prejudicial to accused who was convicted of manslaughter under instructions fully and correctly defining manslaughter (St. 1929, p. 537, § 112; Pen. Code, §§ 367d, 1096).

10. Automobiles ⇐357

In prosecution for death arising out of automobile collision, refusal to instruct on excusable homicide was not prejudicial error, where there was no evidence on which such instruction could be based.

11. Automobiles ⇐357

In prosecution for death arising out of automobile collision, refusal of instruction that, in determining whether accused was intoxicated, only his ability to operate automobile, and not manner in which it was actually driven or result of its operation, should be considered, was proper (St. 1929, p. 537, § 112).

12. Criminal law ⇐829(9)

Refusal of instruction that burden of proof as to every link in chain of evidence

necessary to conviction was borne by prosecution was not error, where court instructed that state had burden of proving accused guilty beyond reasonable doubt and that it was essential that each fact relied upon in chain of evidence be established to a moral certainty and beyond reasonable doubt, and read instruction based on statute defining reasonable doubt (Pen. Code, § 1096).

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Pete Aguilar was convicted of manslaughter. From the judgment of conviction and from an order denying his motion for a new trial, he appeals.

Affirmed.

S. L. Heisinger, of Reedley, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

MUNDO, Justice pro tem.

The defendant was charged, by an information filed in the superior court of Fresno county, with the crime of murder. Upon arraignment he entered a plea of not guilty and was tried before a jury which returned a verdict convicting him of manslaughter. A motion for a new trial was denied. The defendant then perfected this appeal from the judgment and from the order of the trial court denying his motion for a new trial.

The grounds upon which appellant relies for a reversal of the judgment and order denying his motion for new trial are as follows: (1) That the evidence is insufficient to support the judgment in that it does not sufficiently show that appellant, Pete Aguilar, while driving the automobile which caused the death of Lucius Powers, Sr., was intoxicated. (2) That the court erred in admitting into evidence a statement made by Pete Aguilar taken shortly after the accident. (3) That the court erred in refusing to give instructions requested by the defendant. (4) That the court erred in giving certain instructions offered by the prosecution.

It appears from the evidence that one Lucius Powers, Sr., was, on the 4th day of September, 1933, at about the hour of 5:30 o'clock in the evening, operating an automobile in a northerly direction on United States California highway No. 99, and that when he was at a point on said highway approximately two miles north of the city of Fowler his car collided with an automobile being driven in a southerly direction by the defendant, Pete Aguilar. The point of impact was on the left front wheel of each automobile. At the place over which the two cars were being driven, the highway is divided into three traffic lanes. The cars came together in the easterly one.

Both Powers and the defendant were, shortly after the collision, taken to the emergency hospital in Fresno. Powers died from injuries received in the collision some three or four hours later. The defendant was removed to the county hospital, where he remained for a period of approximately seven days.

Both sides agree that the case revolves around the question as to whether the defendant was under the influence of intoxicating liquor at the time of the collision. Mr. Stapleton, a nurse at the emergency hospital, testified that defendant's breath was alcoholic. He asked the defendant if he had been drinking, and the defendant replied, "I drink jackass." Mr. Stapleton was asked by the district attorney to "state whether or not in your opinion, * * * the use of intoxicating liquor had so far affected this defendant, as you saw him that night, to affect to an appreciable degree his ability to operate an automobile," and the answer was, "It had." Upon cross-examination he stated that he made no examination as to intoxication, but determined that defendant was intoxicated because of his alcoholic breath and thick tongue and his thick speech.

Mr. Dahlgren of the emergency hospital testified that, when he first observed the defendant shortly after he was admitted to the hospital, there was a smell of alcohol on his breath and his speech was "slurring in character." When asked if the injuries to his nose, knee, and hand were serious, the doctor replied, "I don't believe sufficient to produce that type of speech." The doctor testified that in his opinion the defendant was under the influence of liquor to the extent that his mental control and co-ordination of speech were interfered with.

At the county hospital, on the evening of the accident, the defendant was observed by Dr. Ginsburg and found to be under the influence of intoxicating liquor. At the trial the doctor stated that in drawing his conclusions he took into consideration the defendant's injuries and did not deem them sufficient to give rise to the symptoms which the patient was exhibiting, but rather thought the symptoms indicated intoxication.

The witnesses Chess and Tyson testified that at the scene of the collision they did not notice anything unusual about the demeanor or actions, speech, or appearance of the defendant, and that in assisting him from his

car they did not smell alcohol on his breath. Other witnesses testified to the effect that the defendant had not been drinking within two or three hours immediately preceding the collision.

There was testimony to the effect that a specimen of defendant's urine, taken the day following the collision, showed that alcohol in the amount of 2 per cent. was present. But, without considering this testimony and without considering defendant's admission of drinking, we are of the opinion that the record contains ample evidence to support a finding that the defendant was under the influence of intoxicating liquor at the time of the collision.

On the night of the collision, while the defendant was at the county hospital, the following statement was taken:

"Q. What is your name? A. Pete Aguilar.

"Q. Where do you live, Pete? A. I live at Reedley.

"Q. Working down there? A. With my brother down there at the pool hall at Reedley.

"Q. Your brother is down there? A. Yes, I was working with him.

"Q. Working with him today? A. All the time; not today; all the time.

"Q. How far out of Reedley does he live, Pete? A. What?

"Q. How far out of Reedley does your brother live? A. He lives just in the same lot, out in the back.

"Q. Same what? A. In the same lot.

"Q. Same lot? A. Yes.

"Q. In the town or outside of town? A. In town.

"Q. In town? A. Yes.

"Q. I see. When did you leave Reedley today, Pete? A. I was leaving at Reedley—let me see—about 2–2:20, I believe.

"Q. 2:20? A. Two and something. After 2, anyway.

"Q. Where did you go when you came to town? A. I was down—coming downtown in Fresno, and I was going back to home when I had a wreck.

"Q. You had been in Fresno and were going home? A. Yes.

"Q. How much did you have to drink in Fresno, Pete? A. Not very much.

"Q. How much? A. I had the same God damn drink there where I was over there.

"Q. What were you drinking, wine? * * * A. I don't like wine very much.

"Q. You don't. What do you like? A. I like whiskey, you know.

"Q. You like whiskey. Is that what you were drinking today, Pete? A. Drank about two glasses down there before I come down here, over there. I come down to the hospital because I was—some girl there.

"Q. Where did you go? Where did you say you went to see the girls? A. Well, I tried to see one girl here at the hospital.

"Q. Here at the hospital? A. Yes.

"Q. Yes. A. So I figured after while I might go home.

"Q. You didn't go to see the girl? A. No. After that I figured I might as well go home.

"Q. Did you have a shot before you started home? A. No.

"Q. You didn't? A. No.

"Q. What were you drinking—whiskey, Pete? A. Yes. I had one more shot there.

"Q. Where? A. I had two over at Reedley; I had one more here.

"Q. Two at Reedley and one here? A. Yes.

"Q. Of what—jackass? A. Yes. Three of them. Three little glasses. I didn't pay any attention.

"Q. How did you happen to run into this man, Pete? A. I don't know; was something the matter with the car?

"Q. What? A. I tried to pass another car and it happened.

"Q. You tried to pass up another car? A. Yes, and I happened to get hurt.

"Q. Was anybody with you, Pete? A. No, nobody; just me.

"Q. All by yourself? A. Yes, I was going home.

"Q. How do you feel now? A. I feel all right.

"Q. You do? A. Yes.

"Q. Head hurt? A. Feel just like you are.

"Q. Feel just like I do? A. Yes.

"Q. Does your head hurt? A. Well, I know it is hurt, all right, but I don't think it is hurt very much.

"Q. Not very much. Scratched up some? A. Yes.

"Q. What kind of a car were you driving, Pete? A. Packard.

"Q. You drive a Packard? A. Yes.

"Q. Sedan? A. Yes, sir.

"Q. Yours or your brother's? A. It is my brother's car.

"Q. Did you have any liquor in the car,

Pete? A. No, sir, I don't think; if you find anything you can give whatever you say.

"Q. What is that? A. If you find anything on the car you can give hell on me; I never carry liquor in my car; that is one thing I never do there.

"Q. Do you know who it was you ran into, Pete? A. No.

"Q. Didn't you know your car caught on fire? A. I know it. As soon as I saw it burn up I tried to get away from it.

"Q. Yes, I suppose so. A. Why sure. No use staying around there.

"Mr. Carter: All right. Anything you want to ask? (No response.)

"Mr. Carter: No question in your mind about his condition at all, Doctor? * * *

"Dr. Ginsburg: No."

Present at the time were Dr. H. M. Ginsburg and internes, Deputy Sheriff John W. Ford, Deputy Sheriff J. Ed Martin, Chief Deputy District Attorney Rae B. Carter propounding the questions, and Ray E. Adams, shorthand reporter. No interpreter, friends, or representatives of the defendant were present, and the defendant was not advised that he was entitled to be represented by counsel, nor was he informed that any statement he might make could be used against him.

[1-4] There is no evidence that the statement was ever read over to or signed by defendant, but we do not understand that objection was made to it on that ground. At the close of the testimony of Mr. Adams, shorthand reporter, the district attorney offered in evidence the above statement as written by Mr. Adams. The defendant objected to its admission. The objection was overruled, and the statement was admitted. In this connection the defendant contends, first, that the statement was not taken in the form and manner which would make it available to the prosecution as a free and voluntary statement of the defendant; and, secondly, that the last question and answer in the statement were not a part of the defendant's statement, and that, when they were read to the jury, undoubtedly raised in the minds of the jury a question as to the sobriety or condition of the defendant, and therefore the question and answer were prejudicial to the rights of the defendant.

The Attorney General contends that the statement did not amount to a confession of guilt, and therefore no foundation was necessary for its admission in evidence, but, he contends, even if it were considered as a confession, the only preliminary proof necessary to lay the foundation for its introduction in evidence would be to show that there were no threats, promises, or inducements made which would cause the defendant to make the statement. The record shows that the statement was made without any previous inducement, promise, or offer of leniency in punishment, or by reason of any duress, intimidation, or threat. While the statement was being taken, the defendant was lying on the dressing table with a bandage over his head. He spoke with broken English, but apparently understood everything that was asked him. There is no intimation of persistent questioning as there was in the case of People v. Gow, 23 Cal. App. 507, 138 P. 918, cited by counsel, nor is there any evidence of the defendant being frightened or unwilling to answer. To the contrary, it appears that he was quite willing and inclined to talk. Under such circumstances it is our opinion that the statement was a voluntary one and that the trial court did not err in allowing it to be received in evidence. While it might be better practice when taking statements of this kind to inform the party of his right to remain silent and of the fact that his statement may be used against him, the failure to affirmatively instruct the party does not affect the admissibility of the statement, especially where, as here, the statement was not made as testimony or under conditions which necessarily required such specific instructions. People v. Booth, 72 Cal. App. 160, 236 P. 987. That the defendant's counsel or friends were not present did not operate in any wise to make the statement involuntary. The proceedings were not such as required the presence of counsel. No interpreter was necessary. The record amply indicates that the defendant understood and expressed himself without the necessity of an interpreter.

[5] Respecting the question put to Dr. Ginsburg and his answer, we are of the opinion that no damage resulted by their inclusion in the statement as received in evidence, for the reason that Dr. Ginsburg testified independently to the same effect, that in his opinion the defendant was intoxicated when he was brought into the hospital. Furthermore, the question and answer being made in the defendant's presence and along with the rest of the statement, the defendant could have, if he desired, commented on them. In effect the answer of the doctor amounted to an accusation that the defendant was intoxicated, and, since the defendant did not make any comment, we must assume he did not desire to dispute the statement of the doctor.

[6] The fact that the defendant may have been injured or was under the influence of in-

toxicating liquor when he made the statement does not affect its admissibility where the character of the statement clearly indicates that he was not injured or so much intoxicated as to be unconscious of the meaning and effect of his words. People v. Farrington, 140 Cal. 656, 74 P. 288; People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73; People v. Egan, 133 Cal. App. 152, 23 P.(2d) 1042.

[7, 8] Complaint is made that the instruction given by the court upon the issue of intoxication was too narrow in its import. Appellant contends that his proffered instruction should have been given, especially the following portion: "* * * That the public or persons coming in contact with him could readily see and know that it was affecting him in this respect and was reflected in his walk, acts and conversation * * *" and he cites the case of People v. Dingle, 56 Cal. App. 445, 205 P. 705, in support of his contention. The instruction which was given is as follows: "* * * Any person is under the influence of intoxicating liquor within the meaning of this statute if intoxicating liquor has so far affected the nervous system, brain or muscles of the driver of an automobile as to impair to an appreciable degree his ability to operate his car in the manner that an ordinarily prudent and cautious person in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions. You are further instructed that under this section it is not necessary that the person accused should be so called 'dead drunk,' or hopelessly intoxicated, but if you shall be convinced beyond a reasonable doubt and to a moral certainty from the evidence in this case that this defendant was in such a condition from the use of intoxicating liquor, that it so affected his acts, conduct or movements that the public or persons coming in contact with him could readily see and know that it was affecting him in this respect, and that in such condition this defendant was operating a motor vehicle upon a public highway in the County of Fresno, State of California, then this defendant was under the influence of intoxicating liquor within the meaning of the statute." The language of this instruction is identical with the approved instruction in the Dingle Case, excluding, however, the portion which defendant claims was proffered and improperly refused by the trial court. In commenting on the instruction it was said in the Dingle Case that the instruction was too favorable to the defendant. The court in the Dingle Case said (page 453 of 56 Cal. App., 205 P. 705, 708): "A person may be so far under the influence of intoxicating liquor that, to an appreciable degree, there is an impairment of his ability to operate his automobile in the manner that an ordinarily prudent and cautious person, in the full possession of his faculties, would operate a similar vehicle under like conditions; and yet the person whose ability to operate his car is thus impaired might not be so drunk that the public, or persons coming in contact with him, could 'readily' see and know that intoxicating liquor was affecting his acts or conduct and was being reflected in his walk and conversation. The drink may have impaired his ability to drive his car properly by imparting to him a dash of dangerous recklessness, without in any wise manifesting itself in his speech, or in his walk, or be noticeable in his intellectual processes." The instruction as given by the trial court herein adequately covers the subject, and we do not agree that it is too narrow in its import and such as would lead the jury to believe that the testimony of police officers and experts should be more readily believed than the testimony of the average person.

[9] In instructing the jury that the driving of an automobile upon a public highway while under the influence of intoxicating liquor is a felony, the court erred, for neither under section 112 of the California Vehicle Act (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537) nor section 367d of the Penal Code is the crime defined as a felony. But, since the defendant was convicted of manslaughter, we do not see how an erroneous instruction on second degree murder could be prejudicial to him. The other instructions given fully and correctly defined manslaughter, the crime of which the jury convicted the defendant. We find no prejudicial error in the instruction complained of.

[10] Appellant further contends that the court erred in refusing to instruct the jury on excusable homicide and thereby deprived the defendant of the benefit of his defense as to accident and misfortune. A review of the record does not disclose any evidence on which such an instruction could be based, and therefore the court's refusal to so instruct was not prejudicial.

[11] The court also refused to give an instruction proposed by defendant which he claims was offered pursuant to the authority of People v. McGrath, 94 Cal. App. 520, at page 524, 271 P. 549. His proposed instruction was: "In determining whether or not the defendant was under the influence of intoxicating liquor, you are to consider only the mental and physical condition of the driver,

that is, his ability to operate his car and not the manner in which the car is being actually driven nor the result of its operation." The instruction was properly refused. In the first place, the rejected instruction does not follow the authority cited; and, secondly, the rule announced in the McGrath Case, with respect to the ability of the driver to operate his car, is covered fully by other instructions given by the court.

[12] Finally, it is contended that the court erred in refusing to instruct the jury that the burden of proof as to every link in the chain of evidence necessary to a conviction is borne by the prosecution. This contention must fail, for the court did instruct the jury that the state had the burden of proving the defendant guilty beyond a reasonable doubt, and the court also advised the jury that "it is essential in the chain of evidence relied upon each fact be established to a moral certainty and beyond a reasonable doubt." The court also read to the jury an instruction based on section 1096 of the Penal Code.

The judgment and order are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

140 Cal.App. 87

PEOPLE v. AGUILAR.

Cr. 168 (4).

Supreme Court of California.

Aug. 20, 1934.

In Bank.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

On rehearing.

For prior opinion, see 35 P.(2d) 137.

S. L. Heisinger, of Reedley, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

PER CURIAM.

The petition for hearing is denied. In denying said petition we withhold our approval of the statement in the opinion that under section 112 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1929, p. 537, the crime of driving an automobile by any person upon a public highway while under the influence of intoxicating liquor is not defined as a felony.

139 Cal.App. 747

AUSTIN v. BURNS.

Civ. 9330.

District Court of Appeal, First District, Division 2, California.

July 18, 1934.

1. Appeal and error ⇐1011(1)

Reviewing court would not disturb trial judge's finding, based on conflicting testimony, that grantor was of unsound mind when deed was executed.

2. Deeds ⇐208(1)

Evidence sustained finding of nondelivery of deed.

3. Pleading ⇐377

Judgment for value of rental *held* properly granted notwithstanding no evidence was introduced as to value, where complaint alleged that rental value of property was $30 per month and no issue was made thereof by answer; allegations being deemed as having been admitted by defendant.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Gertrude H. Austin, as executrix of the estate of Thomas Murphy, deceased, against Alice Burns. Judgment for plaintiff, and defendant appeals.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Irving P. Austin, of Compton, for respondent.

SCHMIDT, Justice pro tem.

The complaint in this case filed by respondent as the executrix of the estate of Thomas Murphy, deceased, was for cancellation of a deed purported to have been given by said Murphy in his lifetime to Alice Burns, the appellant herein, charging that the purported deed had been obtained from said Murphy by undue influence. After hearing all the evidence in the case upon motion of the respondent the trial court permitted her to file an amended complaint to conform to proof setting up the additional ground of nondelivery of the deed. The complaint also asked for judgment for the rental value of the property from the date that appellant took possession. The court found for respondent that the purported deed had been obtained by undue influence; that there was not any consideration for the deed; that the deed had not been

delivered and found that the rental value of the premises during the period occupied by appellant was $1,170 and entered judgment for the cancellation of the deed and for the sum of $1,170. The appeal is from this judgment.

Although appellant attacks substantially every finding of the court and the judgment thereon, these attacks may be stated as insufficiency of the evidence to support the findings: (a) That appellant procured the purported deed through undue influence; (b) that the purported deed had not been delivered; and (c) for the rental value of the premises.

The testimony showed that the alleged grantor, Thomas Murphy, died on the 31st day of December, 1928, aged 86; that the date of the deed involved herein was twelve days prior thereto, namely, the 18th day of December; that at the date of the deed said Murphy owned two pieces of property which for convenience will be designated as the Orange street or his home property, located in the town of Compton, and the other the Stockwell street property located a few blocks therefrom in the county of Los Angeles, the said Stockwell property being the property described in the deed involved herein; that said Murphy and the defendant had been acquainted for a year or more prior to his death; and that they lived next door to each other on Orange street.

Appellant testified that during the earliest part of her acquaintance with Murphy he was ill; she took food to him and otherwise took care of him; that she went into his home "every day when I came home at noon from the store, I went in there and fed him * * * and in the morning I would wash his face and hands and give him whatever he wanted, and at night when I came home I did the same thing, I fed him * * *"; that he soon recovered from this temporary illness and their friendship continued. "* * * he used to come in and eat when I came home at noon; he didn't have breakfast with me at all, but at noon he came in and had lunch with me, and at night when I came home he would come in and have dinner with me, and if he didn't come in, I brought it in to him." This continued "as long as I lived there. * * * Well, no, not every day * * * he would come in for quite a while steady, and then all of a sudden * * * he wouldn't come in for awhile * * * and then he would come in again." During this relationship between them no discussion was had between them about any property except about three months prior to his death and then in connection with some error regarding a cloud on the title to one of his pieces of property which he had asked appellant to help him to straighten out, concerning which property he wanted to make a loan, and that she went with Mr. Murphy to see a Mr. Erickson concerning the error; that she had loaned money to Murphy at times when he needed it without any apparent expectation of receiving it back. She did not keep account of the money she either loaned him or that she gave him; that some months prior to his death Murphy told her he desired to remember her by deeding her the Stockwell property, the property in question.

"Q. * * * now, what was stated by Mr. Murphy? * * * A. Well, I don't know; I can't remember.

"Q. Just as near as you can recall? A. I know he told me he wanted me to have that deed to that property because that I had been kind to him and did everything; things that nobody else would have done for him, and I came to him and took care of him when nobody else did. * * * He told me that several different times."

That Murphy was acquainted with a real estate man named Nygaard. When he wanted the deed executed, "Why, he told me to get Mr. Nygaard; * * * he wanted Mr. Nygaard to come to him; * * * he wanted to make some papers out; * * * I went and got Mr. Nygaard. * * * Mr. Nygaard told him to get a lawyer." Mr. Nygaard told the deceased to get a Mr. Aylmer as an attorney.

"Q. * * * did Mr. Nygaard get the lawyer? A. No, Mr. Nygaard told Mr. Murphy to get Mr. Aylmer, or to get a lawyer, and I told him I didn't know any lawyers, and Mr. Nygaard told Mr. Murphy to get Mr. Aylmer. * * *

"Q. * * * then did you see Mr. Aylmer? * * * A. Well, Mr. Aylmer went down to Mr. Murphy's; I don't know if it was that day or the next day, but I know he went down."

Mr. Nygaard testified: "Mr. Murphy asked me to draw a deed in favor of Mrs. Burns; he said he would like to deed his Orange street property, * * * and I stepped outside of the house and I talked to Mrs. Burns, and I advised Mrs. Burns, under the circumstances, that she better consult an attorney and have a deed drawn up and have the transaction handled by an attorney. She asked me what attorney I would recommend; I said, 'There are several up town; Mr. Aylmer is very reliable; you might see him.'"

At the time he had conversation with Mr. Murphy "Mrs. Burns was there, but, however, she went out before—she stepped out of the kitchen, on the rear porch, as I remember; she was in the other room part of the time."

The record shows that the appellant, Mrs. Burns, went to the office of Mr. Aylmer, an attorney, and had him prepare a deed and then took Mr. Aylmer with her to Mr. Murphy. Mr. Aylmer testified: "Yes, I asked him if he really wanted to deed the property to her and he said he did * * * after I found out that it was his wish to sign that deed, I said, 'We will have to have a notary.' * * * He wanted to have it cleared before he gave her a deed." Aylmer was not present when the deed was signed.

The witness Mrs. Olive Harr testified that she was the notary who placed the certificate on the deed involved herein; that she first saw the deed at the bank where she worked; that Mrs. Burns asked her to go to Mr. Murphy's house; that she saw him sign the deed, but did not have any conversation at all with Mr. Murphy; that she took the deed back to the bank where she placed her notary seal on it; that she then gave the deed to Mrs. Burns.

"The Court: Do you remember whether he told you to give it to Mrs. Burns? A. I don't remember that he did.

"Q. Why did you give it to her? A. Well, it was made out to her."

One witness, Carrie Dimmler, testified she had known Mr. Murphy for six or seven years; had seen him frequently almost every day; that he was an old man; that she talked to him occasionally; that she had observed him; that "he was a very feeble old man." When questioned as to his mental condition, she answered, "He was very feeble. * * * Well, he was childish. * * *"

Another witness, Mrs. Delia Guay, testified that she had known Mr. Murphy for seven or eight years; had frequently attended the same church; the last two years had seen him every day while he was able to be around; that she conversed with him nearly every morning; that he was very feeble; "I thought he was getting childish; I saw it myself the last two years."

Mrs. Ella Pindle testified she was a professional graduate nurse; she lived next door to Mr. Murphy; that she saw him every day, sometimes two or three times a day; she had rendered assistance to him, given him food and waited on him; she had had him over to her house for meals and also had taken meals to him; she had loaned him money. When she had first known him he had been in good health and later had become childish and in a senile stage; that he was easily led; that Mr. Murphy died at her house; that Mr. Murphy was brought by her and her husband to her home on the 19th day of December, eleven days before he died; and that he was in bed all the time; that she was present at the time his will was drawn; that she testified at the hearing for the probate of the will; that she believed that at the time the will was signed he was of sound mind and that he was not acting under any duress or undue influence or fear; that Mrs. Burns went to business in the morning, came back at noon, would go away again, and stay until about 6 o'clock.

Mrs. Nell Goodran testified that she knew Mr. Murphy for about a year before he died; that she lived the second house away from him; she talked with him frequently; that in her opinion the condition of his mind was all right; that as far as she knew he talked intelligently; she had never visited him at his house, but had been to the door of the kitchen.

Alfred H. Elliott testified that he knew Mr. Murphy several years up until just before he died; that about six months before he died Mr. Murphy had told him how much he thought of Mrs. Burns and what he was going to do for her; "that he had a little home down there that he wanted to leave to Mrs. Burns for her old age;" that he saw Mr. Murphy after he had signed the deed, he believed the next evening, and Mr. Murphy then said: "I have done what I have been wanting to; now the little home belongs to Mrs. Burns. I gave it to her." When asked his opinion as to his mental condition, he answered: "I couldn't see any difference from the first time I met him until up towards the last. * * *"

William C. Elliott testified that Mr. Murphy had told him of the kindness of Mrs. Burns and that she would be rewarded some day for her kindness. He had known Mr. Murphy about six months before he died and in his opinion he was rational; that he did not know anything about his making a deed to Mrs. Burns.

[1] 1. From the foregoing statement of facts it is apparent that the evidence in the case is in decided conflict as to the mental state of Thomas Murphy at the time the purported deed was signed by him as well as to whether any undue influence had been used

by appellant. Reviewing courts of this state have so repeatedly held that where there is such a conflict in the testimony the reviewing court will not disturb the finding of the trial judge, that citation of authority is not necessary.

Also, the record discloses many inconsistencies in the testimony of appellant as given at the trial and as given by her in a deposition. It is quite probable that the trial court discredited her story. Without her testimony she would not, in any event, have proved a defense to the action.

[2] 2. There is ample evidence in the record to support the finding of the nondelivery of the deed.

[3] 3. The objection to the finding of the rental value of the property and the objection to the judgment thereto is not well taken for the complaint alleged that the rental value of the property was $30 per month and no issue was made thereof by the answer. Therefore same was deemed to have been admitted by appellant and it was not necessary for respondent to introduce any evidence whatever as to the rental value.

Judgment affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

AMERICAN STATES PUBLIC SERVICE CO. v. RATH et al. *

Civ. 5089.

District Court of Appeal, Third District, California.

July 9, 1934.

Rehearing Denied Aug. 8, 1934.

Hearing Granted by Supreme Court Sept. 6, 1934.

1. Trial ⇐333

Where there was no dispute as to two separate liquidated sums, claimed by complaint in action for fraudulent conversion of moneys, verdict for smaller sum only was unwarranted.

2. Trial ⇐333

Jury's verdict for only part of claim in unquestioned liquidated amount is nullity as not responsive to issues.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the American States Public Service Company against John C. Rath and another. Judgment for plaintiff, and named defendant appeals.

Reversed, and new trial granted.

Albert Sidney Brown and Knight & Reynolds, all of Los Angeles, for appellant.

Paul Overton and W. C. Kennedy, both of Los Angeles, for respondent.

WEYAND, Justice pro tem., delivered the opinion of the court.

The plaintiff, respondent herein, is a corporation organized under the laws of Delaware, and is authorized to do business in California. Defendant John C. Rath, during the dealings here involved, was its vice president residing at Los Angeles, Cal. One William E. Vogelback residing in Chicago, Ill., was president of the plaintiff, and was apparently the sole director of its policies and activities. Frank Gillelen was an engineer, who for many years had resided in Los Angeles, and who had acquired much data and information as to public utilities in and about the city of Los Angeles. One R. H. Nicholson was in control of all the capital stock of a corporation known as Southern California Utilities Inc., which last-named company owned a water plant supplying water to Vernon and Huntington Park, two areas near Los Angeles.

The grievances of plaintiff can best be stated in the language of its complaint, as follows:

"That during said year (1928) plaintiff was desirous of acquiring all of the issued and outstanding capital stock of Southern California Utilities Inc., a California public utility corporation furnishing and supplying water to certain areas in the County of Los Angeles; and that plaintiff instructed defendant John C. Rath to purchase said stock at the lowest price obtainable. That in the month of October of said year and prior thereto said stock was owned by R. H. Nicholson and plaintiff was informed by said defendant John C. Rath that he was unable to negotiate directly with the owner of said stock, and that it would be necessary to employ defendant Frank Gillelen to negotiate with the owner for the purchase of said stock. That on or about the 30th day of October, 1928, said defendant Rath advised

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

 *For subsequent opinion see 42 P.2d 1010.

plaintiff that said defendant Frank Gillelen had interviewed the owner of said stock, and that the owner would sell the same for the sum of $650,000.00, and that if such stock were purchased, it would be necessary to pay, in addition to the said sum of $650,000.00, the further sum of $25,000.00 as a commission to said defendant Frank Gillelen for his services in the transaction. That pursuant to such information and advice, and in reliance upon the verity thereof, plaintiff authorized and instructed defendant John C. Rath to acquire said stock upon said terms and conditions. That pursuant thereto said defendants received from plaintiff, in lawful money of the United States, the sum of $675,000.00. That $5,000.00 of said money was so received on or about the 31st day of October, 1928; that $20,000.00 of said money was so received on or about the 1st day of November, 1928; that $625,000.00 of said money was so received on or about the 18th day of December, 1928; and that $25,000.00 of said money was so received on or about the 11th day of February, 1929. That in said month of October, 1928, and prior to said 30th day thereof, the owner of said stock stated to defendant Frank Gillelen that he would sell said stock for $500,000.00, and that said defendants well knew on said 30th day of October, that said stock could be purchased for $500,000.00. That said defendants purchased and acquired said stock for plaintiff and paid therefor to the owner thereof out of the moneys so furnished and provided by plaintiff a sum of money not exceeding $500,000.00.

"III.

"That the said defendants and each of them, disregarding the rights of plaintiff, and for the purpose and with the wrongful and fraudulent intent of obtaining from plaintiff the difference between the amount of money so received by defendants from plaintiff as aforesaid and the amount of money paid by defendants for the purchase of said stock, to wit the sum of ~~$175,000,~~ $150,000, entered into a conspiracy and agreement together, whereby said defendant John C. Rath represented to and advised plaintiff that the amount required to be paid to the owner of said stock was $650,000, while in truth and in fact the price at which the owner thereof had agreed to sell said stock was the sum of $500,000, which fact was well known to defendants, and that, pursuant to and in furtherance of such conspiracy and agreement, said defendants induced plaintiff, in reliance upon such false representations, to pay to them said sum of $675,000 for the purchase and acquisition of said stock. That plaintiff is informed and believes, and upon such information and belief alleges, that said defendants, in pursuance of said conspiracy and agreement, further agreed to divide between themselves the proceeds of said transaction, to wit the sum of ~~$175,000,~~ $150,000.

"IV.

"That each and all of the foregoing acts and transactions were had and done with the full knowledge and consent of each and all of said defendants, and were had and done with the fraudulent intent and purpose on the part of said defendants and each of them to deprive plaintiff of said sum of ~~$175,000,~~ $150,000, and to wilfully convert the same to their own use and benefit."

To understand the points now raised by appellant it should be stated that as the complaint was originally filed $175,000 was claimed as the amount due plaintiff, but during the trial the complaint was amended on motion of plaintiff, and $175,000 was stricken out and $150,000 was inserted in lieu thereof.

To further clarify the matter we should state that the $175,000 is clearly shown to be made up of two items, to wit, $150,000 being the difference between $500,000, the price actually paid to R. H. Nicholson for the stock of the Southern California Utilities Inc., and $650,000, the price Rath and Gillelen represented had been paid therefor; and, in addition, $25,000, which Rath represented he paid to Gillelen for acting as agent to effect the deal.

The testimony of Vogelback disclosed that the only demand made on the defendants was for the return of $150,000. Vogelback further stated that he was perfectly willing for Gillelen to retain the $25,000 payment as a commission.

From the fact that the complaint was amended striking out $25,000 from the demand, we conclude that it meant that plaintiff did not intend to claim a return of the $25,000 which Rath had paid Gillelen as an agent's commission. The amendment could have meant nothing else.

Plaintiff contends that Rath and Gillelen were at all times agents of plaintiff, and that defendants fraudulently conspired to have it appear that Gillelen was a buyer of the stock of Nicholson's company, and that he sold this stock to plaintiff and fraudulently took the $150,000 as his own.

Defendants contend that Gillelen was not an agent of plaintiff, but that he arranged for the purchase of the stock from Nicholson and then sold it to plaintiff. After the purchase

was completed Rath did ask his company, plaintiff herein, for $25,000 as an agent's commission to be paid to Gillelen, which sum plaintiff paid. Rath explains this in the following manner: Rath says that he had "beat" Gillelen down in the price Gillelen had placed on the Nicholson stock from $700,000 to $650,000, and that Gillelen seemed to grow cold towards him, and, as Gillelen was in a position to aid Rath in many ways in the acquisition of other properties, he felt that to give Gillelen $25,000 as a further payment would be a good investment for the plaintiff.

With these facts before them the jury in the case gave to plaintiff a verdict for $25,000 and no more, and upon this verdict judgment was rendered for $25,000 against defendants.

Defendant Rath, appellant herein, now contends that this verdict and judgment is unsupported by evidence, is against law, and outside the issues of the case.

[1] The original complaint as shown claimed two separate liquidated items; one for $150,000, and one for $25,000. There was no dispute as to these items. There was a claim that Gillelen had paid back to the plaintiff $4,571.82. It thus appeared that the $150,000 item might have been undisputed and liquidated in the full sum of $145,428.18, but for no less a sum.

The question now is, Can a jury render a verdict for part only of a claim, as to which the amount is unquestioned and liquidated?

We have been at some pains to examine the question presented, and we are of the opinion that the jury was not warranted in ignoring the pleadings and the evidence and in rendering a verdict for $25,000, when the verdict should have been rendered for $145,428.18, or for no amount whatsoever.

[2] The following cases taken from appellant's brief, we think, illustrate the rule of law that should be applied to the situation here involved:

"In the case of Muller v. Jewell, 66 Cal. 216, 5 P. 84, being an action for replevin of certain cattle, the verdict of the jury was:

" 'We, the jury, find in favor of the defendants for one-half of the G O Cattle.'

"The court, in its decision, stated: 'The verdict did not respond to the issues joined in the case.' * * * 'On this verdict a judgment was rendered in favor of the defendants, for one-half of that certain brand of cattle known as the G O brand, now in the county of Kern,' etc. 'On what theory this judgment could be entered on such a verdict, we cannot perceive. The jury should have been directed by the court, on its own motion, to retire and find as to the other half of the cattle sued for.' 'The verdict, in failing to respond to the issues raised by the pleadings, was a nullity, and should have been, after the discharge of the jury, so regarded by the court.' 'For the foregoing reasons the judgment should not be allowed to stand.' "

"In Koebig v. Southern Pacific Co., 108 Cal. 235, 41 P. 469, which was an action to recover $34,891.26 as damages for destruction of certain brandies, wines, liquors, and other personal property.

" 'The cause was tried by a jury, which rendered a verdict for plaintiff of five hundred dollars.' * * *

" 'There is but one question necessary to be noticed. It is contended by plaintiff that there was no evidence to support the finding of the jury as to the amount of damages suffered by plaintiff.'

" 'The court instructed the jury, among other things: "It is conceded that the property described in the complaint as having been destroyed was of the value stated in the complaint." * * *

" 'The verdict, however, not only ignores the admitted facts as to the amount of damages suffered, but plainly disregards the charge of the court upon that point. It is, therefore, in that regard, both unsupported by the evidence and contrary to law.'

" 'The judgment and order denying a new trial are reversed and a new trial ordered.' "

"Gundry et al., respondents, v. Atchison, Topeka & Santa Fe Railway Company, appellant, 104 Cal. App. 753, 286 P. 718.

"Action one for damages; verdict in favor of plaintiff; defendant appeals.

"The Court: 'The only evidence as to the amount of damages shows that the trailer was damaged to the amount of $553.60, and that the loss of the use of the trailer amounted to $35, or a total of $588.60. The jury brought in a verdict for $500. While the defendant cannot ordinarily complain that the verdict is for an amount less than it might have been, if there is any evidence at all to sustain the verdict, a verdict may not be sustained which attempts generally to somewhat equalize financial conditions. Citing Driscoll v. Market Street Cable Ry. Co., 97 Cal. 553, 32 P. 591, 33 Am. St. Rep. 203. That would appear to have been the purpose of the jury, in this case, as the record contains no evi-

dence to justify placing the damages at such an amount.' "

In the courts of other states this same rule has been followed. In Shoemaker v. Johnson, 200 Mo. App. 209, 204 S. W. 962, it was held that where the action was on a contract for $520 as a real estate broker's commission, the issue raised by an answer denying the contract was whether there was a contract; and, if plaintiff was entitled to recover, he might recover the specified sum, and a verdict for $150 was not responsive to the issues. In Martin v. Barnett (Mo. App.) 208 S. W. 278, the court held that where the only issue under the pleadings and evidence was whether there was a contract or no contract for $100 commission, a verdict for $50 cannot stand.

The judgment of the lower court is reversed, and a new trial is granted.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

140 Cal.App. 103

DURAN v. PICKWICK STAGES SYSTEM et al.

Civ. 8372.

District Court of Appeal, Second District, Division 2, California.

July 23, 1934

Hearing Denied by Supreme Court Sept. 19, 1934.

1. Pleading ⇐129(2)

Where plaintiff alleged that defendant corporation transferred all its assets to codefendant corporation, codefendant's failure to deny the allegation *held* admission of facts alleged, but from such admission an agreement to assume and pay all existing and contingent liabilities of defendant could not be implied.

2. Pleading ⇐129(2)

Where plaintiff alleged that, after accident, defendant corporation transferred to codefendant corporation all its assets "and assumed all of existing and contingent liabilities of defendant," codefendant's failure to deny the allegation *held* not admission that codefendant agreed to assume defendant's liabilities, though plaintiff intended so to plead and though the allegation as it stood was nonsensical.

3. Carriers ⇐306(1)

In personal injury action, that defendant motor carrier, after accident, transferred assets to codefendant corporation *held* not, regardless of validity of transfer, to imply agreement by transferee that indebtedness of transferor was assumed by transferee, nor would such assumption be implied even if facts showed that assets in hands of transferee remained subject to transferor's debts.

4. Appeal and error ⇐1050(1)

In action against carrier, where driver of passenger stage had suddenly collapsed and thus caused accident and injury to passenger, admission of evidence that driver had been drinking some hours before stage departed and that witnesses smelled liquor on his breath after accident *held* not prejudicial, where there was no evidence of intoxication and manner of driving conclusively opposed any such suggestion.

5. Carriers ⇐320(4, 30)

Where driver of passenger stage suddenly collapsed, causing accident and injury to passenger, whether driver, who had been feeling ill, was negligent in staying alone in driver's compartment without advising any one of his condition and whether accident was result of driver's negligence *held* for jury.

6. Carriers ⇐321(23)

In personal injury action against carrier, where driver of passenger stage suddenly collapsed, causing accident and injury to passenger, and where complaint alleged negligence in general terms, giving of instruction embodying res ipsa loquitur doctrine *held* proper.

7. Constitutional law ⇐33

In constitutional provision that jury trial may be waived in civil actions by consent of parties signified in manner "prescribed by law," quoted words *held* to look to actual legislation upon the subject (Const. art. 1, § 7; Code Civ. Proc. § 631).

[Ed. Note.—For other definitions of "Prescribed by Law or Ordinance," see Words & Phrases.]

8. Jury ⇐28(2)

Code provision prescribing manner in which jury trial may be waived was intended to grant parties right to waive jury trial and not to impose conditions constituting irrevocable waiver, and trial court may use its discretion in determining whether, under the circumstances, waiver should actually be implied (Code Civ. Proc. § 631; Const. art. 1, § 7).

9. Appeal and error ⇐1031(1)

No presumption exists that prejudice resulted from trial before jury, though such trial was had in face of alleged statutory waiver (Code Civ. Proc. § 631; Const. art. 1, § 7).

10. Jury ⇐28(3)

In personal injury action against motor carrier, court's action in ordering jury trial though one day's jury fee had not been deposited ten days before date set for trial *held* not prejudicial (Code Civ. Proc. § 631; Const. art. 1, § 7).

11. Damages ⇐208(1)

In personal injury action by passenger against motor carrier, conflict in evidence as to extent of plaintiff's injuries *held* for jury.

12. Damages ⇐132(1)

$10,000 verdict for married woman suffering injury to rib, coccyx, internal condyle of right humerus, and ulnar nerve, and other injuries, some of which were permanent, *held* not excessive.

There was evidence that plaintiff sustained fracture of coccyx; that twelfth rib was separated or pulled apart from spinal column; that there was fracture of internal condyle of right humerus; that there was permanent injury to ulnar nerve affecting sensation and use of fingers of right hand; that plaintiff might suffer pain and tenderness in back from rib injury during rest of her life; that soreness on sitting and need to have pillow were likely to remain unless there was surgical operation removing coccyx; that there was quarter inch atrophy of right forearm as compared with left; and that plaintiff had suffered intense pain and had been unable to work since accident which occurred over two years before trial.

13. Appeal and error ⇐1004(1)

Verdict awarding damages for personal injuries cannot be set aside on appeal unless so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on part of jury.

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by Blanche Duran against the Pickwick Stages System, the Pacific Greyhound Lines, Inc., and others. Judgment for plaintiff against named defendants and such defendants appeal.

Affirmed as to first-named defendant, and reversed as to second-named defendant.

B. P. Gibbs, of Los Angeles, for appellants.

Arthur C. Webb and James MacIntosh, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

From a judgment entered on the verdict of a jury against defendants Pickwick Stages System and Pacific Greyhound Lines, Inc., in favor of plaintiff for damages for personal injuries alleged to have been sustained by her while traveling as a passenger on a stage owned and operated by defendant Pickwick Stages System, both defendants have appealed.

Plaintiff and her husband boarded a stage of defendant Pickwick Stages System at Los Angeles at about 12 p. m. on October 24, 1929, for El Centro. The stage went over what is known as Valley boulevard, through Pomona, Ontario, and Riverside and then over what is called the "Jack Rabbit" trail to Banning and on to Brawley, making many stops along the way. About two miles south of Brawley the driver, without any warning or indication of previous sickness observed by any of the passengers, turned around with a look of pain on his face, threw up his hands, and fell over in the seat unconscious. The driverless vehicle angled from the right to the left side of the highway, off the road into a shallow ditch and up on the side of an embankment, where it turned over on its right side. Defendants in their answer denied negligence and pleaded unavoidable accident as a defense, but the jury evidently found against defendants on both issues.

[1, 2] The amended complaint alleged that between the date of the accident, October 25, 1929, and the filing of the complaint herein "defendant Pickwick Stages System, a California corporation, assigned, transferred and set over to defendant Pacific Greyhound Lines, Inc., all of its properties, assets, franchises and operating rights, and assumed all of the existing and contingent liabilities of the said Pickwick Stages System, a corporation, defendant herein." Such allegation was not denied. The evidence showed without contradiction that Pickwick Stages System owned and operated the stage herein mentioned at the time of the accident. At the close of plaintiff's case motions for nonsuit were made by defendants Pickwick Greyhound of California, Limited, and Pacific Greyhound Lines, Inc., on the ground that the evidence failed to connect such defendants or either of them with the management or operation of said stage. The motion of Pickwick Greyhound of California, Limited,

was granted, but that of defendant Pacific Greyhound Lines, Inc., was denied. Such denial was based on the assumption that by failing to deny the allegation above quoted such defendant had admitted that it assumed the liabilities of its assignor, Pacific Stages System.

It is true that such failure to deny admitted the definite allegation that said Pickwick Stages System transferred all of its assets to the Pacific Greyhound Lines, Inc., but from such admission alone an agreement to assume and pay all of the existing and contingent liabilities of the Pickwick Stages System cannot be implied. Chase v. Michigan Tel. Co., 121 Mich. 631, 80 N. W. 717; Luedecke v. Des Moines Cabinet Co., 140 Iowa, 223, 118 N. W. 456, 32 L. R. A. (N. S.) 616. It is urged, however, that the rest of the allegation, "and assumed all of the existing and contingent liabilities of said Pickwick Stages System," is an express allegation that the defendant Pacific Greyhound Lines, Inc., assumed such liabilities. The allegation does not so read. The subject of the latter phrase is "Pickwick Stages System," and the allegation is that such corporation assumed the liabilities of said Pickwick Stages System, not that the Pickwick Greyhound Lines, Inc., assumed them. We may admit that the pleader intended to say that the latter corporation made such assumption and agreement, and that as it stands the allegation is nonsensical, to say the least. In our opinion, however, a defendant by the failure to deny a specific allegation admits what is alleged, not what the pleader had in his mind but failed to put into the allegation, however clear it may be that he intended to make such allegation. Any other rule would abrogate the law we now have that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, open the door to great carelessness in pleading and make a pleading sufficient if it appeared merely that the pleader clearly intended to allege certain things necessary to his cause of action although he did not do so, thus placing an impossible burden on a defendant, who would then not only have to deny the allegations contained in the complaint but as well any that might be necessary to make that pleading state a cause of action, if such contention is carried to its logical conclusion. The motion for nonsuit as to Pacific Greyhound Lines, Inc., should have been granted.

[3] Unquestionably a quasi public corporation cannot transfer its franchises and assets without legislative authority so to do (City of South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 583, 93 P. 490), but such question is not involved here. Such a transfer might be void, but no agreement could be implied therefrom that the indebtedness of the transferor was assumed by the transferee. Nor would such assumption be implied even if the facts showed that the assets in the hands of the corporation receiving them remained subject to the debts of the transferor.

[4] Certain testimony to the effect that the driver had been drinking from two to four hours prior to the time the stage departed and that certain witnesses smelled the odor of liquor on his breath immediately after the accident was admitted over the objection of defendants. There was no evidence at all that the driver was under the influence of intoxicating liquor, and the manner in which the evidence shows the stage was handled, not only on the level pavement but "up over the hill" on the "winding, curving piece of highway" known as the "Jack Rabbit trail," conclusively opposes any such suggestion. In our opinion, however, no prejudice could have resulted in the face of such evidence and by reason of evidence hereinafter discussed.

[5] If there was no other negligence on the part of the driver of the stage than what could be implied from the fact that he suddenly lost consciousness and in consequence the control of his vehicle, we would agree with appellants' contention that the accident was unavoidable and that the evidence does not support the verdict. The evidence shows, however, that the driver "had been sick all the way down, feeling sick," and "had been fighting it off," but that it came on him suddenly and "I passed out suddenly." The driver also told a passenger that he had eaten some cucumbers for breakfast and that they poisoned him and caused his condition. He testified on direct examination, however, that he did not know what caused his collapse unless it was the result of a party in his apartment from two to four hours before he left, at which "we had a few drinks." It would seem, considering the high degree of care required of the driver of a stage containing passengers, that it was a question of fact for the jury to determine whether or not the action of the driver in continuing at the wheel of the stage, alone in the driver's compartment in the condition he was in, without advising some one of his condition and having some one there with him, constituted

negligence. In our opinion there was evidence to support the conclusion that the accident was not unavoidable, but was the result of the negligence of the driver for which the owner and operator of the stage was responsible.

[6] The amended complaint having alleged negligence in general terms, it was perfectly proper, under the circumstances of the accident, for the court to give instructions to the jury embodying the doctrine of res ipsa loquitur.

[7-10] In view of the fact that one day's jury fee was not deposited ten days prior to the date set for trial, as required by section 631, Code Civ. Proc., it is contended that trial by jury was waived and that the court had no discretion to order it. Section 7 of article 1 of the Constitution provides that the right of trial by jury shall be secured to all and remain inviolate, but "may be waived * * * in civil actions by the consent of the parties, signified in such manner as may be prescribed by law." The ten last quoted words "look to actual legislation upon the subject" (Exline v. Smith, 5 Cal. 112), and in section 631, Code Civ. Proc., the Legislature has set out the manner in which the consent of the parties to such waiver may be signified. It is not only by express consent, but by one implied by law from the failure to do certain required things. At a very early day the Supreme Court held that the court "has the right, notwithstanding such waiver, to direct an issue of fact to be tried by a jury," and said that "besides this, it would not be presumed that any injury had accrued to the plaintiff in consequence of the issues of fact being tried by a jury instead of the court." Doll v. Anderson, 27 Cal. 248, 251. In the case of Norland v. Gould, 200 Cal. 706, 254 P. 560, deposit was not made as required by rule of court ten days prior to date of trial, and the trial court refused to grant a continuance and permit a jury trial, the court there saying, "We find no grounds for disturbing the exercise of the discretion of the trial court with reference to this matter," indicating at least that "discretion" was involved in making such denial. In the case of Dickey v. Kuhn, 125 Cal. App. 68, 72, 13 P.(2d) 834, 835, the court said that, "notwithstanding a jury has been waived in the statutory manner, it is within the discretion of the trial court to disregard the waiver and try the case by a jury," and that "the court did not abuse its discretion in so doing." A hearing of said cause in the Supreme Court was denied September 19, 1932. See, also, Burbank v. McIntyre (Cal. App.) 27 P.(2d) 400, and Nevin v. Mallon (Cal. App.) 29 P.(2d) 303.

In view of the foregoing it is our opinion that the purpose of section 631, Code of Civil Procedure, is to grant the parties the right to waive a jury trial and not to impose conditions constituting an irrevocable waiver, and that the trial court may use its discretion in determining whether under the circumstances a waiver should actually be implied. No presumption exists that prejudice resulted from trial before a jury (Doll v. Anderson, supra), and a motion for new trial based on this contention was denied by the judge who saw the witnesses, heard the evidence and observed the jury, and we find nothing in the record indicating such prejudice.

[11, 12] A more serious question is whether or not the verdict of $10,000 was the result of passion or prejudice on the part of the jurors, rather than the exercise of an intelligent discretion which finds support in the evidence. Plaintiff did not call in a doctor until her return home and did not receive even first aid treatment until such doctor came to her home about 7 o'clock on the evening of the day following the accident. The doctor so called testified that plaintiff was a "strong, healthy lady" prior to the accident; that when he examined her after being called in he found her "suffering from a severe pain in her neck and her right arm from the shoulder down and in the back, in the region of the twelfth rib, and in the region of the coccyx"; that there "were bruises on her body and she complained of pain in her head." He found an injury "at the coccyx" which he diagnosed as a fracture and treated. The twelfth rib was separated or pulled apart from the spinal column, and there was a fracture of the internal condyle of the right arm, which member was "put in a splint." The doctor also testified that he "strapped her right side for the fractured ribs with adhesive plaster from the pelvis up," and gave her some medicine for the pain; that he had not yet dismissed the case at the time of trial; that he made an examination of plaintiff before the trial and "found her very nervous," with "a marked callus over the region of the 12th rib," and "some thickening of the internal condyle on examination of the humerus of the right arm." It was his opinion that there was a permanent injury to the ulnar nerve, affecting the sensation and use of the fingers of the right hand, and that plaintiff might have pain and tenderness in her back from the rib injury "the rest of her life," due to pressure on the nerves and muscles of that region;

that the "soreness on sitting" and need "to have a pillow," of which she complained, was likely to remain "unless there is a surgical operation performed, removing the coccyx"; that in his opinion "the chances are against her for a full recovery," based on "her present physical condition and also the length of time that has elapsed since she had the injury." Dr. Galvin, a witness for plaintiff, who was called into the case for consultation some weeks after the injury, testified as to the injury to the twelfth rib, the coccyx and the internal condyle of the right humerus, and that as a result of such fracture "she was getting some pressure on the ulnar nerve"; that "there was a quarter inch atrophy of the right forearm as compared with the left"; that "as far as the injury to the nerve was concerned, that depended entirely on whether or not the pressure was relieved. If the pressure was not relieved she would be permanently disabled, as evidenced by changes of sensation and loss of power in her right arm." This doctor felt that "unless something was done in the way of an operation, that she would always have more or less pain and discomfort at the end of the spine," and that "as far as the ribs are concerned I felt at that time that that would come out all right." There is other evidence from which the jury could conclude that plaintiff had suffered intense pain and had been unable to work since the time of the accident.

Dr. Ledyard, a witness for defendants, who examined plaintiff November 4, 1929, testified that her health on that date was "comparatively good to what it is now"—a little more than two years after the first examination. There was other evidence conflicting seriously with some of the foregoing which indicated that the injuries were not nearly as serious as the above seems to show, and that plaintiff's condition at the time of trial, when apparently she had to be helped from the courtroom into the judge's chambers so that an expert could examine her at the request of defendants, was not due to the injuries resulting from the accident but to arthritis. In our opinion, however, such conflict was for the jury to determine, and it did so adversely to such conflicting evidence, and a motion for new trial was denied by the judge who heard the evidence and saw the witnesses, to whom such adverse contention was addressed in the first instance.

[13] In view of such evidence we cannot say that the judgment rendered is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury" which we understand is the test to meet before an appellate court can hold the action of the trial court in denying the motion for a new trial to be erroneous and set aside the verdict of a jury. Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 106 P. 83.

Judgment reversed as to appellant Pacific Greyhound Lines, Inc., and affirmed as to appellant Pickwick Stages System.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 135

CLUTTER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9793.

District Court of Appeal, Second District, Division 2, California.

July 24, 1934.

Appeal and error ⇐1207(3)

After reversal with general direction of judgment for defendant in ejectment settling right to possession, trial court could award damages for withholding land, or rents and profits, in original action, considering any claimed right of offset for permanent improvements (Code Civ. Proc. § 741).

Petition for writ of prohibition by J. O. Clutter against the Superior Court of the State of California in and for the County of Los Angeles.

Writ denied.

Hardy & Hunt, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Petitioner intervened in an action for ejectment and for damages for withholding the possession of certain real property pending in respondent superior court, and filed his cross-complaint in another similar action pending therein in which he was named as a defendant, claiming title to the real property

involved therein. Said actions were consolidated and a judgment followed quieting title to the property in petitioner. An appeal was taken from the consolidated judgment, which resulted in a reversal with the following direction: "The judgment is reversed and the trial court is directed to enter judgment for plaintiffs in accordance with the views expressed in this opinion." Conlin v. Blanchard (Cal. Sup.) 28 P.(2d) 12. Following the filing of the remittitur after such decision on appeal, and on application of plaintiffs in said consolidated action, a judgment was entered therein by respondent court decreeing that plaintiffs, who are the heirs at law of Sam Huston Collins, deceased, "are the owners," subject to administration of the estate of said decedent, "and are entitled to the possession" of said real property; that petitioner and his predecessors wrongfully entered into possession of such property; and that "plaintiffs shall have the necessary writ or writs from this court to carry into effect this judgment." After providing for the recovery of costs of suit by plaintiffs from petitioner, the judgment continued: "That this cause be, and the same is, hereby continued for the purpose of taking evidence and stating the account of the reasonable rental value of said property, and for damages for the unlawful withholding of the same since June 17, 1930, and for such further proceedings in connection with the statement of said account as shall be proper."

Petitioner here contends that respondent court had no jurisdiction to do anything more than enter judgment as directed, and seeks to restrain such further proceedings determining the issue of damages for the unlawful withholding of said property or an accounting for the reasonable rental value thereof.

The Supreme Court in its decision on appeal held that the proceedings upon which petitioner's claim of title was based were void, and that he acquired such title after plaintiffs had "asserted their rights and filed their lis pendens." Under the circumstances petitioner had no right, title, or interest in and to said property. His possession was wrongful ab initio, and plaintiffs had a right to unite in their complaint to recover said property a claim for damages for the withholding thereof and for the rents and the profits of the same. Code Civ. Proc. § 427 (2). The record before us shows that plaintiffs united said claims in their complaint, but no evidence was introduced as to such damages or such rents and profits on the trial. If the judgment entered on the trial had been affirmed, both issues would have been finally determined against them. The judgment, however, was reversed, and a new judgment as to the claim of possession has been entered in accordance with the directions given. That issue has been finally determined. Not so, however, the issue as to damages or rents; and we see no reason why such issue should not now be determined in the original action. Petitioner does not deny the right of plaintiffs to have such issue determined, but urges that it must be done in a separate action, otherwise he will be denied the right to offset under section 741 of the Code of Civil Procedure, as against any amount found to be due plaintiffs from him for such withholding or rents collected, the value of permanent improvements placed upon the property by him and his predecessor in good faith and under color of title. Such claim of right, if it exists, cannot be denied, whether such damages or rental value is proved in the original or in a separate action, and in our opinion the order made, and to which objection is here urged, contemplates that "an account" will be taken, not only of such damages and reasonable rental value, but of any permanent improvements placed upon said property by petitioner or his predecessor in good faith and while holding under color of title, and that such damages, or reasonable rental value, will be offset against the value of any improvements that may be found to have been so placed on the property, if such right of offset is found to exist.

We think we are not without authority for such action. In the case of Raun v. Reynolds, 15 Cal. 459, 468, as we read it, a judgment was reversed with the general direction to dispose of the case in pursuance of the principles of the opinion. The trial court, upon the filing of the remittitur, not only did that, but it also appointed a referee to take an account of the rents and profits of the property in the hands of one Harris, which issue was not passed upon in the trial of the case. The court said: "The directions of this decree, except the last one, are in express accordance with the decision of this Court. * * * The general direction to the lower Court, to proceed in pursuance of the principles announced in the opinion, is a mere formality, which, of itself, neither gives authority nor limits the power of the inferior tribunal. Without such direction, the principles being adjudged, the same duty would devolve upon that Court. It could le-

gally act in no other manner than in subordination to the principles declared by the superior tribunal. * * * The opinion disposes of the question of the power of the Court in this way to order restitution of the property in specie, and we cannot see why a distinction should be made in a case of this sort, between the power to restore property taken, and the power to restore money received by or from sales of the property, or of parts of it, as water. * * * The Court of Equity having jurisdiction of the mortgage suits should close the whole controversy, by settling and adjusting the accounts of these parties."

In our opinion it was within the power of the trial court, the right to the possession of the land having been finally settled, to determine and adjust the right to damages for withholding same, or to the rents and profits thereof, in the original action, considering in so doing any claimed right of offset under section 741 of the Code of Civil Procedure, if such right is found to exist.

Writ denied.

We concur: STEPHENS, P. J.; DESMOND, J.

140 Cal.App. 184

WHITE et ux. v. ROSENTHAL.

Civ. 1143.

District Court of Appeal, Fourth District, California.

July 25, 1934.

1. Homestead ⇐167

Word "grant," within statute providing that homestead can be abandoned only by declaration of abandonment, or grant thereof, executed and acknowledged, is applicable to all transfers of realty including transfers by operation of law as well as voluntary transfers (Civ. Code, § 1243).

[Ed. Note.—For other definitions of "Grant," see Words & Phrases.]

2. Homestead ⇐188

Sale under mortgage foreclosure decree is "judicial sale" and is regarded in law as sale by judgment debtor, and is not a "forced sale" within Constitution protecting homesteads from forced sales (Civ. Code, §§ 1039, 1243; Const. art. 17, § 1).

[Ed. Note.—For other definitions of "Forced Sale" and "Judicial Sale," see Words & Phrases.]

3. Homestead ⇐172

Phrase "forced sale," within Constitution protecting homesteads from forced sales, does not apply where owner consents directly to sale, or does so indirectly by consenting to, or doing that which necessarily or usually eventuates in sale, as sale under power contained in mortgage or decree of foreclosure, and when property owner consents to sale under execution or other legal process, sale is "voluntary" (Civ. Code, §§ 1039, 1243; Const. art. 17, § 1).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

4. Mortgages ⇐533, 554

Upon sale under mortgage foreclosure decree, purchaser acquires all right, title, and interest of mortgagor, and officer's deed is in effect deed of mortgagor.

5. Homestead ⇐212

Where there is homestead upon mortgaged premises, it is necessary, in order to foreclose homestead, to make both husband and wife parties to mortgage foreclosure proceedings.

6. Mortgages ⇐273

When mortgagor disposes of mortgaged premises by his own deed or by operation of law, he loses all control over them, and his personal liability thereby becomes separated from ownership of land, and mortgagor can by no subsequent act create or revive charges upon premises, and he cannot at his pleasure affect interest of other parties.

7. Homestead ⇐171

Where husband and wife as homestead owners were made parties to mortgage foreclosure proceeding, upon foreclosure sale, owners lost all control and homestead was as completely abandoned as though owners had disposed of their property by grant deed, and such abandonment was not affected because owners and mortgagee during latter part of period of redemption engaged in negotiations to refinance property and to reconvey it.

8. Homestead ⇐175

Homestead owners who resided upon premises during six days after expiration of period of redemption from foreclosure sale resided as tenants, and when property was reconveyed to them by mortgagee, they became owners of new rights but not of homestead right (Civ. Code, §§ 1039, 1243).

9. Homestead ⇐42

Mortgagors, to protect their homestead rights when they again became owners of

property after foreclosure sale, were required to file new declaration of homestead (Civ. Code, §§ 1039, 1243; Const. art. 17, § 1).

10. Homestead ⇐95

Where homestead was sold under foreclosure decree and judgment creditor levied upon property, subsequent declaration of homestead did not exempt property from execution sale (Civ. Code, §§ 1039, 1243; Const. art. 17, § 1).

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Arthur White and his wife against Harry Rosenthal. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Clarence F. Terry, of San Diego, for appellants.

Charles B. De Long, of San Diego, for respondent.

MUNDO, Justice pro tem.

Appellants were the owners of a piece of property in San Diego upon which, in November, 1928, a declaration of homestead was filed. In March, 1929, a mortgage on this property was foreclosed by the owner, Florence A. Faurot, and on March 25, 1930, a commissioner's deed was issued to her. During the latter part of the period of redemption from said foreclosure, negotiations to refinance were entered into between appellants and Florence A. Faurot which resulted in a deed from her to appellants. This deed was dated April 1, 1930. On April 2, 1930, appellants executed a trust deed to Florence A. Faurot. Respondent had in February, 1929, recovered a judgment for $439.84 against appellants. On June 24, 1931, respondent caused an execution to be issued on the judgment and the property was levied on. A second declaration of homestead was filed and recorded by appellants on June 25, 1931. On July 20, 1931, the property was sold on execution sale to respondent.

The present action was commenced by appellants on July 14, 1932, to quiet title. The sheriff's deed was issued to respondent on July 21, 1932. The case was tried on a stipulated statement of facts, and the court found that appellants had no right, title, or interest in and to the property; that the respondent Rosenthal is, and ever since the 21st day of July, 1932, has been, the owner of and entitled to the possession of the property.

The principal question involved is whether the homestead recorded on November 1, 1928, remains in full force and effect up to and including the present time, or whether the foreclosure of the mortgage annulled the first homestead, in view of the fact that the appellants have continuously resided on and been continuously in possession of said premises since the acquisition thereof in April, 1919, and also in view of the fact that their right to possession has never been questioned by any one so far as this action is concerned until the levy of the execution on June 24, 1931.

Appellants contend that a homestead once declared and established remains in full force and effect until abandoned in the manner provided by section 1243 of the Civil Code. That section provides: "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged. * * *"

In the case of Faivre v. Daley, 93 Cal. 664, 29 P. 256, the word "grant," as used in Civil Code, § 1243, was defined as being applicable to all transfers of real estate, and that when a party owning property upon which a homestead is filed executes a quitclaim deed it operates as an abandonment of the homestead right and conveys to the grantee all of the party's interest in the property. The same principle would be true of a grant deed, and it now remains for us to determine what happens to the homestead upon a foreclosure sale.

[1-3] A transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another. Civ. Code, § 1039. The word "grant," as used in Civil Code, § 1243, is applicable to all transfers of real estate, and this would include transfers by operation of law as well as the voluntary transfers of the owners of property. The sale under the decree of foreclosure of a mortgage is a judicial sale and is regarded in law as a sale by the judgment debtor. Thresher v. Atchison, 117 Cal. 73, 48 P. 1020, 59 Am. St. Rep. 159; 18 Cal. Jur. 547. It is not a forced sale within the meaning of the Constitution, art. 17, § 1, and statutes passed in pursuance of the constitutional requirement protecting homesteads from forced sales. The phrase "forced sale" does not apply where the owner consents directly to the sale, or does so indirectly by consenting to, or doing those acts or things that necessarily or usually eventuate in a sale,

as, for instance—a sale under a power contained in a mortgage or a decree of foreclosure. When the owner of property consents to a sale under the execution or other legal process, the sale is not forced, but it is as voluntary, within the full import of the term, as it is when he directly effects the sale and executes the conveyance. Peterson v. Hornblower, 33 Cal. 266.

[4, 5] At such a sale the purchaser acquires all the right, title, and interest of the mortgagor, and the officer's deed is in effect the deed of the mortgagor. Freelon v. Adrian, 161 Cal. 13, 118 P. 220. Where there is a homestead upon the mortgaged premises, it is necessary, in order to foreclose the homestead, to make both husband and wife parties to the mortgage foreclosure proceedings. In the instant case the mortgage was executed by both appellants and they were both made parties to the foreclosure proceedings.

[6] When the mortgagor disposes of the mortgaged premises either by his own deed or by operation of law, he loses all control over them. His personal liability thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises. He is, as to the premises, thenceforth a mere stranger. With respect to the property placed beyond his control he has no personal privilege. He cannot at his pleasure affect the interest of other parties. Lord v. Morris, 18 Cal. 482.

[7] When the premises herein concerned were sold at foreclosure sale, the owners thereof lost all control over them and the homestead thereon was as completely and effectually abandoned as though appellants had disposed of their property by grant deed. The fact that appellants and the mortgagee were, during the latter part of the period of redemption, engaged in negotiations to refinance the property and contemplating a reconveyance of it to appellants, does not change the rule. No rights existing or contemplated in the transferor in and to the property survive the transfer of the property.

[8-10] During the six days after the expiration of the period of redemption the appellants resided upon the premises as tenants, and when the property was reconveyed to them by the mortgagee they became the owners of new rights respecting the property. The homestead was not one of them. Appellants had no power to revive or prolong the homestead upon the premises. In order to protect their homestead rights it was necessary when they again became the owners of the property to file a new declaration of homestead. Johnston v. Bush, 49 Cal. 198; Corey v. Matot, 47 Cal. App. 184, 190 P. 378. Apparently this requirement was recognized by appellants for they did file a new declaration on June 25, 1931. Being filed, as it was, after the sheriff had levied on the property, the second declaration of homestead could not operate to exempt the property from execution sale.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

139 Cal.App. 777

SCHELLENBERG et al. v. SOUTHERN CALIFORNIA MUSIC CO. et al.

Civ. 1032.

District Court of Appeal, Fourth District, California.

July 18, 1934.

Hearing Denied by Supreme Court Sept. 13, 1934.

1. Trial ⇐194(16)

In action for injuries to pedestrian struck by truck, instructions that defendant was admittedly driving truck with codefendant owner's consent and is presumed to have been so driving within scope of his employment *held* erroneous as invading jury's province and directly contrary to facts in evidence.

2. Appeal and error ⇐1064(1)

Instructions, contrary to facts shown, that defendant was admittedly driving truck, which struck plaintiff, with codefendant owner's consent and presumably within scope of employment, *held* prejudicial error; instruction leaving latter question to jury being merely conflicting.

3. Automobiles ⇐246(15)

In action for injuries to pedestrian struck by defendant's truck, instruction that fact that driver was operating his employer's truck did not render employer liable for driver's negligence, unless such operation was with employer's direct or indirect consent, should have been given.

4. Trial ⇐108½

Counsel for plaintiffs in personal injury suit *held* guilty of prejudicial misconduct in indicating to jury that defendant was insured by questions to prospective jurors as to whether they owned stock in, knew named men associated with, or represented, insurance company, and to witnesses as to whether they knew and worked for one of such men.

5. Trial ⇐108½

While prospective jurors may be interrogated as to their ownership of stock in insurance company insuring defendant against liability for injuries sued for, it is improper to tell them in effect that defendant is insured and that judgment against him will be paid by insurance company.

6. Trial ⇐108½

Prejudicial misconduct of plaintiffs' counsel in indicating to jury that defendant is insured against liability for injuries sued for by questions to prospective jurors and witnesses is question of counsel's good faith.

7. Trial ⇐415

Objection to misconduct of plaintiffs' counsel in indicating to jury that defendant was insured against liability by questions to prospective jurors and witnesses *held* not waived by defendant's failure to ask for mistrial before taking of evidence began, where defendants' counsel stated in reply to court's question in jury's absence before commencement of trial that he thought he would take advantage of error in indicating fact of defendant's insurance and court stated that mistrial would not be declared when assured by plaintiffs' counsel that certain men represented insurance company as stated in questions to jurors and witnesses.

8. Appeal and error ⇐1060(1)

Misconduct of plaintiffs' counsel in informing jury that any judgment against defendant would be paid by insurance company through questions to prospective jurors and witnesses *held* reversible error as probably affecting amount of verdict for plaintiffs.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Maybelle I. Schellenberg and husband against the Southern California Music Company and another. Judgment for plaintiffs, and named defendant appeals.

Reversed.

Stearns, Luce & Forward and Harry P. Sweet, all of San Diego, for appellant.

V. F. Bennett and Fred O'Farrell, both of San Diego, for respondents.

BARNARD, Presiding Justice.

The plaintiff Maybelle I. Schellenberg, at about 6:15 p. m. on the night of January 2, 1931, while crossing C street in the city of San Diego, at the intersection of that street with Thirteenth street, sustained severe injuries through being struck by an automobile delivery truck owned by the defendant corporation and driven by the defendant Banks. In this action for damages which followed, the jury returned a verdict for $40,000, which was reduced to $30,000 in connection with a motion for a new trial. From the judgment then entered the corporation defendant alone has appealed.

The defendant Banks, who was 19 years of age, had for some time been operating the delivery truck as an employee of the appellant. His work consisted in delivering radios, musical instruments, and the like, and in picking up and returning to the store articles on which payments were in default, when ordered to do so. He was assisted by one George Sorenson, who rode with him on the truck. In the usual course of business deliveries and pick-ups were made on written orders, the originals of which were placed on a hook in the store. Banks would take these orders to the truck and place them in a tin "book," and thereafter a record thereof would be made in a truck book carried on the truck; the entries usually being made by Sorenson while the truck was in motion. Banks had formerly been paid for extra work at night, but this practice was discontinued in November, 1930. While his regular working hours were from 8 a. m. to 6 p. m., Banks claimed to have done some work after 6 o'clock on some evenings after Christmas, 1930, although he was unable to remember when he so worked or what was done.

The appellant's store was on Broadway between Seventh street and Eighth street. At the close of each day's work the truck was taken by Banks to a garage on Eighth street, immediately north of Broadway. Broadway runs east and west, and C street and F street run parallel thereto; C street being one block north and F street two blocks south of Broadway. Thirteenth street is six blocks east of Seventh street and No. 1441 F street, which will hereafter be referred to, is between Fourteenth and Fifteenth streets.

About 6 p. m. on January 2, 1931, Banks stopped at the garage where the truck was kept at night and Sorenson got out to get his own car for the purpose of proceeding to his home. They had previously had a conversation to the effect that there was nothing fur-

ther for Sorenson to do. Banks drove the truck around the corner and stopped in front of the store. Sorenson, in his own car, drew up alongside the truck in front of the store. It was raining heavily at the time, and appellant's manager and two or three of his assistants were standing in the entryway to the store. Banks went into the store and immediately returned and got into the truck. It is not claimed that he received or obtained any orders at that time. While Banks was present, Sorenson called out to the group in the doorway and asked if there was anything further for him to do, and was told that there was not and motioned to go on. Appellant's manager then noticed that one of the lights on the truck was defective, whereupon he told Banks to take the truck to the garage and have it fixed, to which Banks replied, "All right." Sorenson drove away, and almost immediately Banks followed in the truck, turning north on Seventh street. He turned east on C street, but, instead of then turning south on Eighth street to go to the garage, he proceeded east on C street, and, as he crossed Thirteenth street, the accident in question happened.

After the accident, Banks stated, on a number of occasions, that at the time the accident occurred he was on his way to pick up a radio either at 757 or 767 Seventeenth street. He testified to this effect in the police court on January 20, 1931, and so told an investigator for appellant's insurance carrier as late as April 19, 1931. On the truck report for January 3, the day after the accident, there appeared for the first time an entry purporting to be that of an order for a pick-up from 767 Seventeenth street, which again appeared on January 5th, 6th, 7th, and 9th. It was established that there was no such address and that no order for such an address was ever found. Sorenson testified that Banks gave him this number, and that on each of these occasions Banks went up to a house and returned telling him that no one was at home. It was also established that the person living at 757 Seventeenth street had had no dealings whatsoever with the appellant. As testified to by them, none of Banks' superiors knew of any order or of any work which Banks could have been executing for the appellant after 6 o'clock on the night of January 2.

In an effort to check on the order relating to 757 or 767 Seventeenth street, which Banks claimed to have been executing, Banks was taken to the store late in April to look over the carbon copies of the original orders which had been issued. While looking over these carbon copies, Banks came upon the carbon copy of an order, dated December 31, 1930, to pick up a radio at the home of Simon Cervantes at 1441 F street. He then stated that he thought this was the order he was executing at the time of the accident, but he could not be positive because he did not have the original. He was asked to search for the original, but could not find it, and the same was never found. Up to this time Banks had never mentioned the name of Simon Cervantes as the person to whose home he was going for the purpose of picking up a radio on the night of January 2. At the time of the trial, he was very certain that this was the order he was executing at the time of the accident and was also certain that he had always remembered that the name was Cervantes, although he might have been confused as to the address. The truck book contained no record of any order relating to Cervantes or 1441 F street. At the time of the trial Banks claimed that he had had the Cervantes order for several days prior to January 2, that the order was marked "rush," and that some time during the day of January 2, one of his superiors had told him to be sure to execute it. While he went to a supposed address on Seventeenth street on January 3, and several times thereafter, for the ostensible purpose of picking up a radio, and while he had Sorenson make records of such trips in the truck book, he did not go to 1441 F street then or at any other time. When asked why he did not go, he testified: "To the best of my memory I think it was because somebody down in the store said it was canceled." Sorenson testified that he knew of no further work for Banks to do that night and that when they separated Banks said nothing to him of having any other work to do. Banks' superiors testified that he had said nothing to them about any further work that night and that they knew of none. Banks testified that when he went back to the store at 6 p. m. on January 2 no one there told him to go out and pick up this radio. He further testified that he told neither Sorenson nor his superiors that he intended to make another trip. It is in evidence that the number of orders handled by Banks on January 2 was very small in comparison with that of the ordinary day. While Banks testified that sometimes one order took an unusual length of time because of the time required to put up aerials and the like, he did not testify as to any extra work in connection with the orders handled by him on that day. The evidence justifies the inference that the amount of work done by him on that day was unusually small and

that he had ample time during the day to execute another order if he had one.

All of the evidence introduced by the appellant went to the question as to whether Banks, at the time of the accident, was driving the truck with the consent of his employer and in the course of his employment. This was the entire defense and no effort was made to show that Banks was free from negligence at the time of the accident. The appellant now concedes that there is some evidence to support the judgment, if the testimony of Banks was believed by the jury, but contends that he was so thoroughly impeached by his own contradictory statements and by other evidence that his testimony is unworthy of belief, and that, at best, the evidence upon the main question of fact presented is so close that certain errors and misconduct must be held to have been prejudicial.

[1, 2] The first of these matters relates to certain instructions given. The court instructed the jury as follows: "It is admitted that the plaintiffs are husband and wife; that defendant Banks was an employee of defendant Southern California Music Company; that defendant Banks was driving the automobile truck with the consent of the defendant Southern California Music Company at the time and place of the accident. These are to be considered by you as facts without proof or evidence."

Following this the court gave another instruction as follows: "While the truck was being driven by defendant Banks with the consent of the defendant Southern California Music Company, a corporation, as its employee, it is presumed that he was so driving within the scope of his employment at the time and place of the accident and injuries."

It is conceded by the respondent, as it must be, that there was no admission in the pleadings that Banks was driving the automobile truck with the consent of the appellant at the time and place of the accident. Nowhere in the evidence is such a fact expressly admitted. It seems to be the respondents' contention that, since it was shown that Banks drove the automobile during the daytime with the consent of the appellant, it conclusively follows that he was driving with such consent at the time of the accident in question. It is also argued that, since Banks was told to take the truck to the garage and have the lights fixed, it follows that appellant's manager expected him to again make a trip for the company that night. This does not follow, as the truck was to be used the next day and at that time of the year, especially in rainy weather, lights would be needed for the next day's work before 6 o'clock. While the respondents attempt to draw a distinction between driving with the consent of an employer and driving in the course of one's employment, under the facts as developed in this case this distinction is not important. No question was raised during the trial as to the possibility that the appellant had given Banks permission to use the truck upon business of his own or for his own purposes and, under the facts shown, it conclusively appears that, if Banks was driving the truck at the time and place of the accident with the consent of his employer, he was driving the same in the course of his employment. The two matters were inseparable in so far as this case is concerned. Under these circumstances, the instruction complained of was not only an instruction upon a matter of fact, invading the province of the jury, but it was also directly contrary to the facts as shown by the evidence. While the court, in another instruction, purported to leave to the jury the question as to whether it had been shown by a preponderance of the evidence that the driver of the truck was acting within the scope of his employment at the time and place of the accident, this instruction was merely conflicting at best. And the jury had already been instructed that it was admitted, and was to be taken as an established fact without any proof or evidence, that Banks was driving the truck with the consent of his employer at the very time and place of the accident, and that it was to be further presumed from this that he was then driving within the scope of his employment. Not only was the jury thus instructed when a large part of the evidence was directly contrary to such an admission, as well as to such a fact, but the matter of such consent, under the circumstances, was so interwoven with the matter of the scope of the employment as to give the instruction upon the one an improper effect upon the other. We regard the question of fact before the jury as a close one, and it is not possible to say that the error was not prejudicial in the extreme.

[3] Error is claimed in the refusal to give certain other instructions. One of these was to the effect that the fact that the defendant Banks was operating an automobile truck belonging to his employer at the time and place in question did not render his employer liable for his negligence unless it was further established, by a preponderance of the evidence, that the operation of the automobile at the very time and place of the accident was with

the consent, directly or indirectly given, of his employer. Some such instruction should have been given in place of the instructions first above referred to.

The appellant complains of certain other instructions which were given. The matters referred to are not particularly prejudicial, and appear to have been the result of an oversight. They will undoubtedly be corrected on another trial, and further comment is unnecessary.

[4-6] It is further contended that counsel for respondents were guilty of prejudicial misconduct in improperly indicating to the jury that the appellant was covered by insurance. The record contains a large number of instances where counsel laid themselves open to this charge. While some of the intimations to this effect are close to the line and while some of them arose somewhat incidentally to other matters, it hardly seems possible either that the jury missed the force of the suggestions thus made or that the many matters of that nature occurring throughout the trial were entirely unintentional and accidental. The record is voluminous, and it would serve no useful purpose to refer to all of the matters in detail. In examining prospective jurors, counsel for respondents asked a juror if he owned any stock in the Individual Underwriting Corporation and if he happened to be interested or engaged in selling accident insurance. The juror was then asked: "Do you happen to know a Mr. Le Barron or a Mr. Don or Von Heeringen, associated with insurance companies?" Counsel thus told the jurors that these gentlemen were associated with insurance companies, although no evidence to that effect was produced. The name of Mr. Le Barron was very frequently brought into the case thereafter. While he was present in the courtroom, he did not take the witness stand. While the next juror was being asked as to whether he represented an insurance company, appellant's counsel objected, and the court stated he would ask the matter of the jurors collectively. Counsel for respondents then stated: "I would prefer, if your Honor will permit me, to ask the question individually. I would like to get the individual juror's response to the question." The court, however, proceeded to ask the question of the jurors collectively, and, when he asked them whether they represented or had any stock in a named automobile indemnity exchange or whether they knew any of its officers or agents, counsel for respondents interrupted, suggesting the names of Mr. Le Barron and Mr. Von Heeringen, whereupon the court added to his question the following: "Mr. Le Barron or Mr. Von Heeringen, their representatives?" An objection to the question as it related to the two individuals was not sustained. Similar questions were asked of the other jurors, and in one case counsel for respondents asked one of the jurors if he had ever acted as adjuster for any insurance carrier. During the taking of testimony counsel repeatedly asked witnesses if they knew Mr. Le Barron or if they had conversed with him, and similar questions. While one witness was testifying concerning the truck reports in possession of the appellant, counsel asked if he had seen Mr. Le Barron going through these reports. When another witness mentioned Mr. Le Barron, counsel asked "Who is Mr. Le Barron?" Another witness, who was known to counsel for respondents as an investigator for the insurance company, was asked by whom he was employed at the time of the investigation, bringing out the answer that he was employed by Mr. Le Barron. He was then asked if Mr. Le Barron had not left the courtroom and talked to witnesses in the corridor on several occasions. Another investigator for the insurance company was asked what was his business and for whom he worked. When he replied he worked for Mr. Le Barron he was asked if Mr. Le Barron was employed by the Southern California Music Company. When he replied that Mr. Le Barron did some work for this company he was asked: "And he wasn't employed by them as an employee in connection with their store was he?" In his argument to the jury counsel for respondents stated, in connection with a certain matter, that Mr. Le Barron knew certain facts, there being nothing in the record justifying this statement or justifying the reference to Mr. Le Barron.

While it has been held proper to interrogate prospective jurors as to their ownership of stock or interest in an insurance company to the end that an unprejudiced jury may be secured, it is equally well settled that jurors may not be in effect told that a defendant is insured and that any judgment that may be rendered will be paid by the insurance company. It has also been held that any information of such a fact which comes out incidentally in connection with something which is proper for the plaintiff to bring out and without an intention on the part of the plaintiff to violate the rights of the defendant, is not a sufficient cause for reversal. In general, under the authorities, the rule obtains that the question of prejudicial misconduct in such a connection comes down to a

question of good faith on the part of counsel. It is strenuously urged by counsel for respondents that the record shows that they are within this rule and that any reference to or suggestion of an insurance company in this case came up accidentally, and that there is nothing to show a lack of good faith upon their part. Counsel for respondents devote 127 pages of their brief to justifying their actions in this respect, and, while it may be conceded that a part of the instances referred to find some justification under some of the authorities, it is suggestive that so many instances require explanation, that so many are so close to the border line, and that several were injected so unnecessarily.

[7] It is further argued by respondents that the appellant waived any objection to these matters by failing to ask for a mistrial before the taking of evidence was begun. It is pointed out that, after the jury was selected, but before the trial commenced, in the absence of the jury, the court asked counsel for the appellant if he intended to take advantage of any error in this regard. Counsel for appellant replied that he thought he would. The court stated that he did not know as to the fact, but that, if it were a fact that Mr. Le Barron and Mr. Von Heeringen were not associated with an insurance company, he would declare a mistrial. Upon being assured by counsel for the respondents that these gentlemen in fact represented an insurance company, the court stated that they would proceed. Under these circumstances and especially when many of the incidents referred to occurred during the taking of the testimony and during the argument, it cannot be held that the matter was waived by the appellant.

[8] In our opinion, the rule that a plaintiff must not be allowed to inform a jury that a possible judgment is to be paid by an insurance company should not be further relaxed. In this regard, the case before us goes farther than any case to which our attention has been called or of which we have knowledge, with the exception of those cases where the jury was told this fact in express terms. In our opinion, the record on this matter justifies a reversal for the following reasons: (1) It was repeatedly, although by indirection, brought to the attention of the jury that an insurance company was interested in the outcome and it is unreasonable to believe that the jury failed to comprehend the situation. (2) The inference seems to be clear that a part, if not all, of the matters referred to were brought out for the purpose of informing the jury of the fact that the appellant was insured. (3) The court did not instruct the jury to disregard any of these matters, but apparently took the position that, if any of the investigators or witnesses in fact represented an insurance company, the truth of the fact was a sufficient justification. (4) The main question of fact presented to the jury was a close one, and it is impossible to say what the result would have been in the absence of this objectionable matter. (5) It seems probable that the matter under consideration had its effect upon the amount of the verdict. Assuming that the verdict could not be held excessive, in itself, as a matter of law, it was undoubtedly very liberal, even if full consideration be given to all injuries sustained. The respondents, for another purpose, set forth the statement made by the trial judge in ruling on a motion for a new trial. After referring to the matter of insurance which he said had crept into the case, he said: "I do feel it may have had some effect on the amount of the verdict, and, therefore, I feel impelled to arrive at the amount of the verdict in my own way, independent of the jury's verdict." As a result, the verdict was reduced from $40,000 to $30,000. While the statement of the trial judge is not a part of the record, a reading of the record leads us to the same conclusion. If knowledge that an insurance company was interested in the result had an effect upon the amount of the verdict, it is hardly possible to say that this information was without an effect upon the entire verdict.

For both of the reasons mainly relied on by the appellant, there should be a new trial to the end that the question as to the responsibility of the appellant for the negligence of its codefendant should be determined upon its merits.

The judgment is reversed.

I concur: JENNINGS, J.

MARKS, J., being absent, does not participate in this opinion.

140 Cal.App. 195

YAGUDA v. MOTION PICTURE PUBLICATIONS, Inc.

Civ. 8476.

District Court of Appeal, Second District, Division 2, California.

July 26, 1934.

1. Contracts ⇐10(2)

Contract granting exclusive right to sell magazine subscriptions *held* not lacking in mutuality, though no definite volume of subscriptions was agreed on nor undertaking made to supply all magazines required by seller, where he agreed to produce whatever business publisher wanted and latter was satisfied with volume produced.

2. Contracts ⇐10(2)

Whether contract between one granted exclusive right to sell magazine subscriptions and newspaper company for latter's use of magazines for clubbing purposes was lacking in mutuality *held* immaterial in seller's action for damage caused by magazine publisher's repudiation of agency contract before completion of newspaper contract, which plaintiff completed by substituting other magazines at loss to himself.

3. Principal and agent ⇐47

One granted exclusive right to sell magazine subscriptions *held* publisher's agent, though publisher was interested only in results obtained.

4. Principal and agent ⇐41

Commissions, which agent for sale of goods on commission was prevented from earning by principal's breach of contract, may be established by proof of sales in agreed territory before breach or sales by principal therein after breach.

5. Principal and agent ⇐41

One granted exclusive right to sell magazine subscriptions in certain territory by contract allowing him fifth of amount paid annually by each subscriber *held* properly awarded damages for publisher's wrongful termination of contract in amount of such portion of total amount of subscriptions sold through another agent in such territory from date of such termination until expiration of exclusive term, less his selling expenses.

6. Principal and agent ⇐41

Magazine subscription agent's execution of contract, giving another agent of publisher right to sell same periodicals in portion of former agent's exclusive territory in consideration of payment to him of certain sum on each subscription, *held* not to limit his recovery for publisher's breach of agency contract to such amount on each subscription sold by other agent in that territory after such year.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Arthur J. Yaguda, doing business under the fictitious name and style of the Newspaper Service Bureau, against the Motion Picture Publications, Incorporated. Judgment for plaintiff, and defendant appeals.

Affirmed.

Janeway, Beach & Hankey and S. T. Hankey, all of Los Angeles, for appellant.

Murphy & Doherty and Clyde F. Murphy, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem., delivered the opinion of the court.

For approximately one year prior to April 7, 1929, plaintiff had been selling subscriptions to two publications issued by defendant, paying particular attention to subscriptions obtained on club rates offered newspapers. No salary was paid him, although a purely fictitious salary was fixed in order, apparently, to conform to certain requirements of the audit bureau of circulations which called for payment by a subscriber of a minimum percentage of the published price of the publication. In other words, plaintiff sent his check to defendant for such aggregate minimum, $1.25, on each subscription reported, and the exact amount so remitted was returned to him; $1 of same being charged to expenses and 25 cents to salary. Plaintiff retained the entire amount of subscriptions collected, which in the club rates given newspapers was a minimum of 25 cents for each annual subscription, and this was his only recompense. The business produced by plaintiff was so gratifying that on April 7, 1929, a letter was written him by defendant's vice president and general manager, Duncan A. Dobie, reading as follows: "Confirming the points discussed in our conference this morning, we hereby extend to you National Exclusive rights to sell subscriptions for our publications Motion Picture Magazine and Motion Picture Classic, through newspapers, for a period of two years from date. It is understood that our arrangements with other production sources of this character are to continue until the expiration of present agreements. Terms to be the same as those

now in force, and of course, all production is to be in accordance with the requirements of the Audit Bureau of Circulations."

Plaintiff extended his operations under such letter and continued to sell such subscriptions until March 26, 1930, at which time by agreement he relinquished his rights on the territory east of the Rocky Mountains, but kept the Pacific Coast territory and operated there until July 17, 1930, when defendant, by letter terminated the relationship theretofore existing, but gave plaintiff until October 1, 1930, to "work out problems with whatever newspapers you have tie-ups, and after that date we definitely part company in a business sense." Apparently the only newspaper with which plaintiff then had a "tie-up" was the Evening Express of Los Angeles. On July 5, 1929, plaintiff had written said newspaper giving it the exclusive use of the magazines named for clubbing purposes at 30 cents per year in certain counties of Southern California, in consideration of the agreement of said paper to use the two publications in the solicitation of new subscriptions, "as well as your agreement to put on drives from time to time using these magazines for clubbing offers to tie up your present subscriptions." Because of such cancellation plaintiff was unable to carry out his agreement with the Evening Express, and later filed his complaint for damages alleged to have resulted from the breach of his agreement with defendant.

The trial court found that plaintiff and defendant, "for a good and valuable consideration, * * * made and executed a contract in writing" in which defendant granted to plaintiff exclusive national rights to sell subscriptions to said publications; that the latter had diligently and faithfully performed his part of said contract, but that the same was repudiated by defendant, to plaintiff's damage in the sum of $6,571.24. From the judgment entered on said findings, defendant has appealed.

No question is raised on appeal as to the sufficiency of the letters introduced as a writing to take the two-year contract out of the statute of frauds, so we must presume that if any valid objection on such ground existed it was waived in the court below by the introduction of parol evidence as to some of the terms of such contract, without objection.

[1] Regardless of whether plaintiff was an agent of defendant in selling said subscriptions, as respondent claims, or merely an independent contractor, as appellant urges, in our opinion the latter was bound to comply with its agreement unless, as it contends, it had no binding force because no definite volume of subscriptions was agreed to be obtained nor any undertaking made to supply all the magazines respondent might require. That he (respondent) agreed to "produce whatever business we wanted" is clearly shown by a letter from Mr. Dobie, of appellant corporation, to respondent's attorneys; and there is evidence showing that appellant was entirely satisfied so far as volume of business is concerned, although it did, toward the last, express a desire that less of the volume should come from the high postal rate zone and that more of it should come from zones of lower rates. Under the circumstances, we believe that the contract was not lacking in mutuality.

[2-5] Nor in our opinion was it material that the contract made by respondent with the Evening Express may have been lacking in mutuality. The evidence shows that the contract was completed by respondent by substituting magazines at a considerable loss to himself. The difficulty of proving damages does not justify breaking a contract, although it may make it comparatively safe to do so, financially speaking. But it is apparent that the damage allowed by the trial court was not based on respondent's inability to perform the Evening Express contract, caused by appellant's failure to furnish magazines, nor was the 30-cent rate mentioned in the contract used in computing such damage. Under his fictitious salary arrangement heretofore mentioned, which was set out in a letter dated June 15, 1928, sent respondent by appellant's general manager, respondent sent to appellant $1.25 for each annual subscription sold. One dollar of this was returned by appellant "for traveling, printing and postage," and the remaining 25 cents as "salary." The evidence shows without conflict that Whitlock & Co., Chicago agents of appellant, sold through their representative on the Pacific Coast 27,401 subscriptions to said magazines from October 1, 1930, the day respondent's contract was terminated, to April 7, 1931, the day when the two-year exclusive term expired. Using such figures with the minimum rate of 25 cents, and deducting therefrom respondent's expenses in selling—which he testified amounted to $200 per month, one-fourth of which he allotted to the selling of appellant's magazines—gives a sum which closely approximates the judgment rendered.

That respondent was the agent of appellant for making such sales, even though appellant was interested only in the results obtained and not in the particular way the sales were effected, seems clear from the evidence. Under the circumstances here the law applicable is, in our opinion, well stated in Restatement of Law, Contracts, vol. 1, § 331, subdivision E, as follows: "In contracts of agency for the sale of goods on commission, the profits that the agent would have made if he had not been discharged can often be proved with reasonable certainty. Proof of the sales made in the agreed territory before the breach, *or of the sales made there by the principal after the breach*, may be such as to make a reasonably accurate estimate of the commissions that the agent has been prevented from earning. This is less likely to be true if the agency is not an exclusive agency." (Italics ours.) The evidence supports the conclusion that during said period respondent had the exclusive right to sell said publications, through newspapers, on the Pacific Coast; that such sales were made there during such exclusive period by a representative of Whitlock & Co., Chicago agents of appellant, which concern sent such subscriptions in to appellant, who accepted and filled them knowing the facts. Appellant's general manager says the letter of April 7, 1929, "was a memorandum to assure him [respondent] that we would not let Whitlock or Fennell operate in that territory"; and the evidence shows that although Whitlock & Co. had its representative on the Pacific Coast before respondent's contract was canceled, they were not selling subscriptions to appellant's periodicals in any great number until thereafter, and that Whitlock & Co. before that date "could not make any headway due to the fact that they [the newspapers] all wanted Motion Picture Magazine * * * inasmuch as the competitive papers were using it, and they could not supply it." We are of the opinion that under the circumstances the measure of damages used by the trial court was correct.

[6] Nor would the fact that respondent, for appellant, executed a contract with Whitlock & Co. giving them the right to sell said periodicals in the East for a period of one year from September 1, 1929, on which he was to receive ten cents on each subscription sold, limit respondent's recovery to that amount on each subscription sold by such firm in his exclusive territory after October 1, 1930. The right to sell such subscriptions was limited to the East, and the contract had expired. If appellant gave such firm the right to sell in the exclusive territory after October 1, 1930, it could not limit the damage by any terms contained in any such contract.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

140 Cal.App. 115

EASTERLY v. COOK et al.

EASTERLY et al. v. SAME.

Civ. 4709, 4710.

District Court of Appeal, Third District, California.

July 23, 1934.

1. Appeal and error ⇐1011(1)

In automobile accident case, judgment would not be disturbed where it could not be said as matter of law that findings of court as to negligence of defendant and contributory negligence of plaintiff were not adequately supported by the record, even though there was serious conflict of evidence.

2. Marriage ⇐54

Marriage of 16 year old girl *held* not void ab initio for lack of consent on part of father, but merely voidable.

3. Parent and child ⇐16

Upon marriage of minor child, child is emancipated from parent's control, and parent's authority over child ceases (Civ. Code, § 204).

4. Automobiles ⇐184

Statutory liability for imputed negligence against signer of minor's application for automobile operator's license does not depend upon relationship or continued control over minor on part of signer, but is a separate statutory liability during minority or until license is canceled (St. 1923, p. 532, § 62 (e) as added by St. 1929, p. 522).

5. Automobiles ⇐184

Father who signed minor child's application for automobile operator's license was not relieved of liability for imputed negligence of child by reason of child's subsequent marriage, where license was not canceled as provided by statute (St. 1923, p. 532, § 62 (a, b), and (e), as added by St. 1929, p. 522).

6. Judgment ⇐200

In case tried by court without jury, signing and filing of findings of fact and conclusions of law constitute decision of court, and judgment cannot be rendered until findings have been adopted and filed (Code Civ. Proc. §§ 632, 633).

7. Trial ⇐388(1)

In case tried by court without jury, statutory provision for rendering decision by adoption and signing of findings is mandatory (Code Civ. Proc. §§ 632, 633).

8. Appeal and error ⇐1074(1)
Judgment ⇐200

In case tried by court without jury, judgment filed before decision and findings had been rendered in writing and signed by court was invalid, so that refusal to set judgment aside was harmless.

9. Judgment ⇐256(1)

In case tried by court without jury, judgment in favor of plaintiff was supported by findings where valid finding specifically determined amount of damages sustained by plaintiff, although prior purported findings which were filed without signature of judge failed to so determine.

10. Appeal and error ⇐1074(1)

In case tried by court without jury, that judgment in favor of plaintiff, which was based upon findings of fact unsigned by the court, was vacated on motion of plaintiff, *held* harmless, though statute provided that party aggrieved by judgment based on findings made by court might move to set aside judgment, since unsigned findings were not "findings made by court" within meaning of statute (Code Civ. Proc. § 663).

[Ed. Note.—For other definitions of "Finding," see Words & Phrases.]

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Actions by John I. Easterly, and by John I. Easterly and another, against Elaine Cook and another. From judgments for the plaintiffs and from an order refusing to vacate or modify one of the judgments, the defendants appeal.

Affirmed.

W. F. Cowan and J. O. Kroyer, both of Santa Rosa, for appellants.

F. D. Darby, of Healdsburg, and A. Q. Lomba and J. Raegen Talbot, both of Oakland, for respondents.

PER CURIAM.

The defendants have appealed from two judgments which were rendered against them jointly in the above-entitled actions which were consolidated for the purpose of trial. Both cases involved the same automobile casualty. In the first case a judgment was awarded the plaintiff John I. Easterly for personal injuries received and for damages to his automobile and for medical and hospital expenses incurred. The judgment in the second case was rendered for personal injuries sustained by Della, the wife of plaintiff John I. Easterly in the same automobile accident.

There is a conflict of evidence on several of the material issues which are involved in this appeal. In accordance with the well-established rule of law with respect to appeals, the following recitation of facts must be accepted as true, since said facts are supported by substantial evidence:

The defendant Elaine Cook was a minor, seventeen years of age at the time of the automobile accident, which occurred July 28, 1929. She held an operator's license which was issued to her in 1925. The application therefor was signed by her father, E. D. Cook, as required by section 62 of the California Vehicle Act (St. 1923, p. 532). One year prior to the time of the accident which is involved in this appeal a marriage ceremony was performed between Elaine and a young man by the name of Parkinson, with the consent of her mother, but without the consent of her father. She was then under sixteen years of age. Soon after the marriage ceremony was performed the young couple was separated and Elaine returned to the home of her parents, where she has remained to the present time. The marriage was subsequently annulled November 19, 1930, under the provisions of section 82 of the Civil Code, for lack of consent of the father of Elaine. The marriage was not void ab initio. It was merely voidable.

On July 28, 1929, at 11 o'clock at night, the defendant Elaine Cook was driving a Ford coupé northerly along the Redwood highway between Healdsburg and Geyserville. At the same time the plaintiffs were driving their Studebaker sedan southerly along the same highway. In ascending a slight grade around a curve in the roadway, Elaine's automobile suddenly met the plaintiffs' machine and a collision occurred. Her car was demolished. The plaintiffs' machine was overturned and damaged to some extent.

Both Mr. and Mrs. Easterly were injured. The extent of their injuries is not questioned. There is evidence to support the findings that Elaine's automobile was running at an excessive rate of speed and that she drove it on to the wrong side of the highway where the collision occurred. It satisfactorily appears that John I. Easterly was then operating his car in a careful and prudent manner on his proper side of the roadway.

Based upon these facts, two suits for damages were brought jointly against Elaine Cook and her father E. D. Cook. Mr. Cook was joined as a party defendant on the theory of imputed negligence as the signer of Elaine's operator's license under the provisions of section 62 (b) of the California Vehicle Act (St. 1923, p. 532, § 62 (b). The first suit was brought by John I. Easterly only to recover damages to his automobile, expenses incurred for medical and hospital care of his wife, and for his own personal injuries sustained as a result of the accident. The second case was instituted jointly by John I. Easterly and his wife, Della, to recover damages for serious injuries which she received as a result of the accident. Upon application therefor E. D. Cook was appointed guardian ad litem for his daughter Elaine. He appeared and answered both complaints in his own behalf and also as guardian ad litem for his daughter. The cases were consolidated and tried by the court sitting without a jury. Separate findings were adopted and separate judgments favorable to the plaintiffs were rendered. In the first case purported findings, which the judge failed to sign, were filed November 5, 1931. On the same day a judgment for the sum of $1,785 was filed in that case in favor of John I. Easterly. On motion of the plaintiffs, under the provisions of section 663 of the Code of Civil Procedure, the judgment was vacated on the theory that it was premature and void for lack of a written decision and findings of facts as required by sections 632 and 633 of the same Code. Findings in the first case were subsequently signed by the judge and filed January 15, 1932, and another judgment against the defendants for the sum of $1,785, based upon these findings, was rendered and filed on the last-mentioned date.

Separate findings favorable to the plaintiffs were adopted and filed in the second case on November 5, 1931, awarding them damages in the sum of $1,500 for the injuries sustained by Mrs. Easterly as a result of the automobile casualty. These findings were duly signed by the judge. A judgment against the defendants for that sum was accordingly rendered and filed on the last-mentioned date. The regularity of the findings and judgment in the last-mentioned case is not questioned.

A motion for new trial was presented and denied in each case. On December 11, 1931, the defendants moved the court to set aside the judgment in the first case and to enter another judgment in favor of plaintiffs for the sum of $1,035 only, on the theory that the findings of facts failed to determine that the plaintiff John I. Easterly had sustained damages for personal injuries in the additional sum of $750, or in any sum whatever as a result of the accident. This motion was denied.

The defendants have appealed from both judgments and also from the order of the court refusing to vacate or modify the original judgment which was filed in the first case so as to conform to the unsigned findings.

It is contended neither judgment is supported by adequate evidence; that there is a lack of proof of negligence on the part of Elaine Cook, and upon the contrary that it appears the plaintiffs were guilty of contributory negligence; that the judgment in the first case is not supported by the findings because they fail to determine the amount of damages which the plaintiff John I. Easterly sustained as a result of his personal injuries; that the court therefore erred in refusing to set aside that judgment. Finally it is asserted the defendant E. D. Cook is not liable for imputed negligence of his daughter Elaine, on account of signing her application for an operator's license because she subsequently married and that her marriage automatically emancipated her from his control and relieved him of future liability on that account.

[1] While there is a serious conflict of evidence regarding the negligence of the defendant Elaine Cook, and with respect to the question of plaintiffs' alleged contributory negligence, we are not able to say as a matter of law that the findings of the court are not adequately supported by the record. We are therefore not warranted in disturbing either judgment on those grounds.

[2-5] We are of the opinion the defendant E. D. Cook, was not automatically relieved of liability under section 62 of the California Vehicle Act for imputed negligence of his daughter, whose application for an operator's license was signed by him, merely because she was subsequently married. It appears that

his daughter Elaine was seventeen years of age at the time of the accident. She then held an operator's license to drive an automobile which was issued to her upon the signature of her father as required by section 62(a) of the California Vehicle Act. Subdivision (b) of that section provides: "Any negligence of a minor in driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence except in the event the minor is driving a motor vehicle as the agent, or servant or upon the business of a person other than the person who has signed said application."

While it is true that Elaine Cook was not driving an automobile belonging to her father, E. D. Cook, at the time of the accident, it is not contended she was driving the Ford coupé as an agent of any person. Her operator's license was in full force at the time of the accident. It had never been revoked. While it is true that a marriage ceremony was performed between her and Parkinson subsequent to the issuing of the operator's license, they were soon separated, and she returned to the home of her parents, where she continued to remain to the time of the accident.

E. D. Cook was appointed as Elaine's guardian ad litem, and represented her in defending this suit. The purported marriage was not void for lack of consent on the part of her father. It was merely voidable. Campbell v. Campbell, 78 Cal. App. 745, 248 P. 762. It is true that upon the marriage of a minor child, she is deemed to have been thereby emancipated from her parent's control, and that the parent's authority over her then ceases. Section 204, Civil Code; 13 Cal. Jur. 169, § 25; 46 C. J., p. 1345, § 197. It has been held that this is true even though a child under the age of statutory consent marries without the consent of her parents. 46 C. J., supra. Section 204 of the Civil Code provides that: "The authority of a parent ceases: * * * 2. Upon the marriage of the child." The statutory liability for imputed negligence which is created by section 62 of the California Vehicle Act against one upon whose signed application an operator's license to drive an automobile is issued to a minor, does not depend upon the relationship or continued control over the minor, on the part of him who signs the application. It is a separate statutory liability during minority, or until canceled under the provisions of subdivision (e) of section 62 of the act, as added by St. 1929, p. 522, which is created by signing the application for the license and thereby vouching for the careful conduct of the driver, independently of their relationship, or continued control over the operator. Lackey v. Olds & Stoller, etc., 80 Cal. App. 687, 252 P. 672; Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42, 44. In the case last cited it is said with reference to the negligence imputed by statute to the one who signs the application upon which an operator's license is issued to a minor: "The Legislature has now declared that under a given state of facts a liability exists where none existed before." In the Lackey Case, supra, the negligence of a minor was imputed to his uncle, who had signed his application for an operator's license, although it does not appear that the uncle ever had any authority or control over the minor. The court there says: "The motor vehicle act * * * makes the person who signed the application jointly and severally liable with the minor. The signer of the application was therefore made liable as a matter of law for the negligent act of the minor in operating the car, whether he was on the business of the signer of the application or not. The motor vehicle act * * * expressly makes the negligence of the minor imputable to the person who signs his application; hence the liability is one expressly created and imposed by the statutory law."

The signer of an application upon which an operator's license is issued to a minor under the provisions of section 62 of the California Vehicle Act is therefore not automatically relieved of his liability by the subsequent marriage of the minor during her minority. Subdivision (e) of that section of the act specifically provides for the method by which the signer of a minor's application for a driver's license may be relieved of liability. It reads: "Any person who shall have signed the application of a minor for an operator's license under this section and who desires to be relieved from the joint and several liability imposed by reason of having signed such application, may file a verified application with the division requesting that the license of said minor be canceled and thereupon the division shall cancel the license of said minor and thereafter the said person who originally signed the application shall be relieved from the liability imposed in subdivisions (a) and (b) of this section, on account of subsequent negligent operation of a motor vehicle by said minor."

We are of the opinion the statutory liability is imposed upon the signer of the application for an operator's license by a minor, independent of the general liability of a parent

for the torts of his minor child, on the theory that an automobile is a dangerous instrumentality, the operation of which may not ordinarily be safely intrusted to a minor child on account of a lack of judgment on his part. This liability is deemed to cover the operation of the machine during the years of indiscretion of the minor, and until he reaches the age of majority, regardless of the continued control of the conduct of the minor by the signer of the application, unless the license is canceled pursuant to subdivision (e) of section 62 of the California Vehicle Act. The liability created by that section is not dependent upon the continued authority of the signer of the application. It is a guarantee of compensation for the negligence of the child during minority.

[6-8] The denial of defendants' motion to vacate the judgment in the first case which was filed before the findings and decision had been signed by the judge, and to render a different judgment therein was harmless. That judgment was premature and void for the reason that the decision and findings had not been rendered in writing or signed by the judge as required by section 632 of the Code of Civil Procedure. In a case tried by the court without a jury the signing and filing of the findings of facts and conclusions of law constitute the decision of the court. Hoover v. Lester, 16 Cal. App. 151, 116 P. 382. Section 633 of the Code of Civil Procedure provides that, "Judgment upon the decision must be entered accordingly." The validity of the judgment depends upon the previous rendering of the decision by signing and filing the findings of facts and conclusions of law. The Code provision with regard to the necessity of rendering a decision by the adoption and signing of findings is mandatory. Williams v. Wren, 88 Cal. App. 607, 263 P. 1038. The judgment is deemed not to have been rendered until the findings have been adopted and filed. Brownell v. Superior Court, 157 Cal. 703, 109 P. 91, 93; Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am. St. Rep. 491; 14 Cal. Jur. 912, § 32. In the Brownell Case, supra, the court quotes approvingly from the Crim case, supra, in that regard as follows: "Under the provisions of the Code of Civil Procedure, whenever findings are required there can be no 'rendition of the judgment' until they are made and filed with the clerk."

It follows that since the findings and decision in the first case had not been signed or adopted by the court at the time the defendants made their motion to set aside the judgment, the purported judgment was invalid, and there were then no findings upon which the judgment could be based. The purported judgment which had been filed might properly be disregarded as invalid and it was therefore harmless to refuse to set it aside.

[9] That document was, however, subsequently set aside upon motion of the plaintiffs. Findings favorable to the plaintiff were thereafter adopted, signed by the judge and filed. A judgment in accordance with these findings was then filed in favor of the plaintiff for the sum of $1,785.

The appellants contend this judgment is not supported by the findings for the alleged reason that the court failed to determine the amount of damages which were sustained by the plaintiff John I. Easterly as a result of his personal injuries. There is no merit in this claim. It is true that the first purported findings which were filed without the signature of the judge did fail to so specifically determine. But the valid findings which were subsequently signed and filed provided, "That by reason of the injuries aforesaid, plaintiff has been damaged in the sum of seven hundred and fifty and no/100 ($750.00) Dollars." The judgment which was subsequently filed included this item of damages.

[10] Finally, the appellants contend the court erred in setting aside the original so-called judgment which was filed in the first case, which was based upon the unsigned findings, because it was vacated on motion of the plaintiffs pursuant to section 663 of the Code of Civil Procedure. It is asserted that motion is only available to the party *aggrieved* by the challenged findings and judgment. That section provides:

"A judgment or decree of a superior court, when based upon findings of fact *made by the court*, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of such party and entitling him to a different judgment:

"1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside, the conclusions of law shall be amended and corrected."

Since the challenged unsigned findings did not constitute a determination of the facts or a decision of the case, the document was a nullity and may not be deemed to constitute findings "made by the court." The judgment which was dependent thereon was therefore invalid. It was unnecessary to set that document aside. The fact that it was vacated on

motion of the plaintiff under section 663, supra, was harmless. The court had a right to strike that invalid instrument from the records on its own motion.

The judgments and the order are affirmed.

139 Cal.App. 696

SMITH v. PACIFIC GREYHOUND CORPORATION et al.

Civ. 4945.

District Court of Appeal, Third District, California.

July 14, 1934.

Hearing Denied by Supreme Court Sept. 11, 1934.

1. Appeal and error ⇐931(1)

Reviewing court, in examining sufficiency of evidence to support questioned finding, must accept as true all evidence tending to establish correctness of finding as made, and every substantial conflict of testimony is to be construed in favor of finding.

2. Evidence ⇐568(6)

Whether witnesses were able to estimate speed of bus traveling in fog was for jury.

3. Automobiles ⇐168(1)

It is not absolute speed at which automobile is driven that determines whether it is being operated at reckless rate, but condition and circumstances of highway at time must be considered.

4. Automobiles ⇐168(8)

That bus driver traveling at 25-mile per hour speed on foggy night could not bring bus to stop within his 25-foot range of vision, and that wet and slippery condition of highway prevented application of brakes with adequate force lest bus skid into car ahead, would justify finding of jury that 25-mile per hour speed was excessive (St. 1923, p. 553, § 113 (a), as amended by St. 1931, p. 2120).

5. Automobiles ⇐211

In determining whether parking disabled automobile on highway without lights was contributory negligence, driver who installed first a rental battery and subsequently a new battery upon discovering generator was not operating properly exercised due care in supervision of lights and battery (St. 1923, p. 561, § 136 (a), as amended by St. 1931, p. 2128).

6. Automobiles ⇐211

In determining whether parking disabled automobile on highway without lights was contributory negligence, driver who left 2½ to 3½ feet of automobile on pavement after lights went out without warning, and engine stopped, was forced to park automobile on highway, so that he came within exception exempting disabled vehicles from statutory prohibition against parking on public highway (St. 1923, p. 561, § 136 (a), as amended by St. 1931, p. 2128).

7. Automobiles ⇐245(83)

Whether driver who had exercised due care in supervision of lights and batteries was justified in leaving 2½ to 3½ feet of automobile on pavement after lights went out without warning and engine stopped was properly submitted to jury (St. 1923, p. 561, § 136 (a), as amended by St. 1931, p. 2128).

8. Automobiles ⇐245(72)

Whether driver of parked automobile was negligent in standing by automobile when he saw bus bearing down upon him *held* for jury (St. 1923, p. 561, § 136 (a), as amended by St. 1931, p. 2128).

9. Negligence ⇐83

Necessary elements of "last clear chance" doctrine are that plaintiff, because of his negligence, is in position of danger from which he cannot escape by ordinary care, both because of physical impossibility of escape and because of lack of knowledge of danger; that defendant has knowledge of plaintiff's position and knows, or should know, that plaintiff cannot escape; and that defendant has last clear chance to avoid accident but fails to do so, whereby plaintiff is injured as proximate result of such failure.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words & Phrases.]

10. Automobiles ⇐245(91)

Whether driver standing by parked automobile upon which bus was bearing down was in position of danger from which he could not escape, as regards application of last clear chance doctrine, was question for jury.

11. Negligence ⇐83

That person knew of existence of instrumentality that subsequently caused his injury, without his also appreciating its peril, will not preclude his relying upon last clear chance doctrine.

12. Negligence ⇐83

In last clear chance doctrine, knowledge of peril is established like any other fact.

13. Automobiles ⇐245(91)

Where there was conflicting evidence as to whether driver standing by parked automobile should have had knowledge of peril of approaching bus, question was one of fact for jury, and finding of jury that knowledge did not arise until instant before collision was binding.

14. Trial ⇐296(4, 5)

Defect of instruction in applying "last clear chance" doctrine if bus driver "should have seen" perilous position of person standing by parked automobile without adding "did see" was cured by other instructions which charged upon bus driver's being aware of perilous position of other person.

15. Trial ⇐295(1)

Instructions on a particular subject must be construed as a whole.

16. Automobiles ⇐246(38)

Instruction applying "last clear chance" doctrine if bus driver "should have seen" perilous position of driver standing by parked automobile, which omitted to add words "did see," did not contain all necessary elements of last clear chance doctrine.

17. Trial ⇐228(1)

All law applicable to case need not be stated in single instruction.

18. Trial ⇐256(1)

If more elaborate or complete instructions upon statement of doctrine involved are desired, fuller or more accurate instructions on subject must be prepared and presented by party desiring them.

19. Automobiles ⇐246(20)

Instruction that speed limit at place where automobile accident occurred was 45 miles per hour and that it was violation of law for motor vehicle to travel on highway at that place at greater rate of speed than 45 miles per hour, which did not state that such violation was negligence, was not error.

20. Trial ⇐248

Instruction which is merely declaration of abstract principle of law and truism or general statement which has no specific bearing upon case is not error.

Appeal from Superior Court, Yolo County; Henry B. Neville, Judge.

Action by W. R. Smith against the Pacific Greyhound Corporation and others. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

C. C. McDonald, of Woodland, and Gerald M. Desmond, of Sacramento, for appellants.

Huston, Huston & Huston, of Woodland, and Jesse W. Carter, of Redding, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal by defendants from a judgment entered on a verdict of a jury awarding damages for personal injuries and for medical, surgical, and hospital treatment suffered and incurred by plaintiff as the result of an accident which occurred about midnight on the 8th day of December, 1931, on the Pacific highway a few miles south of the city of Woodland, when an automobile stage, owned by defendant Pacific Greyhound Corporation and operated by defendant Irwin, collided with plaintiff.

On the day in question plaintiff was taking a load of Christmas trees from Castella to San Francisco, and accompanying him on the trip were his son, James E. Smith, nineteen years of age, and Ray Hunter, eighteen years of age. In the afternoon of that day the two boys left Castella in plaintiff's truck with the Christmas trees, plaintiff following in his Dodge sedan. When plaintiff left home the Dodge was apparently in good running order. Before reaching Redding, however, he observed that the generator was not operating properly, and stopped at a garage in Redding, where he learned there was something wrong with the generator which could not be immediately repaired, so he had a rent battery installed. Upon reaching Willows plaintiff again observed that the battery was not operating properly and he then purchased and installed a new battery. From Willows he proceeded on his way, arriving at Woodland about 11:45 p. m., where the three stopped for supper. A few minutes after midnight, as they left the restaurant, preparatory to resuming their journey, they observed a stage of the Pacific Greyhound driving into the main depot in Woodland. Plaintiff proceeded without difficulty until he crossed the railroad track about 4 miles south of Woodland. As he hit the crossing plaintiff observed his lights to flicker. After crossing the railroad the lights gave him no further trouble and plaintiff proceeded 3 or 4 miles further, when, without warning, the lights suddenly went out. The night was dark and foggy and plaintiff was unable to see much, if anything, but turned his car to the right to get off the pavement and after getting the

two right wheels on the graveled shoulder of the highway, allowed the car to coast 8 or 10 feet until it came to a stop. At the time the lights went out the Dodge was 100 to 125 feet ahead of the truck. James Smith, his son, driving the truck, saw the lights go out and observed the Dodge drawing to the right. He passed the Dodge about 12 or 14 feet and brought his truck to a stop, and went back to see if he could be of any assistance to his father. When he reached the front of the Dodge his father was just getting out of the car. At that time the son saw the lights of the stage approaching at a considerable distance to the rear. Plaintiff also observed the headlights of the approaching car and told his son to flag them. Plaintiff had just reached into the car for a box of matches when his son called, "Look out, Dad!" Plaintiff jumped back, observing the approaching lights were not more than 4 to 6 feet behind the Dodge, and before he could move in any direction, the stage, driven by defendant Irwin, struck the Dodge. In the meantime plaintiff's son and Ray Hunter had run behind the Dodge to flag the stage. Smith, Jr., stayed about 10 feet back of the Dodge and about 3 feet west of the white center line and waved his arms at the approaching stage, trying to flag it. Ray Hunter was about 12 feet back of the Dodge and about 3 feet inside the shoulder, where he waved his arms. From the time the lights of the Dodge went out until the collision, a minute or a minute and a half had elapsed. When the stage struck, it ripped open the gasoline tank of the Dodge and the car burst into flames. Plaintiff was knocked down and rolled beneath the stage and was also covered with gasoline which burst into flames as he rolled along under the stage. As a result of the injuries caused by this collision he was, as already related, awarded damages by the jury.

[1] Appellants contend that the finding of the jury that defendants were negligent is not supported by the evidence, that plaintiff was guilty of contributory negligence, and that the court misdirected the jury in certain particulars. It is, of course, too well established to require the citation of authorities that a reviewing court, in examining the sufficiency of the evidence to support a questioned finding, must accept as true all evidence tending to establish the correctness of the finding as made and every substantial conflict of the testimony is to be construed in favor thereof. All this court is required to do is to point out testimony which, if believed by the jury, would be sufficient to support the finding. With that in view, therefore, we will not attempt to narrate evidence which might lead to a contrary conclusion but direct our attention solely to the evidence adduced in behalf of plaintiff, for the purpose of determining whether or not such testimony, together with reasonable inferences to be drawn therefrom, are sufficient in weight and quality to justify the verdict of the jury.

James Smith, who testified he had driven a car for eight years and piloted an airplane for two years, estimated that the stage was traveling between 50 and 55 miles an hour at the time of the accident. Hunter testified the stage at that time was traveling approximately 50 miles an hour.

[2-4] Appellants contend that respondent's witnesses would be unable to estimate the rate of speed on account of the fact that lights in a fog looked further away and because of the fog the stage was much nearer to them than they realized. This was a matter to be determined by the jury. Physical facts also bear out the estimate of respondent in regard to the speed of the stage in that it appears that the Dodge was forced ahead some 12 to 15 feet until it struck the truck, crushing the Dodge between the two. James Smith testified that when he parked the truck he set the brakes and put the gears in reverse. Notwithstanding that fact, the truck was impelled over 100 feet from where it originally stood, across the graveled shoulder into a ditch, over a bank, through a wire fence and into a field. It also appears that the stage, to have reached the point of the accident, must have traveled 7 miles in approximately 8 minutes, or at a rate of speed in excess of 50 miles an hour. The night was dark and a heavy wet fog hung over the valley. The driver of the stage testified he was traveling 25 miles an hour and at that speed it would require 58 feet for him to bring his car to a stop. He also testified he could not see more than 25 feet ahead of him at the time. However, the testimony of Smith, Jr., was that he was following the Dodge some 100 or 150 feet in the rear, and could see the Dodge at that distance and saw the lights flicker and go out, and could see the outline of the car in the darkness. The driver of the stage also testified that, owing to the wet and slippery condition of the highway he feared to apply the brakes lest he skid into the car in front of him. That being true, and assuming that the stage was operating at only a rate of speed of 25

miles an hour, the jury would be justified in finding that that rate was excessive, in view of the fact that the driver could see such a short distance ahead and that it would require such a distance to bring his stage to a stop.

It is not the absolute speed at which a car is being driven that determines whether or not it is being operated at a reckless rate, but the condition and circumstances of the highway at the time must be taken into consideration. Havens v. Loebel, 103 Cal. App. 209, 284 P. 676. If, therefore, the driver of the stage was traveling at a rate of speed at which he could not bring his vehicle to a stop within his range of vision, and the condition of the highway was such that his brakes could not be applied with adequate force lest the stage skid into the car ahead, the jury would have been justified in believing that even 25 miles an hour was excessive. Section 113 (a), California Vehicle Act (St. 1923, p. 553, § 113 (a), as amended by St. 1931, p. 2120); Huddy Automobile Law, vol. 3-4, p. 301.

[5-7] Appellants contend that the evidence shows that plaintiff was guilty of contributory negligence as a matter of law. Section 136 (a) of the California Vehicle Act (St. 1923, p. 561, § 136(a), as amended by St. 1931, p. 2128) provides:

"No person shall park or leave standing any vehicle whether attended or unattended upon the paved or improved or main traveled portion of any public highway. * * *

"The provisions of this subsection shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a public highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

In interpreting this section this court, in Silvey v. Harm, 120 Cal. App. 561, 8 P.(2d) 570, 573, has held: "The driver of a truck is not guilty of negligence if his machine is parked on the main-traveled portion of the highway through no fault of his own. Rath v. Bankston, 101 Cal. App. 274, 281 P. 1081. If the automobile is disabled while it is traveling along a public highway so that it is impracticable or impossible to drive it off of the main-traveled portion of the highway, the driver is not guilty of negligence in permitting it to remain there until, by the exercise of reasonable diligence, it can be removed."

We are of the opinion that plaintiff comes under the exception set out in the last paragraph of section 136 (a), quoted above.

It would seem, also, that plaintiff exercised due care in regard to the supervision of his lights and battery. When he first discovered trouble with his car he stopped at Redding and installed a rent battery and was there informed that that installation would be sufficient to take him safely to San Francisco. In Willows he had the rent battery removed and there purchased a new battery. From that time until the lights flickered at the crossing south of Woodland he had no trouble. Then a short distance further south, without warning, the lights went out and his engine stopped. He coasted along the shoulder of the highway and as far to the right thereof as he thought safe in the darkness until his car came to a stop, leaving 2½ to 3½ feet of the car extending on to the paved portion of the highway. He then alighted and proceeded to search for a light to examine the car, and in less than two minutes and before he could take any precaution to protect himself or others, he was struck by the on-coming stage.

It is apparent, therefore, that plaintiff was forced to park his car on the main traveled portion of the highway, owing to its disabled condition, and whether he was justified in so doing under all the circumstances of the case was properly submitted to the jury.

[8] The answer to the contention of appellants that respondent was negligent, in that he stood by the car as the stage bore down upon him, is likewise for the jury, as the case of White v. Davis, 103 Cal. App. 531, 284 P. 1086, 1091, held: "Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury."

[9] Appellant also claims that the trial court erred in instructing the jury of the doctrine of last clear chance. The principles of this doctrine are clearly set forth as follows in the case of Girdner v. Union Oil Company, 216 Cal. 197, 13 P.(2d) 915, 917: "The necessary elements, as deduced from the well-con-

sidered cases, may be stated in substance as follows: That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure."

[10-13] Whether plaintiff was in a position of danger from which he could not escape was also a question of fact. Appellants assume that when the stage was 150 feet away plaintiff should have realized he occupied an exposed position and by the exercise of due care could have avoided the injury. However, merely to show that plaintiff knew of the existence of the instrumentality that subsequently caused his injury, without showing also that he then appreciated the peril, will not preclude his relying upon the doctrine of the last clear chance (20 R. C. L. p. 110), and such knowledge of the peril is to be established like any other fact. 20 R. C. L. 109; Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114. Under the facts of this case it cannot be said as a matter of law that the approach of an auto stage under the circumstances present at the time of the injury to plaintiff would lead plaintiff to believe he was in a position of peril. He himself had been driving his car through the fog but a few moments before and he knew with only two headlights on his car he had been able to see from 100 to 200 feet in front of him, and he could then see the headlights and fog lights of the approaching stage casting their beams along the highway. He also knew that approximately two-thirds of the width of the highway was unobstructed on his left, and that he had sent the two boys back of the car to warn the on-coming stage. The jury had a right to disbelieve the driver of the stage when he testified that he could see only about 25 feet in front, and just before the accident he was traveling not over 3 miles an hour, and feared to apply the air brakes with which the stage was equipped, lest the wheels would lock and cause the stage to skid. The driver previously testified that a car, equipped as this stage was with six good tires, had practically the same gripping power upon a wet highway that it would have upon a highway in its normal condition. It was therefore a question of fact for the jury to determine when the actual peril to plaintiff arose. The jury by their verdict having held that it did not arise until the instant before the collision, will be binding upon this court.

[14-17] Appellants also complain of an instruction given on the doctrine of last clear chance; the instruction complained of reads in part as follows: "You are instructed that if you find from the evidence even though plaintiff in this case had negligently placed himself in a careless position, and that the defendant S. G. Irwin, the driver of the stage, by the exercise of reasonable care, could have seen and should have seen the perilous situation of plaintiff in time to have avoided injuring him by the exercising of reasonable care. * * *"

It is true that the instruction complained of omitted to add the words "did see" after the words "should have seen," nevertheless other instructions correctly set forth the principle of law involved. It is a well-settled rule that instructions on a particular subject must be construed as a whole (24 Cal. Jur. p. 857), and in other instructions given by the court the jury were instructed, "* * * yet, if thereafter defendants, seeing the position in which he was, had an opportunity * * *," and also "* * * that the defendant driver is aware of his (plaintiff's) dangerous situation under such circumstances * * *."

At most it can be said that the instruction complained of did not contain all the necessary elements of last clear chance doctrine, but it has often been stated that all the law applicable to a case need not be stated in a single instruction. People v. Mohammed, 189 Cal. 429, 208 P. 963.

[18] It has also been held that if an instruction is desired by defendant more elaborate or complete upon the statement of the doctrine involved, it is the duty of defendant to prepare and present such fuller or more accurate instructions on the subject. Townsend v. Butterfield, 168 Cal. 564, 143 P. 760; Galwey v. Pacific Auto Stages, 96 Cal. App. 169, 273 P. 866.

[19, 20] Appellants also claim prejudicial error in an instruction telling the jury that at the time of the accident the speed limit at the place where the accident occurred was

45 miles per hour and that it was a violation of the laws of the state of California for a motor vehicle to travel upon the highway at said time at a greater rate of speed than 45 miles an hour. The jury were nowhere informed in this instruction that if defendants violated such law at the time and place of the accident that such violation would constitute negligence. The instruction was therefore only a declaration of an abstract principle of law and a truism or general statement which had no specific bearing upon the case at issue.

We find no further objections which require consideration, and the judgment appealed from is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

140 Cal.App. 212

PEOPLE v. MULHERIN.

Cr. 2507.

District Court of Appeal, Second District, Division 2, California.

July 27, 1934.

Rehearing Denied Aug. 10, 1934.

Hearing Denied by Supreme Court Aug. 23, 1934.

1. Weapons ⇐8

Evidence of possession of instrument consisting of metal washers strung upon rawhide leather thong, forming two parallel masses three inches long, with rawhide knotted and forming loop on opposite side of knot from washers, sustained conviction for possession of "black-jack" (St. 1925, p. 542, § 1).

Under the Deadly Weapon Act (St. 1923, p. 696, § 1, as amended by St. 1925, p. 542), penalizing possession of any instrument or weapon of the kind commonly known as a "black-jack," "slung-shot," billy, sand-club, sand-bag, or metal knuckles, a "slung-shot" which is not to be confused with a "sling-shot," a boy's toy or catapult is a mass of metal, fixed on a flexible handle, strap, or the like, and a "black-jack" is a bludgeon like weapon consisting of a lead slug attached to a leather thong, and also includes a small leather-covered club or billy, weighted at the head and having an elastic shaft, or a sand-bag, such as a piece of hose loaded with sand; while the general term "sap" includes a black-jack, slung-shot, billy, sand-club, sand-bag, or metal knuckles.

[Ed. Note.—For other definitions of "Black-jack" and "Slung-Shot," see Words & Phrases.]

2. Weapons ⇐6

Purpose of Deadly Weapon Act is to outlaw instruments ordinarily used for criminal and improper purposes (St. 1925, p. 542, § 1).

3. Weapons ⇐17(6)

In prosecution for possessing black-jack, instruction that statute provides that every person possessing weapon of kind commonly known as black-jack, slung-shot, or billy shall be guilty of felony *held* proper (St. 1925, p. 542, § 1).

4. Weapons ⇐17(6)

In prosecution for possession of deadly weapon, instruction defining "billy" as bludgeon carried in pocket, or policeman's club, and "black-jack" as short bludgeon consisting of heavy head, as of metal, on elastic shaft, or with flexible handle, was proper, and refused instruction defining "black-jack" as a leather-covered billy or club weighted at the head and having a flexible shaft was erroneous, since a "black-jack," while usually covered with leather, is not necessarily covered at all.

5. Weapons ⇐8

Language of deadly weapon statute concerning weapons prohibited should be given liberal construction, so long as no injustice results (St. 1923, p. 697, § 4; St. 1925, p. 542, § 1).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Arthur J. Mulherin was convicted of the possession of a black-jack, and he appeals.

Affirmed.

Frederic H. Vercoe and Richard F. Bird, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

DESMOND, Justice.

Defendant was found guilty by a jury of "Violation chapter 339, Laws of 1923, as amended, section 1, Act 1970, Deering's General Laws, Deadly Weapon Act, a felony, as charged in Count II of the information." His motion for a new trial was ordered denied,

and the appeal is from the judgment and order.

The information charged in count II that violation of the above-mentioned law was committed in this: That defendant "did wilfully, unlawfully and feloniously have in his possession what is commonly known as a 'black-jack.'" The defendant upon his trial admitted ownership of the instrument which the prosecution claims was properly described as a black-jack, but he contended at the trial and now contends that it is not a black-jack, and that the verdict therefore is contrary to and unsupported by the evidence and contrary to law.

Quoting from appellant's brief: "The instrument in question consists of a large number of metal washers strung upon a rawhide leather thong. The washers form two parallel masses, each approximately 3 inches long, with the rawhide strung through one mass and back through the other, and then knotted. The excess length of the rawhide forms a loop on the opposite side of the knot from the washers." The Attorney General in his brief has described the instrument as follows: "It is a collection of fifty-six metal washers, one inch in diameter, threaded upon two parallel narrow strips of leather or rawhide. The ends of the strip of leather or rawhide are then brought together and tied in a knot as close to the washers as possible, thus causing the washers to form a compact loop of metal of considerable weight. The four ends of the rawhide or leather strips extend for seven and one-half inches behind the knot, forming a convenient and flexible handle. This handle is so tied that it can be looped over the wrist like the ordinary 'sap' or 'black-jack.'"

[1] It will be seen from the above descriptions that the instrument consists of "a mass of metal, fixed on a flexible handle, strap or the like," which brings it within the definition of a "slung-shot" given in Webster's International Dictionary. A slung-shot, be it noted here, is not to be confused with a "sling-shot", i. e., a boy's toy or catapult. Reference to the case of People v. Williams, 100 Cal. App. 149, 279 P. 1040, also indicates that the article in question might properly be described as a slung-shot. In that case, there was found in the pocket of defendant an instrument which the jury impliedly determined was a slung-shot, described in the opinion as follows: "A flat steel wrench about six inches in length and weighing approximately five ounces. In the same pocket was found a looped leather strap about twelve inches long, so contrived by means of wire and leather thongs as to allow the wrench to be placed in a pocket at one end, while the end forming the loop could be slipped over the wrist of the user and held in the hand." A "black-jack" is defined by Webster as "a small leather-covered club or billy, weighted at the head and having an elastic shaft."

With the instrument in question before us, we believe that under the quoted definitions it would be more correctly described as a slung-shot than as a black-jack. However, the Encyclopedia Britannica (14th Ed.), quoted in People v. Brown, 253 Mich. 537, 235 N. W. 245, 247, 82 A. L. R. 341, defines a "black-jack" as "a bludgeon like weapon consisting of a lead slug attached to a leather thong"; and we are not prepared to say, in view of this definition, that this instrument is not *a kind* of black-jack. The Deadly Weapon Act (St. 1923, p. 696, § 1, as amended by St. 1925, p. 542) provides that: "Every person who within the State of California * * * possesses any instrument or weapon *of the kind* commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles * * * shall be guilty of a felony and upon a conviction thereof shall be punishable by imprisonment in a state prison for not less than one year nor for more than five years." (Italics ours.) All the instruments mentioned, with the exception of metal knuckles, belong to a certain species of weapon having so many characteristics in common that their slight differences are unimportant. They are all, other than metal knuckles, short, easily concealed upon the person and so weighted as to constitute effective and silent weapons of attack. Any one of them, in our opinion, would be properly described by the general term, a "sap," and we believe that a sand-bag, such as a piece of hose loaded with sand, is occasionally correctly described as a black-jack.

[2] The use of language as applied to these weapons, all of the same class, is rather indefinite. It is significant that the Legislature did not prohibit possession of a black-jack as such, a slung-shot, as such, a billy, as such, or of a sand-club, a sand-bag, or even metal knuckles, as it might have done, but instead, and very likely with appreciation of the difficulties of nomenclature, forbade ownership of any instrument or weapon "of the kind," as commonly known. The purpose undoubtedly was to outlaw instruments which are ordinarily used "for criminal and improper purposes" (see People v. Persce, 204 N. Y. 397, 97 N. E. 877, 879, and our recent case, People v. Ferguson, 129 Cal. App. 300, 304, 18 P.(2d) 741), and so we have in this act "a partial in-

ventory of the arsenal of the 'public enemy,' the 'gangster' " (see People v. Brown, supra), and a prohibition against owning anything "of the kind."

[3] Among the court's instructions to the jury was the following: "Chapter 339, Laws of 1923, as amended, section 1, Act 1970, in Deering's General Laws, provides in part as follows: 'every person who within the state of California possesses any instrument or weapon of the kind commonly known as a black-jack, slung-shot or billy shall be guilty of a felony.' " Appellant claims error in this instruction, but since it conforms to the statute we find it unobjectionable.

[4] It is claimed also that the trial court erred in giving the following instructions:

(a) "You are instructed that if you find from the evidence and beyond a reasonable doubt that on or about the date mentioned in the information, at and in the county of Los Angeles, this defendant had in his possession an instrument or weapon of the kind commonly known as a black-jack, or billy, you shall find the defendant guilty as charged in the information."

(b) " 'Billy' is defined as a bludgeon, as one for carrying in the pocket; a policeman's club. 'Black-jack' is defined as a short bludgeon consisting of a heavy head, as of metal, on an elastic shaft or with a flexible handle," and in refusing this instruction, requested by defendant:

"Under the law a black-jack is a leather covered billy or club weighted at the head and having a flexible shaft. Unless the instrument in evidence is such, you must find the defendant not guilty."

It will be noticed that appellant, by the language of the above refused instruction, described a black-jack as a billy, but a leather covered billy, while the court's definition of a billy merely described it as a bludgeon. From what we have said it may be seen that in our opinion a black-jack, while usually covered with leather, is not necessarily covered at all, and therefore the court's definitions, both of billy and black-jack, are approved. It follows that no error arose in the giving or refusing of instructions.

[5] The Deadly Weapon Act provides in section 4 (St. 1923, p. 697, § 4) that "in no case shall any person punishable under the preceding sections of this act be granted probation by the trial court," and we realize that appellant is now confined in state's prison as a result of his conviction. If we should accept his theory of defense, calling for a narrow construction of the terms of the section under which he was convicted, we would necessarily conclude, in the light of approved dictionary definitions, that if he were not guilty of possessing a black-jack he certainly was guilty of possessing a slung-shot; and the punishment is no more severe for the one offense than for the other. However, as we have indicated, the language of the section should be given a liberal construction, so long as no injustice results.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

140 Cal.App. 148

ROSS v. PRUDENTIAL GUARANTEE BUILDING & LOAN ASS'N.

WARNER v. SAME.

Civ. 5143.

District Court of Appeal, Third District, California.

July 24, 1934.

Hearing Denied by Supreme Court Sept. 19, 1934.

1. Money received ⇐8

Assumpsit is proper action in which to recover money obtained by corporation or its authorized agent by means of false or fraudulent representations, under which circumstances law implies promise to repay funds.

2. Principal and agent ⇐156

When duly authorized agent profits by securing funds by means of fraud or misrepresentation which is chargeable to principal on account of its negligence, principal will become liable whether money actually reaches his possession or not.

3. Money received ⇐11

Demand for return of money deposited with agent of building and loan association and notice of rescission were unnecessary as prerequisites to maintenance of actions in assumpsit, where association wrote to depositors prior to commencement of actions denying liability; demand for return being useless and actions not being in rescission (Civ. Code, § 1691).

4. Evidence ⇐376(1)

In assumpsit by depositors of building and loan association to recover money deposited with association's agent, admit-

ting passbooks over objection that their authenticity had not been established *held* not prejudicial error under evidence sufficiently establishing their authenticity.

5. Building and loan associations ⇐23(5)

Building and loan association *held* estopped to deny its liability to depositors upon claim that association's agent exceeded his authority in crediting and collecting more than initial deposit which appeared on passbooks, where association ratified such method of handling accounts with its customers.

6. Principal and agent ⇐99

Organization will be estopped from denying its liability for money secured and misappropriated by its agent acting in excess of his ordinary authority, when it appears that his conduct in so doing was in accordance with a custom which was established and followed with organization's knowledge and approval, express or implied.

7. Building and loan associations ⇐41(7)

Evidence *held* to show that person who acted as local manager of building and loan association was ostensible agent of association which was liable for deposits received by such agent (Civ. Code, § 2300).

Evidence disclosed that such agent was local manager of the association with authority to open investment accounts and issue certificates of investment; that the association's name was advertised in the local newspapers signed by such agent as local manager; and that signs were displayed in the window of the office indicating that such agent was the association's representative in such locality.

8. Building and loan associations ⇐23(5)

Building and loan association might become liable for money deposited with its agent who issued passbook to depositor, notwithstanding association did not deliberately furnish its agent with such passbooks with signed certificates attached thereto, if association negligently left such signed certificates where they could be secured and used by unauthorized agent.

9. Building and loan associations ⇐23(5)

Depositors who deposited money with building and loan association's agent *held* not negligent in failing to examine by-laws of association or purported rules promulgated by building and loan commissioner, as respects association's liability to depositors for money converted by agent (Civ. Code, § 3543).

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Actions by George W. Ross and by S. C. Warner against the Prudential Guarantee Building & Loan Association, a corporation. Judgments for plaintiffs, and defendant appeals.

Affirmed.

Breed, Burpee & Robinson, of Oakland, for appellant.

George F. Jones, of Oroville, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The above-entitled cases were consolidated for the purpose of trial. Separate findings were adopted in each case and separate judgments were rendered against the defendant. The complaints were drawn in the form of assumpsit. They are for money deposited with an agent of the defendant Prudential Guarantee Building & Loan Association. The agent failed to account to the association for any of these deposits and appropriated them to his own use. Judgments were rendered in favor of the plaintiffs on the theory that the defendant negligently permitted the local agent to hold himself out as its authorized employee with authority to accept deposits for the association, by permitting passbooks to remain in his possession, to which certificates of the company were attached, signed by the vice president and secretary thereof. From these judgments the defendant has appealed.

The California Guarantee Building & Loan Association was incorporated in 1923, with its principal place of business in Santa Clara county. In 1927, it was merged with the Home Guarantee Building & Loan Association of Contra Costa county, and continued to operate under the original name. In 1931, the name of the corporation was changed, in the manner provided by law, to Prudential Guarantee Building & Loan Association, with its principal place of business at Oakland. During all of the time involved in this litigation it was the same corporation, notwithstanding the fact that its name had been changed. It appears, however, that the California Guarantee Building & Loan Association suspended active operation of its business for about a year; its license having been revoked by the building and loan commissioner November 18, 1930, but it resumed business under the same articles of incorporation which had been kept in force. Its name was formally changed by a resolution

of its directors duly passed on October 21, 1931, to Prudential Guarantee Building & Loan Association. During the entire time since the merger in 1927 until September, 1932, J. L. James was employed by the building and loan association as its agent at Oroville. License certificates were issued to him as agent and solicitor by the building and loan commissioner of California as provided by law. He maintained an office at Oroville, advertising, with the knowledge of the defendant, in the newspapers and by means of signs displayed in his office window and otherwise, that he was the "Local Manager" of the association. Prior to the time of the change of name of the association, James was furnished with investment passbooks, upon the fly leaves of which were pasted certificates which were previously signed by the vice president and secretary of the association, assuming liability and vouching for the amount of the original deposit "together with any and all additional sums which may be paid to it hereunder, as evidenced by the pass-book hereto attached," and promising to pay the holder thereof upon certain terms and conditions therein specified, all money so deposited, together with interest. These certificates were termed "Thrift Investment Certificates." When a depositor opened an account with the agent, he entered in the blank spaces left therefor in these certificates the name of the depositor, the amount of his original deposit, the rate of interest to be paid, and the date of the certificate. The passbooks were arranged with columns appropriately headed for the entry of the dates of deposits, the principal amounts of deposits, the amounts of dividends or accumulated interest, the sums withdrawn, and the balance of the accounts. In the course of his employment many depositors were thus secured at Oroville in behalf of the association by Mr. James. He testified in that regard:

"Q. Approximately how many books of this kind did you issue in this community? A. I don't remember exactly, but several.

"Q. Would you say as many as fifteen or twenty? A. Possibly, yes sir.

"Q. And did you send some money collected in this manner to the California Guarantee Building and Loan Association? A. Yes, sir. * * * I don't remember (the amount) exactly, the loan company has the record."

December 27, 1928, the plaintiff Ross deposited with solicitor James at his office in Oroville the sum of $900. A passbook was then issued to Ross with that sum credited to his account with the California Guarantee Building & Loan Association. James filled in the certificate which was pasted on the fly-leaf of that book with the depositor's name, the amount of deposit, and a promise to pay quarterly thereon 6 per cent. interest per annum. The date of opening the account was inserted. The certificate had been previously signed by F. C. Watson as vice president, and Frederick H. Clark, as secretary of the association. The passbook was delivered to the depositor Ross. On July 8, 1931, a further deposit of $1,200 was credited to his account in the passbook. Quarterly throughout the entire period of time during which the account existed, until July 6, 1932, the amount of accumulated interest was credited in the book, and corresponding sums were recorded as withdrawn. James paid the interest to the depositor. This left a balance to the credit of Mr. Ross on July 6, 1932, of the principal sum of $2,100. Each entry in the passbook was verified by the initial of the agent.

Likewise, a similar passbook was issued by James to the plaintiff Warner on April 7, 1930, showing five separate deposits of principal sums, aggregating $4,868.65. Items of interest are periodically credited in the passbook in the total sum of $427.79. Several items of withdrawals are charged against the depositor in the passbook, aggregating the sum of $1,430.73. This left a balance to his credit on August 27, 1932, of $3,865.71. Each of these entries in the passbook is certified by the initial of the agent James.

In September, 1932, J. L. James was discharged of his agency by the appellant. On October 8, 1932, the attorneys for the defendant in these actions wrote to the plaintiff Warner, notifying him that the Prudential Guarantee Building & Loan Association had discovered that J. L. James had been wrongfully issuing passbooks and had been illegally procuring money from depositors under false representations, among which transactions his account was included, and that the association repudiated all responsibility therefor and denied all liability for the account as shown by his passbook. A similar letter was written to the plaintiff Ross on December 8, 1932. These letters contained the first intimation that either of the plaintiffs had that James was not recognized by the defendant as its accredited agent and solicitor duly authorized by it to represent the association in that capacity at Oroville.

Separate suits in assumpsit were subsequently brought by the plaintiffs against the defendant for money had and received, to-

gether with the unpaid interest thereon, as shown by their respective passbooks, on the theory that James was either the duly accredited agent of the defendant in those transactions, or that the negligence of the association warranted them in believing they were dealing with its duly authorized agent. The association answered these complaints by denying the material allegations thereof. The cases were consolidated and tried by the court sitting without a jury. Findings favorable to the plaintiffs on all the material issues were adopted in each case. Separate judgments were rendered accordingly. From these judgments the defendant has appealed.

On appeal the defendant contends that: (1) The agent was without authority to bind the association and that his acts were limited by law and by rules promulgated by the building and loan commissioner; (2) the agent's employment had terminated prior to the performance of certain acts of his upon which the plaintiffs rely for judgment; (3) the agent had no authority to fill in the blank spaces of the signed certificates attached to the passbooks; (4) the ostensible agency of James was not proved; (5) the evidence fails to show that the certificates attached to the passbooks were authorized by the officers of the association; (6) the defendant was not authorized to transact business as a building and loan association at the time certain deposits were credited in the passbooks by James and that the necessary action to rescind the contracts represented by the passbooks could not be maintained for the reason that no notice of rescission or offer to restore the passbooks was first served by the plaintiffs pursuant to section 1691 of the Civil Code.

[1] Assumpsit is a proper action in which to recover money obtained by a corporation or its authorized agent by means of false or fraudulent representations, under which circumstances the law implies a promise to repay the funds. Pollak v. Staunton, 210 Cal. 656, 293 P. 26, 29; Long v. Harrison, 113 Cal. App. 321, 298 P. 148, 150; 17 Cal. Jur. 616, § 12. In the Pollak Case, supra, it is said: "As between the corporation or its agents receiving payment for stock which is illegally issued and void, and the purchaser who in his dealings with the corporation persists in the notion that the stock possesses some validity, the corporation should not be privileged to take advantage of his error to retain money for which, by reason of its own violation of law, it gives nothing in return. * * * The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment."

In the Long Case, supra, which was an action for money had and received, it is said: "The main contention of the appellant in this action is that there was a contract between plaintiff's assignors and the defendants under which the money named in the first count of the complaint was paid to them, and, there having been no rescission of the contract, an action for money had and received will not lie. This contention is without merit. * * * This kind of action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged."

[2] The appellant, however, insists that the foregoing principle does not apply except when the defendant "has been enriched" by the acquisition of the money. It is contended the defendant in the present cases was not enriched, since the money did not reach its possession. But when a duly authorized agent profits by securing funds by means of fraud or misrepresentation which is chargeable to the principal on account of its negligence, the principal will become liable whether the money actually reaches his possession or not.

[3] Neither a demand for the return of the money nor notice of rescission was necessary as a prerequisite to the maintenance of these suits under the circumstances of this case. The defendant wrote to the plaintiffs prior to the commencement of the actions repudiating the contracts represented by the certified passbooks and denying its liability for the obligations of indebtedness incurred thereby. A demand for a return of the money was useless, and therefore unnecessary. It has been held that notice of rescission is not necessary "where the defendant is unable or positively refuses to rescind the transaction, or it is certain that the offer, if made, will be refused." 4 Cal. Jur. 769, § 9. An offer to restore the passbooks as a prerequisite to the maintenance of these actions under the provision of section 1691 of the Civil Code was not necessary for the reason that this is not an action of rescission, and because the appellant previously repudiated its liability and denied the existence or validity of the contract created by the opening of the thrift investment accounts with plaintiffs, thus asserting that the passbooks were valueless. It is not necessary to return a thing prior to the commencement of an action which possesses no recognized value.

[4] It did not constitute prejudicial error for the court to admit in evidence the passbooks over the objection of the defendant that their authenticity had not been established chiefly because it was not specifically shown that the individuals whose names appear on the certificates attached thereto as vice president and secretary, respectively, were actually the officers of the association at the times these passbooks were issued to the plaintiffs. Their authenticity appears to have been sufficiently established. Mr. James, who issued them as the agent of the association, testified that those particular passbooks and fifteen or twenty other similar ones with the officers' names attached thereto were delivered to him by the California Guarantee Building & Loan Association to be used by him in procuring investment accounts. This fact is not disputed. They contained printed statements in the following language: "California Guarantee Building and Loan Association, Oakland, California." Mr. Clark, whose name is attached to the certificates on these passbooks, acknowledged the genuineness of his signature which appears on both instruments and admitted that he had been secretary of the association continuously since 1928. In response to the question as to whether the name of R. C. Knight, which appears on the certificate as vice president, was genuine, he said: "Apparently. * * * I would say so." It also appears from the certified copy of the certificate of increase of capital stock of the California Guarantee Building & Loan Association shortly before the first passbook was issued in 1928, that the names of all the officers appearing upon the certificates attached thereto were members of the board of directors, and that Clark was then its secretary. We think the authenticity of these passbooks was sufficiently established.

The appellant contends that the local agent's authority was limited by the provisions of the by-laws of the association, and by the conditions printed on the back of his license certificates which were issued by the building and loan commissioner of California, purporting to be rules which were promulgated by the commissioner pursuant to law. Article 4, section 4, of the association's by-laws do provide in part: "No agents shall collect the funds of the Association, except such as must accompany the subscriptions for shares or investment certificates of the Association, unless authorized by the Association in writing so to do."

The rules purported to have been adopted by the commissioner pursuant to law are printed on the back of the license certificates which were issued by the commissioner to Mr. James as agent of the association. Among these rules the following provisions appear: "The license permits the holder to solicit subscriptions for shares of stock, shares of membership, and certificates of investment, * * *. Upon securing subscriptions for shares or certificates a solicitor may collect and receipt for the entrance fee and not more than one periodical installment. * * *"

Our attention is not called to any evidence that the foregoing rule was ever adopted or promulgated by the commissioner as required by law or otherwise. Moreover, the payments of money which were credited on the passbooks do not purport to have been "installments upon investment certificates." Each sum which is credited to the plaintiffs upon their respective passbooks appears to have been an original and independent investment with the association.

[5] It was evidently the custom of the association to issue to its agent at Oroville blank "Thrift Investment Certificates" signed by the vice president and secretary of the company and attached to passbooks which were arranged in columns, like the ordinary passbook of a modern bank, to enable the agent to enter original and subsequent principal payments. It would seem to be unjust and absurd to hold that under a purported rule of the commissioner, only the collection of the initial payment which is credited on the passbook will be deemed to have been authorized, on the theory that it is "one periodical installment." It would be an unjust and unreasonable construction of the language which would relieve the association of all liability for subsequent principal payments which are credited by the agent on the passbooks. Each principal payment may reasonably be deemed to be an independent investment. There is nothing in the form of the certificate attached to the passbooks which indicates that it was intended to be an installment certificate. No payments of installments are provided for. Fifteen or twenty of these passbooks were delivered to the agent in that very form. He took other subscriptions in that same form and remitted the money received in other transactions to the association. The defendant ratified and encouraged that method of handling accounts with its customers. It must be deemed to have authorized it. It will therefore be estopped from now denying its liability upon the claim that the agent exceeded his authority in crediting and collect-

ing more than the initial deposit which appears on the passbooks.

[6] Regardless of the alleged limitation of authority conferred upon the agent James by the by-laws or rules adopted by the commissioner to deliver the passbooks or receive the payment of more than "one periodical installment" from an investor, there is evidence in this case which will support the assumption that the appellant permitted and encouraged its agent to deliver the passbooks and collect the payments in that manner in conformity with a custom or usage of the association. It has been held that an organization will be estopped from denying its liability for money secured and misappropriated by its agent acting in excess of his ordinary authority, when it appears that his conduct in so doing was in accordance with a custom which was established and followed with its knowledge and approval, either express or implied. Carpy v. Dowdell, 115 Cal. 677, 47 P. 695; Nordin v. Eagle Rock State Bank et al. (Cal. App.) 34 P.(2d) 490. This principle of law is expressed in the syllabus of the Carpy Case, supra, as follows: "Where the cashier of a bank, to the knowledge and with the assent and tacit approval of the directors of the bank, had for many years permitted wine mortgaged to the bank by the same and other persons to be sold to responsible third parties, under contracts similar to the one in controversy, the bank cannot repudiate the act of the cashier in authorizing the contract in controversy, but his act is the act of the bank."

That principle was involved in the Nordin Case, supra, although it was not determinative thereof. It was said in that case that in the absence of a custom or usage to the contrary, conceding the rule of banking law, as announced by the text of Morse on Banks and Banking (5th Ed.) page 381, that, "Where money is offered for credit on a deposit account it is clear that it should not be accepted away from the bank. The bank does not contemplate any such method of receiving deposits, but has provided an entirely different system;" and as it is stated in Paton's Digest, 1926, volume 1, page 296, paragraph 1778, "Until the money [which is paid to an officer of the bank outside of the bank] is actually put in the bank's possession at the bank, the cashier is agent of the depositor and not of the bank, and the bank is not liable if the money is not in fact paid over to it." When the money is accepted by an officer of the bank outside of the bank in accordance with a rule of the bank established and followed with its knowledge, either express or implied, the bank will become liable. Under such circumstances a bank may not deny its liability on the ground that the agent secured the deposit or collected the money by conduct in excess of his authority. The foregoing principle appears to be applicable to the facts of this case. In the present case the building and loan association authorized the practice of permitting the agent to fill in the signed certificates of investments and allowing the delivery of the passbooks together with the collection of subsequent payments of principal sums to be credited to the customer. The association may therefore not now complain of this excess of authority.

[7, 8] The appellant contends that the evidence adduced in this case fails to show that J. L. James was the ostensible agent of the association. Section 2300 of the Civil Code defines an ostensible agency in the following language: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

We are of the opinion the evidence satisfactorily fulfills the foregoing definition. Certainly the plaintiffs must have believed that James was the local agent of the association with authority to open investment accounts with the company and issue certificates of investment, or they would not have deposited their money with him. It does appear that for years he had maintained an office at Oroville equipped for that very business and in which he advertised himself with the knowledge of the association, as its "Local Manager." The California Guarantee Building & Loan Association was advertised in the local newspapers with J. L. James as local manager thereof. Signs were displayed in the window of the office at Oroville. The plaintiffs saw these advertisements and were induced thereby to make their investments. Mr. James made the entries of their deposits in passbooks with the attached certificates in the names of the depositors, with the signatures of the vice president and secretary of the association affixed thereto. The passbooks, which were in the hands of James, also had attached in large display type, "California Guarantee Building and Loan Association, Oakland, California." These passbooks were properly filled out and handed to the depositors. The association had dealt with James as its local agent for several years. Certainly it was charged with knowl

edge of the fact that he represented it as its agent at Oroville. During all of that time, at least one of its officers, secretary Clark, knew that James was supplied with passbooks with the name of the vice president and his own name attached to the certificates. Even after the business was revived and the name changed to Prudential Guarantee Building & Loan Association, Clark remained as the secretary of the organization. He must have known of the custom permitting James to issue these passbooks in that form. James continued to act as its agent. Mr. Clark testified that the passbooks "undoubtedly came from the office of the corporation." We are of the opinion the court was justified in assuming that the association was negligent in permitting James to retain and use these passbooks, since the association must have known of the practice. Even though the association did not deliberately furnish its agent with these passbooks with the signed certificates attached thereto, it may become liable for negligently leaving such signed certificates where they could be secured and used by an unauthorized agent. In the case of Pacific Nat. Bank v. Corona Nat. Bank, 113 Cal. App. 366, 298 P. 144, 147, in which a hearing by the Supreme Court was denied, it was held in a suit for money had and received that the defendant bank was liable for a $10,000 loan procured by false representations on the part of its vice president, who wrongfully took possession of blank certificates of stock which had been previously signed by the president and cashier of the bank and carelessly left where the vice president could secure them and fill in the blank spaces so as to falsely represent that he was the owner of 142 shares of the capital stock of the bank. This false certificate was then presented to the plaintiff bank to establish his credit and secure the loan of $10,000. Upon trial of the cause the defendant bank was held liable for the amount of the loan. On appeal that judgment was affirmed. The court said regarding the liability of the defendant bank: "It appears that the signatures of the officers of the corporation upon the certificate were genuine, and it does not appear that the officers did not have full authority to issue it. The worthlessness of the stock came, not from improper signatures, nor from lack of authority, but from the fact that the blanks left therein were wrongfully filled out. This was made possible by the negligence of the bank's president and cashier in signing the certificate in blank and permitting it to remain where it could be so fraudulently used by McEniry to obtain the loan here involved from the respondent bank. Had the certificate been properly taken care of after it was signed, this loan would never have been made."

[9] In support of the judgment the respondent cites a number of authorities in which the doctrine contained in section 3543 of the Civil Code is announced, that, "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Among the cases which are cited upon that principle are Shirey v. All Night and Day Bank, 166 Cal. 50, 134 P. 1001; Schultz v. McLean, 93 Cal. 329, 28 P. 1053; Pacific Nat. Bank v. Corona Nat. Bank, 113 Cal. App. 366, 298 P. 144. These cases were all founded upon fraud which was exercised by a third party. The doctrine announced in these causes appears to be applicable to the facts of this case. As we have heretofore said, the plaintiffs were not guilty of negligence in assuming from the circumstances that James as the agent of the association had the authority to accept their deposits and issue the passbooks. Nor were they guilty of negligence in failing to examine the by-laws of the organization or the purported rules promulgated by the building and loan commissioner. If they had previously examined article IV, section 4, of the by-laws or the printed rules upon the back of the "Agent's and Solicitor's License" in his possession, they would have discovered nothing, as we have heretofore said, to prohibit the agent from accepting their deposits and issuing the passbooks. Even though the plaintiffs had examined the state records and discovered that the operations of the California Guarantee Building & Loan Association had been suspended for the period of time from November 18, 1930, to October 21, 1931, they would have ascertained that the articles of incorporation were kept in force and that the same association thereafter resumed business under the changed name of Prudential Guarantee Building & Loan Association, and that the same local agent continued to act for it at Oroville. On the contrary, it does appear that the negligence of the appellant and its officers did lead the plaintiffs to believe that the agent possessed the authority which led them in good faith to assume they were dealing with the appellant according to its authorized custom and practice.

The judgments are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

139 Cal.App. 772

RAPPAPORT v. PAYNE, County Auditor.

Civ. 9759.

District Court of Appeal, Second District, Division 2, California.

July 18, 1934.

1. Evidence ⇐82

Under statute and court rule authorizing employment of pro tempore reporter where there was no official reporter in attendance, appointment of reporter by court was assumed to have been made pursuant to direction of presiding judge and that no official reporter was available (Code Civ. Proc. § 274; Rules of Superior Court of Los Angeles County, rule 5, § 2).

2. Courts ⇐57(1)

Statutory provision that reporter pro tempore could not be appointed by court if official reporter was not excused by order entered on minutes was intended as aid to courts in keeping official reporters on official jobs, and not to impair courts' efficiency or restrict them in necessary conduct of official functions, and language of statute importing anything further was directory only (Code Civ. Proc. § 271).

3. Courts ⇐57(1)

Appointment of reporter pro tempore by court in absence of official reporter was authorized even though official reporter was not excused by order entered on minutes, so that it was duty of auditor to issue warrant on treasurer to pay reporter pro tempore his fixed compensation (Code Civ. Proc. §§ 269, 271, 274; Pol. Code, § 4091; Rules of Superior Court of Los Angeles County, rule 5, § 2).

4. Courts ⇐57(2)

Services of pro tempore reporter in assisting official reporter in reporting and transcribing testimony could not be made charge against county, where official reporter was paid his per diem fee for reporting same case on same day and Legislature had authorized additional fees for transcribing testimony (Code Civ. Proc. §§ 269, 271, 274; Pol. Code, § 4091; Rules of Superior Court of Los Angeles County, rule 5, § 2).

Petition for writ of mandate by Samuel Rappaport against H. A. Payne, as County Auditor of the County of Los Angeles.

Petition granted in part, and denied in part.

Dan V. Noland, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Petitioner worked as court reporter in department 24 of the superior court of Los Angeles county on the 20th and 21st days of December, 1932. The clerk of said court certified that such services were rendered, and the judge presiding in the department made his certificate of the fact that they were rendered under his order and were a just and legal charge against the county, and ordered the county auditor to draw his warrant on the treasurer in payment thereof. The amount of each order was $15. Demand was made by petitioner for the issuance of such warrants, which was refused by the auditor. This proceeding is brought to compel their issuance.

It is not denied that petitioner, while a qualified reporter on the eligible list, was not on the designated official list of reporters of said superior court, and that the official reporter assigned to department 24 was assisting the official reporter in department 27 of said court in reporting and transcribing the testimony in a case pending in that department on the 20th of December. On the 21st day of December said official reporter was working in department 24 and petitioner was assisting him in reporting and transcribing the testimony in a criminal case therein pending. The official reporter of department 24 was paid the per diem fee of $15 for his services on said day. The minutes of department 24 for the 20th of December state: "There being no official reporter available, the court appointed Samuel Rappaport as official reporter pro tem. for this department and he is so duly sworn." The record is silent as to any designation on the 21st, but there is no question but that petitioner actually worked in said department on both days.

Petitioner urges that under section 274 of the Code of Civil Procedure and rule V of the rules of said superior court the court was authorized to make such appointment. Respondent contends that the appointment could only be made, and the per diem fee made a charge against the county of Los Angeles by following the provisions of section 271 of the Code of Civil Procedure. Such section provides, in substance, that the official reporter of any superior court shall attend to the duties of his office in person "except when excused for good and sufficient

reason by order of the court, which order shall be entered upon the minutes of the court," and that "employment in his professional capacity elsewhere shall not be deemed a good and sufficient reason for such excuse." The section then continues: "When the official reporter of any court has been excused in the manner provided in this section, the court may appoint an official reporter pro tempore, who shall perform the same duties and receive the same compensation during the term of his employment as the official reporter." Section 274 of the Code of Civil Procedure fixes the fee for reporting at $15 per day, and also fixes a fee for transcribing, which depends upon the number of words transcribed and the number of copies made of the transcriptions, and provides that in criminal cases and cases or proceedings involving the custody or support of a minor child, and "in which the court specifically so directs the fees for reporting and for transcripts ordered by the court to be made," such charges "must be paid out of the county treasury upon the order of the court; provided, that when there is no official reporter in attendance, and a reporter pro tempore is appointed, his reasonable expenses for traveling and detention must be fixed and allowed by the court and paid in like manner." Section 269 of the same Code provides for the appointment of as many reporters as there are judges, "to be known as official * * * reporters of such court." Section 2 of rule V of said superior court provides: "Whenever the services of a phonographic reporter are required in any department, and there is no official reporter available, an official reporter pro tempore may, pursuant to the direction of the presiding judge, be assigned to such department by the judge presiding therein."

[1] It will be seen that section 274 seems to sanction the employment of a pro tempore reporter when there is no official reporter in attendance, and such is the provision of rule V. We must therefore assume that the appointment here was made pursuant to the direction of the presiding judge and that no official reporter was available.

[2, 3] Under section 271, Code of Civil Procedure, no such appointment could be made by the court if the official reporter was not excused for a good and sufficient reason by order entered on the minutes of the court. No such order was made in the instant case. On December 20th the official reporter of the department in which petitioner acted was engaged elsewhere in his professional capacity. Under the section no valid excuse could be made. Suppose the reporter so absented himself, without asking to be excused, because a more remunerative case was pending elsewhere upon which he could employ himself. Suppose he failed to appear and the court could not ascertain why he failed to appear for duty and so could make no valid excuse. Must the court stop functioning until it can be ascertained if such excuse can be made, or proceed without such very necessary assistance, particularly in criminal cases? We think not. "A court set up by the Constitution has within it the power of self-preservation, indeed, the power to remove all obstructions to its successful and convenient operation. * * * While the above statement is true, there is this qualification thereof, which has been recognized at all times in this state, the Legislature may at all times aid the courts and may even regulate their operation, so long as their efficiency is not thereby impaired." Millholen v. Riley, 211 Cal. 29, 33, 293 P. 69, 71. We think the Legislature intended section 271 of the Code of Civil Procedure as an aid to the courts in keeping official reporters on their official jobs, but did not intend thereby to impair the courts' efficiency or restrict them in the necessary conduct of their official functions, and that, if the language of the section imports anything further, it must be treated as directory only. Lorraine v. McComb, Judge of Superior Court (Cal. Sup.) 32 P.(2d) 960. It is our opinion that the appointment of petitioner to serve as pro tempore official reporter on the 20th of December was authorized by law, and that it was the duty of the auditor, under section 4091 of the Political Code, to issue a warrant on the treasurer to pay his fixed compensation for such day.

[4] With regard to December 21st, we must assume that both reporters were not taking down testimony at the same time, but that, while one was so engaged, the other was transcribing testimony theretofore taken down by him in the same case, and that, when he reappeared in the courtroom after doing so, he began taking down testimony and continued to do so while the other was transcribing the testimony taken by him. The $15 per diem was fixed by the Legislature to cover reporting services. The time the reporter is engaged in transcribing the testimony himself, or in dictating the notes taken for an assistant to write up, is to be paid for out of the fee which the Legislature has fixed for transcribing. There would seem to be no need for more than one reporter in court at a time, so far as the actual report-

ing is concerned, and therefore no need for but one per diem; and we know of no law or inherent power of the court which sanctions making a charge against a county of two per diem fees for reporting on the same case on the same day, which would in effect be requiring the county to pay a full day's fee for reporting when not to exceed one-half day was actually spent in such service, and would add to the fee for transcribing fixed by the Legislature by requiring the county to pay for the reporter's time while so engaged during court hours, when the Legislature has already provided for such pay in the fee fixed for transcribing. In our opinion the order made for such fee did not create a demand against the county authorized by law which the auditor was compelled to honor under section 4091 of the Political Code, and he was therefore justified in refusing to comply therewith.

Petition granted as to the claim for services on December 20, 1932, and denied as to the claim for December 21, 1932.

We concur: STEPHENS, P. J.; CRAIG, J.

140 Cal.App. 73

THOMPSON v. LOS ANGELES COUNTY et al.

Civ. 8448.

District Court of Appeal, Second District, Division 2, California.

July 21, 1934.

Hearing Denied by Supreme Court Sept. 18, 1934.

1. Highways ⇐203

General law requiring that claim against county for personal injuries resulting from defective highway shall be presented to board of supervisors within ninety days after accident occurred controls where county charter contains no provision for filing of such claim before bringing action (Gen. Laws 1931, Act 5149).

2. Highways ⇐203

General law requiring that claim against county for personal injuries resulting from defective highway shall be presented to board of supervisors within ninety days after accident occurred *held* to require one so injured before act took effect to file such claim, and not thereby to impair injured party's right to recover since act merely prescribes procedure for enforcement of such right (Gen. Laws 1931, Act 5149).

3. Constitutional law ⇐191

Changes in rules of procedure may be made applicable to pending actions, provided vested rights are not destroyed or obligation of contracts impaired.

4. Statutes ⇐123(4)

Act whose title recites that it relates to liability of counties and other enumerated political bodies for injuries to persons or property resulting from defective highways, and prescribes duties of officers thereof in such cases, and authorizes counties to take out liability insurance, *held* not unconstitutional because contravening constitutional provision that every act shall embrace but one subject which shall be expressed in its title (Gen. Laws 1931, Act 5149; Const. art. 4, § 24).

5. Statutes ⇐47

Act requiring that claim against county for personal injuries resulting from defective highway shall be presented to board of supervisors within ninety days after accident occurred *held* not procedurally uncertain when construed with sections of Political Code dealing with subject of claims against county, since particular provisions of act are paramount to general provisions of Code (Gen. Laws 1931, Act 5149; Pol. Code, §§ 4075–4078; Code Civ. Proc. § 1859).

6. Highways ⇐203

Act requiring that claim against county for personal injuries resulting from defective highway shall be presented to board of supervisors within ninety days after accident occurred is mandatory (Gen. Laws 1931, Act 5149).

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Etta Maude Thompson against Los Angeles County, a political subdivision of the State of California, and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

George Appell, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff filed her complaint in the superior court on March 2, 1932, claiming damages for personal injuries alleged to have occur-

red by reason of a defective condition of a portion of highway maintained by defendants. Defendant county of Los Angeles interposed a general demurrer on the ground that plaintiff had not presented a claim to the board of supervisors within ninety days after the accident occurred. The demurrer was sustained without leave to amend, and, from judgment for defendants thereupon entered, plaintiff appeals.

The accident occurred July 31, 1931, and the only claim plaintiff presented to the board of supervisors was filed with it on December 3, 1931.

The charter of Los Angeles county contains no provision for the filing of claims before suit in a case such as this. Appellant contends, therefore, that she was not required to file a claim with the board of supervisors before bringing suit.

[1] On August 14, 1931, about two weeks after the accident, an amendment to the general laws of this state took effect, being Act 5149, Deering's General Laws of 1931 (St. 1931, p. 2475), which provided in effect that such a claim for damages resulting from a dangerous or defective highway shall be presented to the clerk of the board of supervisors within ninety days after the accident occurred. Plaintiff did not file a claim in this case until more than ninety days had elapsed following the effective date of that act, and an even longer time after the happening of the accident. The provisions of the general law control as to matters on which the charter is silent (Deupree v. Payne, 197 Cal. 529, 241 P. 869; Cline v. Lewis, 175 Cal. 315, 165 P. 915), and this act must be construed and applied in connection with sections 4075 to 4078, inclusive, of the Political Code, which deal with the subject of claims against a county.

[2] Appellant urges that, since the accident occurred July 31, 1931, and the act took effect August 14, 1931, it would result in impairing her right to recover if she were required to file such a claim. She relies on Crim v. City & County of San Francisco, 152 Cal. 279, 92 P. 640, 641, in which plaintiffs sued to recover for certain damages which had accrued in part before an amendment to the charter of the city and county of San Francisco went into effect requiring the filing of a claim as a condition precedent to bringing such a suit. The court there said: "It is true that, if plaintiffs have any claim for damages not barred by the statute of limitations which accrued before the charter went into effect, they could not be deprived of such claim because the charter afterwards provided that a demand must be made within six months of the time of the occurrence of the alleged damages. *Whether it was not the duty of the appellants to have presented their claims after the charter went into effect, need not be considered,* because all of their claims occurring prior to the time when the charter went into effect were barred by the statute of limitations." The portion italicized by us makes it clear that the case cited is not authority for the position urged by appellant here. Act 5149, here in question, in its operation did not impair any right of appellant, but merely declared the procedure to be followed by her in enforcing that right.

[3] "It is a well-settled rule of law that the Legislature may change rules of procedure, or remedies, and that such changes may be made applicable to pending actions, provided, of course, that under the guise of a mere change of procedure or substitution of remedies vested rights are not destroyed or the obligation of contracts impaired." City of Los Angeles v. Oliver, 102 Cal. App. 299, 315, 283 P. 298, 305. In Rhoda v. Alameda County (Cal. App.) 26 P.(2d) 691, 695, the court quoted from Terry v. Anderson, 96 U. S. 628, 24 L. Ed. 365, as follows: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. * * * It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain." The court then declared that the Legislature may change the remedy for the enforcement of an existing right so long as the new remedy is adequate. Plaintiff here, as in that case, was required to file a claim as a condition precedent to instituting an action, and it cannot here be said that her rights have been impaired by action of the Legislature nor that such a construction of

the statute would make it retroactive, since its only effect was to prescribe the mode of enforcing the right.

[4] Appellant suggests that Act 5149 is unconstitutional in that it contravenes article 4, § 24, of the Constitution of California, which provides: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." The title of the act is as follows: "Act 5149.—An act relating to the liability in damages of municipalities, counties, cities and counties, and school districts, in the case of injuries to persons or property resulting from the defective or dangerous condition of public streets, highways, bridges, buildings, works or property; prescribing the duties of the officers thereof in such cases, and authorizing such public or quasi-public corporations to take out and pay for insurance to protect them against such liability." In Heron v. Riley, 209 Cal. 507, 510, 289 P. 160, 161, the court said: "The main object of the provision (article 4, § 24, Const. of Cal.), of course, is to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another. * * * In the accomplishment of this object, however, the constitutional provision is not to receive a narrow or technical construction, but is to be construed liberally to uphold proper legislation, all parts of which are reasonably germane. In other words, the provision was not designed as a loophole of escape from, or a means for the destruction of, legitimate legislation. * * * This being so, the authorities are legion to the effect that the title of an act need not embrace an abstract or catalogue of its contents, but need only contain a reasonable intimation of the matters under legislative consideration." Each provision of Act 5149 is logically pertinent to the subject of liability of political bodies for injury from dangerous or defective public property, and that one subject is contained in the title above set forth.

[5] Appellant's contention that the act is procedurally uncertain ignores the obvious necessity of construing and applying that act in connection with existing law as set out in Political Code, §§ 4075 to 4078, inclusive. When this is done, the particular provisions of the act being paramount to the general provisions of the Code (Code Civ. Proc. § 1859), there is neither uncertainty nor ambiguity.

[6] The provisions of Act 5149 are mandatory and not merely permissive, as urged by appellant. Plaintiff had no right to maintain her action until she had presented her claim to the board of supervisors under the provisions of that act. Mello v. County of Tulare, 99 Cal. App. 268, 278 P. 465. The implication in that act that a failure to present a claim is fatal is as plain as would have been an express declaration to that effect. Bancroft v. City of San Diego, 120 Cal. 432, 439, 52 P. 712.

The suggestion of appellant that respondent is estopped from invoking the provisions of the act in question is not supported by the record or by any authority cited.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 78

PHILLIPS et al. v. LOS ANGELES COUNTY et al.

Civ. 8657.

District Court of Appeal, Second District, Division 2, California.

July 21, 1934.

Hearing Denied by Supreme Court Sept. 18, 1934.

Highways ⇐203

Minor *held* required to file claim against county for personal injuries with board of supervisors within ninety days after accident occurred as condition precedent to action therefor, since infancy is not made an exception by statute requiring filing of such claim (Gen. Laws 1931, Act 5149, § 5, and Act 5619; Pol. Code, § 4075 et seq.; Civ. Code, § 42).

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Clara Nell Phillips, by Diva Phillips Woods, her guardian ad litem, and others against Los Angeles County, a political subdivision of the State of California, and others. From the judgment, plaintiffs appeal.

Affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Greenbaum & Goldstein, of Los Angeles, for appellants.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

SCOTT, Justice pro tem.

The questions raised on appeal in this case are identical with those presented in Thompson v. County of Los Angeles (Cal. App.) 35 P.(2d) 185, this day decided, with one exception, and by stipulation of the parties the two cases were submitted to and considered by this court on one set of briefs. The one exception is the question whether Clara Nell Phillips, a minor, appearing here by her guardian ad litem, Diva Phillips, was bound by the provision of Act 5149, Deering's Gen. Laws 1931 (St. 1931, p. 2475), and the Political Code § 4075 et seq. requiring a claimant to present her demand to the board of supervisors within ninety days after the accident occurred.

There is nothing in the provisions of the law relating to such demand which indicates an intention by the Legislature to except minors from its operation. On the contrary, section 5 of the act expressly negatives that suggestion when it provides that "wherever the words 'person' or 'public' are used in this act, such words shall be deemed to include any pupil attending the public schools of any school or high school district."

Section 42 of the Civil Code provides: "A minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same." The right of action against respondents was by virtue of statutory enactment (Act 5619, Deering's Gen. Laws), and the law-making body which created the right could properly ordain the procedure by which that right was to be enforced. The solicitude of the law in protecting a minor in his contractual and other relationships is limited and not general in application. It does not protect him against civil liability for a wrong done by him (Civ. Code, § 41), nor preclude the defense of contributory negligence in an action brought by him for damages for another's negligence. By way of further example, "a minor has no further time than an adult within which to take the necessary steps for the correction of errors in the proceeding or the judgment, for the statute has not made infancy an exception." Welsh v. Koch, 4 Cal. App. 571, 575, 88 P. 604, 606. The statute having not made infancy an exception in this case, the general provisions of the act must be held to apply, and the minor plaintiff therefore was required to file a claim within the time and in the same manner as an adult, as a condition precedent to bringing suit.

The views expressed in Thompson v. County of Los Angeles being determinative of this appeal as to the other questions raised, the judgment is affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

139 Cal.App. 753

In re HOOVER'S ESTATE.

HOOVER v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 9417.

District Court of Appeal, First District, Division 2, California.

July 18, 1934.

Rehearing Denied Aug. 17, 1934.

Hearing Denied by Supreme Court Sept. 13, 1934.

1. Wills ⇨432

Where contest before probate has been determined adversely, another contest after probate is prohibited (Probate Code, § 380).

2. Wills ⇨432

Contestant's dismissal of contest before probate before trial of issues does not preclude contest after probate; "contest" implying trial and final judgment, and not mere institution of contest and dismissal without trial (Probate Code, §§ 370, 371, 380).

[Ed. Note.—For other definitions of "Contest," see Words & Phrases.]

3. Wills ⇨229

Daughter could not contest codicil providing life trust for her where daughter was not cut off from substantial bequest, chief beneficiaries were not in such relation to testator as to afford opportunity to control testamentary act, testator's mental and physical condition was not such as to permit subversion of his freedom of will, and executor and attorney were not beneficiaries and were not active in procuring instrument to be executed, though dispositions by codicil were at variance with will of testator expressed over many years.

4. Wills ⇐155(1)

That will provided that party shall be attorney in matter of probate thereof did not make such party "beneficiary" under rule permitting contest of will, where chief beneficiaries are active in procuring instrument to be executed (Probate Code, §§ 370, 371, 380).

[Ed. Note.—For other definitions of "Beneficiary," see Words & Phrases.]

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Henry Hoover, also known as H. Hoover, deceased, wherein Gertrude Hoover contested a will sought to be probated by the Bank of America National Trust & Savings Association and others. From a judgment dismissing the contest, contestant appeals.

Affirmed.

Hearing denied by Supreme Court; CURTIS and PRESTON, JJ., dissenting.

Owen D. Richardson, of San Jose, for appellant.

E. M. Rea and Maurice J. Rankin, both of San Jose, for respondents.

SCHMIDT, Justice pro tem.

On April 21, 1931, the decedent, Henry Hoover, made his will. Thereafter he made codicils to such will dated respectively September 18, 1931, September 23, 1931, October 8, 1931, and October 10, 1931. In the will of April 21, Henry Hoover, after bequeathing four legacies totaling $14,000, gave the entire residue of his estate to Gertrude Hoover, his daughter and only child, the appellant herein; and appointed the Bank of America (now Bank of America National Trust & Savings Association) executor, the respondent herein. By the codicil of September 18th, he recites the execution of a deed to his daughter of date September 10, 1931, and that same was made while he was under the influence of opiates. He confirmed the gift of certain cashier's checks in lieu of bequests mentioned in the will of April 21 and reaffirmed the residuary clause of said will. The codicil of September 23d provides for his funeral expenses. The codicil of October 8th, hereafter referred to as the "trust codicil," adds legacies and sets aside or "modifies" the residuary clause of the will in favor of his daughter and creates a trust of said residue with the said Bank of America, as trustee; the "net income" of said trust to be paid to his said daughter Gertrude during her lifetime and all of the property remaining at her death to go to "my heirs then living." In this codicil he recites:

"I declare that although my daughter Gertrude Hoover in the last month has annoyed me, cursed me, threatened me that she would not bury my body in the crypt which I purchased therefor, filed an injunction suit against me and a petition to be appointed my guardian, that I am not doing this to punish her, but have come to the conclusion that on account of her character and disposition and lack of business ability that this trust is for her best interest.

"I also declare that on September 10, 1931, on account of the threats of my said daughter Gertrude Hoover I signed a deed to her of my real estate. I declare that I was under opiates at the time of signing said deed, that misrepresentations were made to me by Gertrude Hoover in regard thereto, and if I am unable before my death to file a suit to set aside said deed, I wish my executor to file such an action. If I have filed such an action, I desire my executor to proceed therewith to the end that all of said property may be included in said trust."

The last codicil, dated October 10th, confirms a deed to two nieces of decedent as to their right and interest in one piece of real estate. Henry Hoover died December 27, 1931, leaving an estate which inventories over $146,000. The Bank of America filed its petition for the probate of the aforementioned will, together with the aforementioned codicils. The daughter, Gertrude Hoover, filed her contest to the admission to probate of said documents. Before said contest came on for hearing she filed a dismissal of her contest "without prejudice." The will with the codicils was admitted to probate. Thereafter, the daughter, appellant herein, filed her petition for revocation of probate of said will and the codicils, setting forth as grounds of contest that said will and each of the codicils was the result of undue influence exercised upon the testator by one Waldo H. Lowe, an employee of said Bank of America and confidential advisor of the deceased, and one E. M. Rea, a confidant of Lowe and also attorney for the deceased.

Upon the trial of the contest contestant waived any and all objections to the will itself and to each of the codicils except the "trust codicil," dated October 8.

The contestant Gertrude Hoover testified that she was the only child of the decedent and Jennie Hoover; that Jennie Hoover died

in 1926 in Detroit, Mich.; that her father and mother accumulated all their property after they were married in 1873; that in 1900 her father, mother, and herself met, and her father then stated he would never make a will and never give any of the property away or dispose of it; that if his wife died first the property would go to his daughter. He said, "I will never make a will, I promise you, and all the estate will go to you and your mother." That she said she would care for her father and mother and care for them all her life; that in 1917 her father made deeds of his property and in 1918 made a will that he tore into fragments, which fragmentary will was offered and received in evidence, containing amongst its provisions, "I give devise and bequeath all the residue and remainder of my estate to my wife Jennie Hoover and my daughter Gertrude Hoover. I hereby confirm any and all deeds heretofore made by me in their favor." That she obtained these fragments of will from her mother, who obtained them from, "The janitor from the building in my father's office brought them and gave them to my mother." The evidence does not show whether said purported will had ever actually been executed by Henry Hoover. She further testified that on May 1, 1923, her father, her mother, and herself signed a paper purporting to be "Community Property Family Agreement between husband, wife, & daughter Henry, Jennie & Gertrude Hoover," in which Henry Hoover agreed to give all the community property accumulated since marriage in September, 1873, "to my wife Jennie Hoover, and our daughter Gertrude Hoover, which they have worked in joint efforts to help me accumulate. I hereby agree to *never* make a Will, or to will any part of the estate away * * * & this agreement dates back to eighteen hundreds, and there was an agreement again made in 1900 a verbal lifelong agreement which was legal verbally at that time to never make a Will * * * So I hereby agree to give all of my & my wife's estate of community property to my wife & daughter, and in case either is gone to go all to the other with no restrictions or orders as to their disposal * * *." That after the death of her mother her father made an holographic will on August 14, 1926, by which will he gave all the rest and residue of his estate to his said daughter Gertrude Hoover. That in 1928 her father's disease became noticeable; it was cancer of the bladder; he entered the San Jose hospital in July, 1931, remaining there until his death on December 27, 1931; she visited her father nearly every day and they were quite friendly until one day she was told by the lady in charge of the hospital office that she was not to go to her father's room without being watched and that when she then went to his room a nurse met her in the hall and watched her every minute she was in the room; that in the latter part of September she was refused admittance to her father's room; that in the last days of September, about the 20th, between 7 and 8 o'clock in the evening, she went to her father's room through the emergency entrance of the hospital, pushed the door partially open, heard some one talking to her father; that it was E. M. Rea; that she heard Mr. Rea say that she did not know how to take care of the ranches or the property and that he ought to put the estate in trust; Mr. Rea also said she was crazy. She testified that she was not insane and was not insane at that time; that Mr. Lowe was always advising her father and had advised him for many years; that her father had told her that he relied upon Mr. Lowe's advice and that Mr. Lowe and her father had a joint safe deposit box in the Bank of San Jose.

Several witnesses called by the contestant testified to statements made by the decedent over a long period of years in which he expressed his intent to leave his property to his daughter.

She also called as her witness one Laura T. Roumasset, who testified that she was the nurse who waited on Henry Hoover every day of the five months he was at the San Jose hospital; that his disease was cancer of the bladder; that during that period he was under the influence of opiates most of the time. This same witness Roumasset, upon cross-examination, testified that she had several times heard Henry Hoover discuss with his daughter the matter of a trust and that he had also discussed the trust with her; that she had heard him discuss the trust with his attorney, Mr. Rea; that "Mr. Hoover often discussed with his daughter, when she was demanding that he sign deeds to all his property and turn it over to her, he often told her he thought the only sensible thing to do was to convey all this property in trust for her, that she was absolutely not a fit manager for his business property, or ranch property, that it would be much more satisfactory if it were in a trust and she would have a regular income, 'regular salary' he always said, coming in each month." That Gertrude "opposed it very bitterly, she said the property was hers as his only child and

she objected to a trust." She further testified when the so-called trust codicil was executed that "he was very clear, perfectly rational and absolutely not under the influence of any opiates"; that "it had been in his possession several days," and that she read it over to him several times; that Rea was not present at any of the times she read it to him; that before the trust codicil was actually written "every day for many days, Mr. Hoover had indicated to you (Mr. Rea) * * * that he wished to make another codicil to his will putting everything in trust for his daughter. At that time you had persuaded him to not make up his mind as yet and in a day or two he asked you to go ahead and make that codicil, that he wanted it done. * * *" That prior to the 8th of October, the date of the execution of the trust codicil, the codicil had been with Mr. Hoover for several days; that Mr. Hoover was the one who insisted the codicil be signed; that she never heard Mr. Rea in any conversation say anything to Mr. Hoover in regard to what he should or should not do; that Mr. Hoover knew in all the transactions what he was doing; that he was "very positive, very decided in his opinion."

In connection with the testimony of Gertrude Hoover it was shown that while her father was in the hospital she had filed an injunction suit against her father; that upon the hearing of same it was decided in favor of her father; and that she had also filed a petition to be appointed guardian of her father; that no citation was served upon the father in connection with the guardianship matter.

The foregoing is the résumé of the substantial testimony. At the close of the evidence introduced by the contestant, the proponent to the will and codicils as admitted to probate moved the court for a nonsuit upon the ground of insufficiency of the evidence to prove or tend to prove material allegations of the contest, specifying amongst other things that there was not any evidence that said decedent's mind was afflicted so as to be easily influenced by those in whom he had confidence or otherwise proving or tending to prove at the time of the execution of any of the documents decedent reposed great or any trust or confidence in Waldo H. Lowe or in E. M. Rea, or that they or either of them controlled or influenced the mind or actions of the decedent whatsoever, or that they suggested or directed him how to make his will, or that they or either of them in any manner substituted their wills for the will of the decedent, or proving or tending to prove that said will and codicils and each thereof were not the free and voluntary act of the decedent, or that any of them were procured or made by the undue influence or any influence of either Lowe or Rea. The motion for nonsuit was granted, and from the judgment entered dismissing the contest this appeal is before us.

1. Respondent contends that appellant is not entitled to maintain this appeal for the reason that she first filed a contest to this codicil before its probate, which contest was upon identically the same grounds as the contest after probate involved in this appeal and in support thereof calls attention to section 380 of the Probate Code, which provides: "When a will has been admitted to probate, any interested person, *other than a party to a contest before probate* * * * may * * * after such probate, contest the same or the validity of the will." Respondent relies upon In re Estate of Smith, 214 Cal. 50, 3 P.(2d) 921, and particularly upon the language used by the District Court of Appeal, 295 P. 75, 78, as follows, after referring to section 1327, Code of Civil Procedure (now section 380, Probate Code): "The contestants above mentioned would seem to be expressly excepted by such section from the right to contest after probate, particularly in view of the fact that their contest before probate of the same will on the same grounds was determined adversely to them."

[1, 2] Without question where the contest before probate has been "determined adversely" it is the intent of section 380 Probate Code to prevent another contest after probate. However, where, like in the case at bar, the contest before probate has been dismissed by the contestant before any trial of the issues of the contest as provided by section 371, Probate Code, it does not preclude a contest after probate under the aforementioned section 380 of the Probate Code.

Section 370 of the Probate Code provides for the contest before probate and section 371 provides how the issues of such contest shall be tried. When the contest is dismissed before trial of the issues there ceases to be a contest; in other words, there has not been a determination of the issues. A "contest" implies a trial and final judgment. The mere institution of a contest and dismissal without a trial is not a contest. Wait v. Westfall, 161 Ind. 648, 68 N. E. 271; McCahan's Estate, 221 Pa. 186, 70 A. 711. The provisions of section

380, Probate Code, are intended merely as a prohibition against two successive trials of the same issues.

[3, 4] 2. Appellant in his opening brief states "that our entire attack herein is directed at the trust codicil of October 8, 1931, which cuts down the disposition to Gertrude to the net income of his property during her life with remainder to 'my heirs then living' at her death," and contends that the motion for a nonsuit was erroneously granted by the trial court because "the evidence adduced by the contestant showed the presence of the indicia of undue influence so ably summed up in the opinion of" the Supreme Court in Re Estate of Yale, 214 Cal. 115, at page 122, 4 P.(2d) 153.

The indicia set forth in Re Estate of Yale are: (a) The provisions of the will were unnatural; it cut off from any substantial bequest the natural objects of the decedent's bounty. (b) The dispositions of the will were at variance with the intentions of the decedent expressed both before and after its execution. (c) The relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control the testamentary act. (d) The decedent's mental and physical condition was such as to permit a subversion of his freedom of will. (e) The chief beneficiaries under the will were active in procuring the instrument to be executed and in addition a confidential relationship existed between at least one of the chief beneficiaries and the decedent.

(a) The facts in the case at bar do not show that the only child, the daughter Gertrude, was cut off from any substantial bequest. On the other hand, the trust codicil attacked gives the entire net income of the residue of his estate to her for her life.

(b) The dispositions of the trust codicil, like the will in the Yale Case, were at variance with the will of the decedent expressed over many years of his life.

(c) The chief beneficiaries, other than appellant, were not in such a relation to the decedent to afford them any opportunity to control the testamentary act. Appellant claims, however, that the relations between the decedent and the Bank of America, particularly his relations with Mr. Lowe of that bank as well as the relations between the decedent and his attorney E. M. Rea, afforded an opportunity to control the testamentary act. There is a marked difference between being afforded an opportunity to control a testamentary act and actually exercising any control whatsoever. As far as the record in this case goes there is not any evidence whatsoever that either Mr. Lowe or Mr. Rea in any manner whatsoever influenced or dictated to the decedent what provisions should be written into the so-called trust codicil. It is true the record shows that Mr. Rea was the attorney who drew the will but the record is entirely absent of any activity on his part of the slightest attempt to influence the mind of the decedent.

(d) The decedent's mental and physical condition was not such as to permit a subversion of his freedom of will. It is true that the testator was physically diseased by a mortal illness. There is not any evidence of any mental weakness, except at times when he was under the effects of opiates. The evidence shows that at the execution of the codicil he was entirely free from any effects of the opiates.

Item (e) in the Yale matter is entirely lacking as neither Lowe nor Rea were beneficiaries under the will and further, neither were active in procuring the instrument to be executed. The fact that the will provides that Rea shall be the attorney in the matter of the probate thereof does not make him a beneficiary. It has been held that an executor is not a beneficiary. (In re Estate of Haupt, 200 Cal. 147, 252 P. 597), and that an executor is not bound to employ the counsel named by the testator. In re Estate of Ogier, 101 Cal. 381, 35 P. 900, 40 Am. St. Rep. 61; Highfield v. Bozio, 188 Cal. 727, 207 P. 242.

As to the last item, appellant urges that "there was a trust relation between the decedent, the Bank's employee Lowe, and the attorney Rea." Assuming that such trust relation did exist as between the decedent and each of the persons mentioned, there is not a scintilla of evidence that shows that either of said persons violated their respective trusts in the slightest.

From the record in this case we are satisfied that the motion for nonsuit was properly granted.

Judgment affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

130 Cal.App. 762

In re HOOVER'S ESTATE.

HOOVER v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 9418.

District Court of Appeal, First District, Division 2, California.

July 18, 1934.

1. Executors and administrators ⇐234

That executor's first annual report specifically mentioned that attorney's claim was presented for approval could not be treated as "first reported as an allowed and approved claim" so as to constitute such claim an acknowledged debt of estate to be paid in course of administration, where claim was not a charge of administration for services rendered estate, but claim for services rendered to decedent prior to his death (Probate Code, § 713).

2. Executors and administrators ⇐251

Probate court order directing executor to pay claim of attorney for services rendered to decedent, without awaiting trial by jury as demanded by contestant, *held* error (Probate Code, §§ 711, 713, 928).

Appeal from Superior Court, Santa Clara County; Maxwell McNutt, Judge.

In the matter of the estate of Henry Hoover, also known as H. Hoover, deceased, wherein Gertrude Hoover contested the allowance of a claim as requested by the Bank of America National Trust & Savings Association, executor of the last will and testament of Henry Hoover, deceased. From an order, contestant appeals.

Affirmed in part, and reversed in part.

Owen D. Richardson, of San Jose, for appellant.

E. M. Rea and Maurice J. Rankin, both of San Jose, for respondent.

SCHMIDT, Justice pro tem.

In the above estate the executor Bank of America National Trust & Savings Association filed in the lower court its first account as such executor. In said first account, after setting forth the receipts and disbursements, there was set forth, among other matters:

"That there has also been presented against said estate the claim of E. M. Rea for the sum of $6,429.60, which claim has not been approved.

"Your petitioner requests that the court * * * determine the propriety of said claim of said E. M. Rea and to make an order relative to the allowance and payment of same."

To this first account Gertrude Hoover, a daughter of decedent and a devisee and legatee under his will, filed her written exceptions and contest, setting forth as to the aforementioned item of Rea "that said proposed expense is excessive, unreasonable and not authorized by law." The said claim of Rea was chiefly for attorney's fees and partially for moneys expended for the decedent. The day following the filing of the written exceptions there was filed a demand for trial by jury, the essential part of which is "* * * and demands that the trial of the issues of fact presented by the contest be tried by a jury." In addition to the particular exception involved herein, twenty-six other exceptions to the first account were set forth in the aforementioned written exceptions, but the appeal herein involves only the aforementioned claim of Rea.

On the hearing, in so far as it related to the Rea item, the court took testimony and after hearing same denied the exceptions and allowed the claim. After the court had allowed certain items presented, including the aforementioned claim of Rea, counsel for contestant, addressing the court, stated: "Now we renew our request for a jury trial as to all items which have been allowed this afternoon." And after some discussion the following took place:

"Mr. Richardson: Now we offer, if your Honor please, to proceed with the trial as to all the claims the court has allowed this afternoon and all claims heretofore allowed, we demand a jury.

"The Court: Well to the extent you are entitled to a jury trial of course I have no discretion.

"Mr. Richardson: Will it be continued to the next calendar?

"The Court: These are allowed. I have nothing to do with the demands for jury trial. You have to file your demand under the Code of Civil Procedure.

"Mr. Richardson: It has been filed. I think I am entitled to a jury trial on the items passed on this afternoon because I think the court's action simply amounts to the allowance of the claims after an ex parte hearing. * * * I don't want to be estopped for my demand for jury.

"The Court: I couldn't estop you. I wouldn't if I could.

"Mr. Richardson: I know you couldn't, your Honor. * * * What is the court's order, that the account is settled?

"The Court: The court's order is the account is settled and allowed as filed.

"Mr. Richardson: We except to your Honor's ruling in allowing the account, and renew our request for a jury trial in default of the allowed claims."

The aforementioned hearing on the claim took place on the 26th day of May, 1933. The transcript shows that the "order settling first account of executor and approving claims and directing payment of same" was dated the same date, to wit, May 26, was indorsed filed June 2, 1933, and entered June 3, 1933. Said written order, after relating the fact that witnesses were sworn and examined relative to the claim of E. M. Rea, and the matter submitted to the court for its decision, sets forth: "Now find that said claim of E. M. Rea for the sum of $6,429.60 is a proper charge against said estate and should be and is hereby allowed, and the said executor is directed to pay same from said estate. * * * Now, therefore, it is hereby ordered, adjudged and decreed that the claim of E. M. Rea for the sum of $6429.60 is a proper and valid claim and charge against said estate and the executor thereof is hereby ordered to pay same from said estate."

The appeal herein is from the aforementioned order. Appellant contends that she was denied a jury trial of the disputed items in violation of law and that each of the four allowances for fee, constituting the claim of Rea, is excessive.

Section 711 of the Probate Code provides for the allowance of a claim by the executor and then provides: "If he allows the claim, it must be presented to the judge for approval, who must in the same manner indorse upon it his approval or rejection, and, if approved, it must be filed with the clerk within thirty days thereafter." Section 713 of the Probate Code provides: "Every claim allowed by the executor * * * and approved by the judge shall be ranked among the acknowledged debts of the estate, to be paid in due course of administration; but the validity thereof may be contested by any person in interest, at any time prior to the settlement of the account of the executor * * * in which it is first reported as an allowed and approved claim. * * *" Section 928, Probate Code, provides: "Whenever an allowed claim is contested by any person entitled to contest it, either the contestant or the claimant is entitled to a trial by jury of the issues of fact presented by the contest, unless a jury is waived as provided by the Code of Civil Procedure with regard to civil actions; and the court shall call the jury and submit such issues to them, and after receiving their verdict, enter an order disposing of the contest in accordance therewith."

[1] From the foregoing facts it will be noted that the trial court not only approved the claim of Rea but ordered same paid. The order directing the executor to pay same in this case was done in direct violation of the statute. Can the fact that in the first annual report it is specifically mentioned this claim of Rea is one presented for approval, be treated as "first reported as an allowed and approved claim" under section 713, Probate Code? We think not. This was not a charge of administration for services rendered the estate, but a claim for services rendered to decedent prior to his death. Had the claim been presented to the decedent while alive and had he refused to pay same because he believed (as contestant stated in her objection), "that said expense is excessive, unreasonable and not authorized by law," and thereby had forced Rea to sue for his fees, would not decedent in his lifetime as a matter of right been entitled, if he so chose, to a trial by jury?

[2] Under the circumstances here presented, counsel for the contestant did all he could to indicate the desire of contestant to have the validity of the claim tried by jury. It will be noticed that the trial court, instead of having said claim await a later report or to have its validity specially tried, almost immediately made and entered its written order directing the executor "to pay same from said estate." This was error done in violation of section 713 of the Probate Code and by so doing deprived contestant of the right to a trial by jury to test the validity of the claim as provided by section 928 of the Probate Code.

The order "settling first account of executor and approving claims and directing payment of same," excepting as said order directs the executor to pay the said claim of Rea, is affirmed, and in so far as said order directed the executor to pay said claim of Rea it is reversed. Appellant will recover her costs on appeal.

We concur: NOURSE, P. J.; SPENCE, J.

140 Cal.App. 46

RUBIO et al. v. NYE & NISSEN, Inc., et al.

Civ. 9410.

District Court of Appeal, First District, Division 2, California.

July 20, 1934.

1. Appeal and error ⇐799

Where it did not appear on face of appellants' brief that respondents were entitled to dismissal or affirmance on ground that appeal was taken for delay or that unsubstantial questions were involved, respondents were required to make some showing by affidavit or otherwise than by argument on merits of judgment appealed from (Rules for Supreme Court and District Courts of Appeal, rule 5, § 3).

2. Appeal and error ⇐1127

Motion to dismiss and affirm would be denied, where motion was attempt to procure an advance on calendar of possibly meritorious appeal, which was based on grounds of excessive damages and erroneous instructions (Rules for Supreme Court and District Courts of Appeal, rule 5, § 3).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Ysabel Rubio and another against Nye & Nissen, Inc., and others. From a judgment for plaintiffs, defendants appeal, and plaintiffs move to dismiss and affirm.

Motion denied.

Charles V. Barfield, of San Francisco, for appellants.

John F. O'Sullivan, Vincent W. Hallinan, and James J. Roach, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

[1, 2] Respondents are the mother and minor brother of I. Rubio, who was killed in a collision with a truck operated by appellants. After the time for filing their brief had expired, the respondents filed a motion to dismiss and affirm under section 3 of rule V, Rules for Supreme Court and District Courts of Appeal. Accompanying their motion they filed a fifteen-page brief arguing the merits of the appeal. On the hearing of the motion they refused to submit the appeal on appellants' opening brief and, after oral argument, filed a reply brief of ten pages. Appellants' appeal rests on two general grounds—excessive damages and erroneous instructions—and to decide either point it is necessary to examine the record. When it does not appear on the face of the appellants' brief that section 3 of the rule applies, the respondent must make some showing by affidavit or otherwise than by argument on the merits of the judgment appealed from. Here the motion is plainly an attempt on the part of the respondents to procure an advance on the calendar of a possibly meritorious appeal.

The motion is denied.

We concur: STURTEVANT, J.; SPENCE, J.

139 Cal.App. 745

TUTEN v. TOWN OF EMERYVILLE.

Civ. 9212.

District Court of Appeal, First District, Division 2, California.

July 18, 1934.

Hearing Denied by Supreme Court Sept. 13, 1934.

1. Automobiles ⇐187

Motorcycle used by town's police officer to overtake speeder *held* "authorized emergency vehicle," and town was not liable for death of pedestrian struck by such motorcycle through alleged negligence of officer in failing to comply strictly with rules of road applicable to motorists generally (St. 1931, p. 2101, § 8½).

2. Automobiles ⇐246(17)

Where motorcycle, which killed pedestrian, was being used by town's police officer to overtake speeder and only negligence charged was failure to comply strictly with general rules of road, instruction that officer must follow specific rules of road and that town was liable for any injury from negligent operation of any motor vehicle by officer within scope of employment *held* prejudicially erroneous (St. 1931, p. 2101, § 8½).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Elvina Tuten against the Town of Emeryville. Judgment for plaintiff, and defendant appeals.

Reversed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

L. R. Weinmann and George La Coste, City Atty., both of Oakland, and Redman, Alexander & Bacon, and Herbert Chamberlin, all of San Francisco, for appellant.

William H. Hollander and I. Richard Gladstein, both of Oakland, for respondent.

NOURSE, Presiding Justice.

In a trial before a jury the plaintiff had a verdict for $9,600 damages for the death of her husband. The facts are not disputed in so far as they relate to the issues raised on this appeal. Plaintiff's husband was struck by a motorcycle operated by one Hoy, a member of the Emeryville police department. The complaint alleged and the answer admitted that Hoy was then acting within the course and scope of his employment. The undisputed evidence is that he was endeavoring to overtake a "speeder." When Tuten and a companion prepared to cross the street the companion saw the "speeder" and heard and saw the motorcycle following it. He crossed in front of the "speeder," but Tuten waited until it had passed and then attempted to cross. The motorcycle collided with him near the middle of the street; Hoy was killed, and Tuten received such injuries that he died soon after.

[1] From the pleadings and the evidence the conclusion necessarily follows that the injuries arose out of the operation of an "authorized emergency vehicle" as defined in section 8½ of the California Vehicle Act (St. 1923, p. 517, § 8½, as added by St. 1929, p. 509, as amended by St. 1931, p. 2101), and that the city is not liable under the evidence presented within the rule of Armas v. City of Oakland (Cal. App.) 27 P.(2d) 666 and (Cal. App.) 28 P.(2d) 422. It should be said that this cause was tried before the Armas decision appeared and this accounts for the rulings of the trial court which assumed throughout the proceedings that a city was liable for any injury arising from any negligent operation of one of its motor vehicles irrespective of the emergency and without regard to the question whether the alleged negligence of the employee was actionable.

[2] Consistently with this theory the trial court instructed the jury that the city was liable for any injury sustained "as the result of the negligent operation of any motor vehicle by any officer * * * while acting within the scope of his agency or employment." Following instructions that it was admitted in this case that Officer Hoy was acting within the course and scope of his employment when the collision occurred, the jury was further instructed that the officer was bound to follow specific rules of the road while in the performance of his duties. These instructions are not in harmony with the rule of Balthasar v. Pacific Electric Railway Co., 187 Cal. 302, 308, 202 P. 37, 19 A. L. R. 452, and Armas v. City of Oakland (Cal. App.) 28 P.(2d) 422. Inasmuch as the only negligence charged to Officer Hoy was his failure to comply strictly with rules of the road applicable to motorists generally the prejudice of these instructions is apparent.

For these reasons the judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

140 Cal.App. 162

PEOPLE v. BECKER.

Cr. 2553.

District Court of Appeal, Second District, Division 2, California.

July 25, 1934.

Hearing Denied by Supreme Court Aug. 23, 1934.

1. Criminal law ⇐507½

In prosecution for commission of immoral acts against 11 year old child, complaining witness *held* not an "accomplice" so as to require corroboration to sustain conviction, in absence of clear proof of his knowledge of wrongfulness of acts (Pen. Code, §§ 26, 286, 288, 288a, 1111).

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

2. Indictment and information ⇐176

In prosecution for commission of immoral acts against child, variance of several weeks prior to dates alleged *held* not material, where proof showed accused was not misled nor twice put in jeopardy (Pen. Code, §§ 286, 288, 288a).

3. Criminal law ⇐772(4)

Instruction that it was immaterial when offense charged in any particular count was committed, provided jury believed that precise offense charged in that particular count was committed and committed within three years prior to filing information, *held* not erroneous as misleading, where testimony offered concerned only the five acts alleged (Pen. Code, §§ 286, 288, 288a).

4. Criminal law ⇐829(16)

Refusal of instruction cautioning jury to weigh and consider testimony of complain-

ing witness with care *held* not prejudicial in view of other instructions unmistakably directing jurors to critically and dispassionately appraise testimony of all witnesses.

5. Criminal law ⇐1169(4)

Contradictions and inconsistencies in testimony alone will not constitute inherent improbability requiring reversal of judgment obtained on such testimony, and it is not sufficient that testimony may disclose circumstances which are unusual.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Max Becker was convicted of violations of Pen. Code, §§ 286, 288, and 288a, and he appeals.

Affirmed.

S. Ward Sullivan, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted of three counts of violation of section 288a, one count violation of section 286, and one count violation of section 288 of the Penal Code. The alleged acts took place between defendant and the complaining witness, a boy of 11 years, in the store of defendant where the latter was engaged in the malt and liquor business.

[1] Appellant contends that the evidence is insufficient to support the verdict, especially by reason of the fact that the complaining witness was an accomplice and corroboration as required by Penal Code § 1111 was lacking. A child under the age of 14, in the absence of clear proof that he knew its wrongfulness at the time of committing the act charged against him, is deemed incapable of committing crime. Pen. Code, § 26. No case has been brought to our attention in which a child of 11 years has been held to be an accomplice in the commission of such an offense. It is doubtful whether it could be said in any case that a child of tender years could so far understand the nature and effect of acts such as those charged against appellant here as to know of their wrongfulness. A child may know that certain acts are forbidden and that, if he commits them, he will be punished, without being conscious that they are wrongful within the meaning obviously intended by the Code. From the evidence in this case it cannot be said that there was the clear proof of knowledge of the wrongfulness of the acts which the law would require before the complaining witness could be held to be an accomplice. People v. Camp, 26 Cal. App. 385, 147 P. 95; People v. Kanngiesser, 44 Cal. App. 345, 186 P. 388; People v. Dong Pok Yip, 164 Cal. 143, 127 P. 1031.

[2, 3] The testimony shows that the felonious acts were committed, and specific acts were proved, several weeks prior to the dates alleged in the information. In these circumstances the variance as to dates would not be material unless defendant is misled in making his defense or placed in danger of being twice in jeopardy (People v. Harrington, 92 Cal. App. 245, 267 P. 942); and, taking into consideration the proof in this case, it appears that there was not such a material variance. In this connection the trial court properly gave the following instruction: "It is wholly immaterial on what day or night the offense charged in any particular count of the information was committed, provided you believe from the evidence that the precise offense charged in that particular count of the information was committed and that the same was committed within three years prior to the filing of the information in this case." Appellant complains of this instruction as prejudicially erroneous under the case of People v. Elgar, 36 Cal. App. 114, 171 P. 697. Both the facts and the instruction given in that case were different than in this case. Except for count No. 6, which was dismissed, there were five acts charged in the information here. Testimony was offered concerning only these five acts, and the jury returned its verdict convicting defendant of the commission of all of them. There is nothing to indicate that the jurors were misled or confused by the above instruction or that it was in any way erroneous under the facts. Where one act is charged and many acts are proved, the jury must clearly understand that the act charged is the one concerning which all twelve jurors must agree, and must be satisfied beyond a reasonable doubt that the defendant is guilty of that very act, or they must acquit him. People v. Elgar, supra. Where one act is charged and only one is proved, the exact date of the offense is ordinarily not material if within the period limited by law. People v. Singh, 62 Cal. App. 450, 217 P. 121. Where five acts are charged and five are proved, an instruction such as that given here is obviously correct. People v. Wyett, 49 Cal. App. 289, 193 P. 153.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[4] The court refused to give an instruction offered by appellant cautioning the jury to weigh and consider the testimony of the complaining witness with care. Similar cautionary instructions have been held to be proper (People v. Vaughan, 131 Cal. App. 265, 21 P.(2d) 438; People v. Scott, 24 Cal. App. 440, 141 P. 945), but in the instant case, even though the jurors were not thus cautioned, we must assume that they understood and applied the other instructions, which unmistakably directed them to critically and dispassionately appraise the testimony of all witnesses, and defendant could not have been prejudiced by the refusal of the requested instruction.

[5] Appellant urges that the testimony of the complaining witness is so inherently improbable in essential features as to render it valueless. Notwithstanding contradictions and inconsistencies, it cannot be said that the latter's testimony "is so obviously and so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment"; and this must "plainly appear before the reviewing court should assume the functions of the trial jury." People v. Antunez, 28 Cal. App. 740, 742, 153 P. 963, 964. "Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability" (People v. Amadio, 25 Cal. App. 729, 145 P. 151, 152), and "it is not sufficient that the testimony may disclose circumstances which are unusual" (People v. Collier, 111 Cal. App. 215, 226, 295 P. 898, 902). "It is the peculiar and exclusive province of the jury to decide upon the credibility of witnesses; and although impeaching evidence, in the nature of contradictions or otherwise, has been received, it is still not only the right but the duty of the jury to determine to what extent they will believe or disbelieve the testimony of the witness thus assailed." People v. Raich, 26 Cal. App. 286, 146 P. 907, 908. From an examination of the entire testimony of the complaining witness and a consideration of it in connection with the testimony of other witnesses, it does not appear that it is so inherently improbable as to require or justify a reversal by this court; and it cannot be said that, viewing the case as a whole, an injustice has been done. Appellant's motion for a new trial was properly denied.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

DANIEL et al. v. JONES et al.

Civ. 8965.

District Court of Appeal, Second District, Division 2, California.

July 24, 1934.

Rehearing Denied Aug. 23, 1934.

Hearing Denied by Supreme Court Sept. 19, 1934.

1. Automobiles ⇨247

Where statute limited recovery against owner of truck for death resulting from negligence of driver to $5,000 and required joinder of driver, if action were based on imputed negligence, and court had instructed jury as to the limitation, verdict in excess of $5,000 was considered based on theory of respondeat superior, and amended complaint was not defective for failure to join driver, especially where judgment against driver under original complaint had become final (Civ. Code, § 1714¼).

2. Automobiles ⇨247

Where, in action for death resulting from collision of corporation's truck with deceased's automobile, jury returned higher verdict against corporation than against driver, judgment against corporation was reduced to conform to judgment against driver, since there could be but one verdict for single sum against driver and employer, and liability of employer arose solely from detriment caused by driver.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Frances H. Daniel, as administratrix, etc., and others, against Howard A. Jones and Sunset Motors, Limited. Judgment for plaintiffs as against Howard A. Jones, and a nonsuit as to Sunset Motors, Limited. Upon an amended and supplemental complaint against Sunset Motors, Limited, only, verdict was for plaintiffs, and, from an order granting a motion for a new trial, plaintiffs appeal.

Order reversed, and judgments modified.

Hearing denied by Supreme Court; SHENK and SPENCE, JJ., dissenting.

Carpenter, Babson & Fendler, Ingle Carpenter, A. H. Blum, and Harold A. Fendler, all of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Erle P. Daniel and his wife, Helen Vera Daniel, were killed in an automobile colli-

sion on June 14, 1931. Their car was struck by a car owned by defendant corporation and driven by defendant Jones. Plaintiffs sued to recover damages for the death of their father. At the first trial a motion for nonsuit was granted as to defendant corporation and judgment for plaintiffs was entered upon a verdict awarding damages against defendant Jones only to Frances H. Daniel, as administratrix, in the sum of $3,000 and to the other plaintiffs as heirs in the sum of $12,000. Thereafter plaintiffs filed an amended and supplemental complaint against defendant corporation only. The jury returned a verdict in favor of the administratrix in the sum of $15,000, which was reduced by the court to $3,341.50, as prayed for in the complaint, and another verdict for plaintiffs as heirs in the sum of $15,000. Defendant corporation made a motion for a new trial which was granted on grounds other than the insufficiency of the evidence. From the order granting such motion, plaintiffs appeal.

In support of the court's ruling granting its motion for a new trial respondent contends that the court gave erroneous instructions to the jury with reference to the liability of the corporation for the acts of the driver of the car under section 1714¼ of the Civil Code and under the doctrine of respondeat superior. From a reading of the court's entire charge it does not appear that the jury could have been confused or misled, notwithstanding certain inadvertent statements which it included.

Respondent contends that the trial court erred in permitting appellants to declare that they were questioning defendant corporation's local manager under section 2055 of the Code of Civil Procedure after they had already asked him some questions, but this contention is without substantial merit. It is further urged that, although the motion was not granted on the insufficiency of the evidence, the evidence, as a matter of law, is insufficient to justify or sustain the verdict. The record of the testimony does not support this suggestion.

[1] The question is presented as to whether the amended complaint was defective in failing to name the driver, Jones, as a party defendant, as required by Civil Code, § 1714¼. It is obvious that the jury returned its verdict for plaintiffs under the doctrine of respondeat superior, since the amount of damages exceeded $5,000, and that was the limit beyond which they could not go under the court's instructions if they allowed recovery only under the section cited. At the time the amended complaint was filed, judgment against defendant Jones had become final, and it would have been a useless act to have named him in the further pleadings. Cole v. Roebling Const. Co., 156 Cal. 443, 105 P. 255.

[2] The court erred in granting the motion for a new trial. Since there can be but one verdict for a single sum against the driver and his employer (Marriott v. Williams, 152 Cal. 705, 93 P. 875, 125 Am. St. Rep. 87), and since the liability of the latter arises solely by reason of the detriment caused by the former, the judgments against defendant corporation will be reduced to conform to the judgments against defendant Jones, to wit, $3,000 in favor of plaintiff Daniel as administratrix and $12,000 in favor of plaintiffs as heirs.

The order granting a new trial is reversed, and the judgments are modified accordingly.

We concur: STEPHENS, P. J.; CRAIG, J.

140 Cal.App. 743

June Harding LUSCHER, as Administratrix, etc., et al., Plaintiffs and Appellants, v. Howard A. JONES, Defendant, Sunset Motors, Ltd. (a Corporation), Defendant and Respondent.

Civ. 8966.

District Court of Appeal, Second District, Division 2, California.

July 24, 1934.

Hearing Denied by Supreme Court Sept. 19, 1934.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Hearing denied by Supreme Court; SHENK and SPENCE, JJ., dissenting.

Carpenter, Babson & Fendler, Ingle Carpenter, A. H. Blum, and Harold A. Fendler, all of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent

SCOTT, Justice pro tem.

This case was tried with the case of Daniel v. Jones (Cal. App.) 35 P.(2d) 198, this day decided, and the two were submitted to this court on one set of briefs.

Plaintiff is the daughter of Helen Vera Daniel, who was killed in the same accident with Erle P. Daniel, her husband. This action is brought to recover damages for the death of plaintiff's mother. The original complaint was by plaintiff against defendant

Jones and defendant corporation, but a nonsuit having been granted as to the corporation, a verdict for $3,000 was returned against Jones, and judgment entered thereon. Thereafter plaintiff, both as administratrix of her mother's estate and individually, filed an amended and supplemental complaint against defendant corporation only. Upon trial of the case the jury returned a verdict for plaintiff individually for $3,000 and for her as administratrix for $1,125. Defendant corporation made a motion for new trial which was granted on grounds other than the insufficiency of the evidence. From the order granting such motion plaintiff appeals.

Our views on the points urged by respondent as to erroneous instructions, improper rulings and legally insufficient evidence are identical to those in Daniel v. Jones. As to the failure to join Jones as party defendant in the amended complaint, we must assume that the views of the jury as to the bases for the corporation's liability were the same here as in the other case it was trying, and the failure to join the defendant driver would be immaterial.

The order granting a new trial is reversed and the judgment is reduced to conform to the earlier judgment entered against the defendant Jones, to wit, to the sum of $3,000 in favor of plaintiff individually and nothing as administratrix.

We concur: STEPHENS, P. J.; CRAIG, J.

140 Cal.App. 188

ACKLES v. LANE (two cases).

Civ. 8488, 8489.

District Court of Appeal, Second District, Division 2, California.

July 26, 1934.

1. Negligence ⇐141(7)

Instruction that in emergency person is not required to exercise that presence of mind and carefulness that is required of careful man under ordinary circumstances, and that reasonableness of his effort to escape injury after discovery of danger is question for jury in view of all circumstances, *held* improper in failing to state that emergency must have arisen without negligence of person referred to.

2. Appeal and error ⇐1066
Automobiles ⇐246(58)

In action by passengers of automobile injured in automobile collision, instruction on degree of care required of plaintiffs in acting in emergency to avoid injury *held* improperly given, where there was no issue as to plaintiffs' contributory negligence but harmless under testimony.

3. Automobiles ⇐246(26)

Instruction that motorist was negligent if he made right turn without signaling to automobile approaching from rear *held* not error (St. 1925, p. 413, § 130 (a).

4. Trial ⇐256(13)

In absence of request for clearer instruction as to damages, giving of instruction correctly stating law but not clearly segregating items of damages allowable *held* not error.

5. Trial ⇐260(8)

Where instruction in personal injury action stated all elements of law essential to case, refusal of defendant's requested instruction that, if plaintiffs were injured solely through negligence of driver of automobile in which they were riding, they could not recover against driver of automobile with which they collided, *held* not error.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Two actions by Rose Ackles and by Albert Ackles, against Charles N. Lane. Judgments for plaintiffs, and defendant appeals.

Affirmed.

Armand H. Blum, of Los Angeles, for appellant.

Paul R. Hutchinson and Hugh M. Bole, both of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiffs in these two cases, husband and wife, recovered judgment against defendant for damages incurred when the latter's car was involved in an accident with a car in which plaintiffs were riding as guests. Albert Ackles sought personal damages for his own injuries, special damages for his wife's expenses, and general damages for loss of her services. Rose Ackles asked general damages for personal injuries. The cases were tried together and plaintiffs recovered judgment.

The testimony shows that defendant was turning to the right off the highway into his residence when the car occupied by plaintiffs collided with that driven by him. Appellant does not contend that the evidence is insufficient to support the verdicts or that any negligence of the driver of the car in which respondents were riding as guests would be imputed to them. Instructions given and refused are the sole points urged on appeal.

[1, 2] The court instructed the jury: "You are instructed that in an emergency a person in great peril of doing injury or of being injured, where immediate action is necessary to avoid it, is not required to exercise all of that presence of mind and carefulness that are justly required of a careful and prudent man under ordinary circumstances, and the reasonableness of his effort to escape injury after the discovery of the danger is a question for you to determine in view of all the circumstances." The instruction failed to include the necessary element to the effect that the emergency must have arisen without negligence on the part of the person referred to, and it therefore did not correctly state the law. Since respondents were not driving the car in which they were riding, and no question as to contributory negligence arose, no such emergency was presented as to them. The instruction was inapplicable and should have been omitted. Under the testimony, however, it does not appear that it could have misled the jury.

[3] Section 130, subd. (a), California Vehicle Act (St. 1923, p. 558, § 130 (a), as amended by St. 1925, p. 413), relating to arm signals, was read to the jury and they were then told: "I instruct you that it was the duty of the defendant to see if there was any car back of him that might be affected by his turn and if there was to make a signal plainly visible to such car in the manner provided by the state Motor Vehicle Act, and the failure so to warn such car would constitute negligence on the part of the defendant. I further instruct you that if you believe that the defendant Lane complied with the above rule of law and used such care as an ordinarily prudent person would have used under ordinary or similar circumstances, then I instruct you that the defendant Lane was not negligent and your verdict must be in favor of the said defendant Lane." Appellant contends that the above instructions were prejudicially erroneous, but it would seem that they merely paraphrased part of the vehicle act which had been read to the jury and added a paragraph on the general question of liability, and that they would have been construed by the jury in the light of the provisions of the vehicle act just read to it.

[4] The court gave the jury an instruction on the question of the amount of damages, if any were to be allowed, which is objected to by appellant, not because it is an incorrect statement of law as to what damages are allowable, but because it did not clearly segregate the items allowable to each plaintiff. Having had the issues defined and the evidence presented as to each respective plaintiff, there is nothing to indicate that the jury failed to properly consider and apply the law as set out in the instruction. Appellant failed to request the trial court to give any instruction which might clarify the question of damages. He does not contend that there is anything in the jury's award, in the light of the testimony, which would suggest that the jurors misunderstood or misapplied the instructions on this point. On this appeal appellant concedes that the instruction complained of is not of sufficient importance to be prejudicially erroneous, standing alone, but urges that it accentuated the prejudicial effect of the other instructions complained of.

[5] Appellant further asserts that the court erred in refusing to give an instruction offered by him to the effect that the driver of the car in which plaintiffs were riding was bound to anticipate and look out for other automobiles and keep his car under control, and that if he failed to do so and such negligence was the sole cause of the accident the verdict should be for defendant. Upon reading and analyzing the court's entire instructions to the jury, it does not appear that the jurors could have been misled or confused, or that any element of law essential to the case was omitted or misstated. We may reasonably assume that the jurors heeded the court's admonition, given at the outset, that they were not to select a single instruction or a portion of one, but were to consider them all, and that on doing so they understood and applied the legal principles which the instructions set forth.

Judgments affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

140 Cal.App. 125

PEOPLE v. GROVES.

Cr. 269.

District Court of Appeal, Fourth District, California.

July 23, 1934.

1. Homicide ⇐244(1)

Evidence that defendant was aggressor and used unnecessary force sustained manslaughter conviction as against plea of self-defense.

2. Criminal law ⇐761(7)

In manslaughter prosecution, instruction concerning question whether death was accelerated by unlawful violence *held* not objectionable as assuming unlawful violence by defendant.

3. Criminal law ⇐761(7)

In manslaughter prosecution, general abstract instruction on self-defense *held* not objectionable as assuming unlawful violence.

4. Homicide ⇐300(1)

In manslaughter prosecution where defendant claimed excusable homicide and possibly also justifiable homicide, court properly gave full instructions on self-defense.

5. Homicide ⇐340(2)

In manslaughter prosecution where defendant claimed excusable homicide and offered some evidence that he feared deceased, error, if any, in giving possibly unnecessary instruction on justifiable homicide *held* harmless.

6. Homicide ⇐338(3)

In manslaughter prosecution, error, if any, in admitting motorist's license ostensibly showing deceased's weight over one year before death *held* harmless; there being ample other evidence regarding deceased's weight.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Wallace Lee Groves was convicted of manslaughter, and he appeals.

Affirmed.

Smith & Perkins, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was convicted of the crime of manslaughter, and has appealed from the judgment and from an order denying a motion for a new trial.

[1] One Crawford Clark, who was the manager of a collection agency at Brawley, had a claim against the appellant, which was, in part, disputed by him. Clark had been trying to locate the appellant's automobile, and about 5:30 o'clock on the evening of February 14, 1934, on one of the main street corners in Brawley, one Palmquist told the appellant that Clark was looking for his car. While they were talking, they saw Clark coming down the street, and Palmquist left. The appellant testified that, when he saw Clark, he said to Palmquist, "There he is, I will see him;" that he then walked up to Clark and Clark asked him about the bill; that he told Clark he did not owe it all, but was intending to pay it; that Clark replied, "You owe it all, all right, you just don't want to pay it;" that Clark then asked him where his automobile was; that he told him, and then called him a son of a bitch, and further said, "It is time you were leaving me alone;" that Clark thereupon struck at him with his right hand; that he knocked Clark's blow off; that Clark kept coming; that "we had three or four licks"; that Clark clutched him; and that "while he had his hands up there he had his head out and I hit him three or four times as hard as I could." He further testified that as he jerked loose "I hit him and knocked him over against the bank building and down he went," and that "I saw he was out when he hit the window."

A merchants' patrolman testified that he was across the street when his attention was called to the trouble; that when he looked he saw the deceased lying on the sidewalk with the appellant standing beside him; that after he looked he saw the appellant strike the deceased twice and, he thought, a third time. Another witness testified that, after he saw the officer run across the street he saw a man lying on the sidewalk, that he started to run up that way, and that just before he got there the appellant "was leaning over him and made two passes or strikes at him about the face." Another witness testified: "I was walking along and I walked up down to the bank and I saw that man laying down on the ground and I saw the other man hit him in his face with his feet." One of appellant's witnesses testified: "Well, I was just walking along there and all at once I seen a couple of parties starting to fight, at least this big heavy-set fellow, the

one with the glasses on, he made a pass at Groves. At the time I didn't know Groves. I had never met Groves until the first inquest that they had there, and they kind of had a little struggle and they were fighting there and I seen Mr. Clark make a pass at Mr. Groves and didn't hit him. He didn't hit him and he kept coming toward Mr. Groves and Mr. Groves whaled him one and hit him in the mouth and he went against the bank and the right side of his head hit the bank wall and he went right on down." Another witness for the appellant testified:

"There were only two blows I could see and that was one struck by each one of the two, the short man struck at the tall man and missed him and the other one hit him and knocked him down.

"Q. You said the first thing that attracted your attention was an officer trying to arrest him? A. Well, it looked like it from where I was standing. The shortest man seemed to be walking over to him or grabbing for him or trying to get him to come back, that's the reason I didn't think it was a fight when I first saw it."

There is evidence that the appellant was much taller than the deceased, that the appellant weighed 170 pounds and that the deceased weighed about 135 or 140 pounds. A doctor was called almost immediately, but when he arrived Clark was dead. The doctor testified that the deceased died as a result of a fractured skull, and an undertaker gave the following testimony with respect to marks on the body: "The lower lip was cut on the right side of the face, quite a piece cut out, you might say, and there was a long mark of some kind over the left eye, across the forehead, running diagonally like across the forehead, and two light ones on the right ear. There were several marks about three inches, two and a half to three inches long around the left ear, and quite a bruised place in the temple over the left eye." He further testified that these marks "didn't look like they were made with a man's fist." Another undertaker testified as follows: "There were abrasions and lacerations on both sides of his head and across his forehead. The lower lip on the right side was cut and a chunk was taken out that you could lay your small finger in. Especially on the temple on the left side of his head he had cuts and bruises." In response to a question by the court, he further testified that these marks "had the appearance of nails."

The appellant contends that the evidence is not sufficient to support the verdict; it being argued that it conclusively appears that the deceased was the aggressor; that the appellant did nothing more than protect himself from an unlawful attack; that he acted only in self-defense; that he used no more force than necessary; and that the unfortunate result was purely accidental. When asked on cross-examination why he applied the epithet to the deceased, the appellant answered, "because he had just made a remark that I owed a bill and didn't want to pay it and I thought I would show him where to head in." The evidence justifies the inference that the appellant was the real aggressor in starting this fight, that he used far more force than was necessary, and that he continued his attacks after he knew his victim had become unconscious. Without going into a technical analysis of the evidence, it is sufficient to say that the real question presented was one of fact, and the evidence supports the conclusion reached by the jury.

[2-5] The appellant complains of several instructions. It is argued that two of the instructions given assumed "unlawful violence" on the part of the appellant and in effect informed the jury that he was guilty of such unlawful violence. These contentions are without merit, and neither instruction contains any such assumption. One of them related to whether the death of the deceased had been accelerated by unlawful violence. The instruction expressly left to the jury both the question of acceleration and the question as to whether unlawful violence had been used. The other, one of the instructions upon self-defense, was entirely general and made no reference to the appellant or to the facts of this particular case. It is further contended that another instruction, although proper in itself, should not have been given because it related to justifiable homicide while the appellant relied entirely upon excusable homicide. It was not too clear that the appellant was confining himself to one defense, and some evidence was brought out to the effect that the appellant was somewhat in fear of the deceased. Under the circumstances it was proper for the court to give full and complete instructions covering the matter of self-defense, which was done. If it be assumed that this particular instruction was unnecessary, no prejudice appears, and the error, if any, could not be held to be prejudicial.

[6] The only other point raised is that the court erred in admitting into evidence an automobile operator's license which had belonged to the deceased. This seems to have

been introduced because of a statement contained therein as to the weight of the deceased in 1932. The appellant concedes that the point is a minor one, and, assuming the license to have been inadmissible, there was ample other evidence as to the weight of the deceased and it is not possible that the matter could have affected the result.

The judgment and order appealed from are affirmed.

I concur: JENNINGS, J.

MARKS, J., being absent, does not participate herein.

140 Cal.App. 97

In re HUGHES' ESTATE.

MALPAS v. WHIPPLE et al.

Civ. 9415.

District Court of Appeal, First District, Division 1, California.

July 23, 1934.

Hearing Denied by Supreme Court Sept. 17, 1934.

1. Wills ⇐72

In determining validity of alleged testamentary instrument, court must consider testamentary capacity of decedent, conformity with statutory requirements in execution of instrument, and intention of testator.

2. Wills ⇐72

If testatrix intended instrument as will or codicil, court is bound to give it effect as such, and in determining such question court is guided primarily by words of instrument, and if words are ambiguous, resort is had to conditions under which instrument was executed.

3. Wills ⇐72

Definite forms or fixed terms are nonexistent which will invariably determine testamentary character of an instrument, but effect must be given to all terms and expressions in instrument, and where doubt arises resort may be had to conditions under which instrument was written to determine what was in mind of party when it was written.

4. Wills ⇐72

Instrument written after execution of holographic will on occasion of testatrix' entrance into hospital for purpose of surgical operation *held* not entitled to probate, since not testamentary in character under circumstances.

Circumstances disclosed that while both original will and subsequent document were holographic in form, the first one was drawn with much technical detail and care, while the latter was in form of an abbreviated note which expressed an apparent fear of the result of impending operation; that in the concluding sentence of the instrument testatrix advised her nephew that her will was in a safe deposit box, and there was nothing in the document to indicate an intention to change the holographic will formerly executed.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Helen H. Hughes, also known as Nellie H. Hughes, deceased, wherein Stephen Knight Whipple and another contested the probate of an alleged will offered by Alfred Malpas. From an order denying probate to such instrument, the proponent appeals.

Affirmed.

Hearing denied by Supreme Court; SEAWELL and PRESTON, JJ., dissenting.

Myron Harris, of Oakland, for appellant.

Donahue, Hynes & Hamlin, of Oakland, and Oliver Dibble, of San Francisco, for respondents.

JAMES, Justice pro tem.

On June 24, 1928, the decedent executed her last will and testament and deposited the same in her safe deposit box in the Oakland Bank. This will was an holographic will but drawn with much care and circumstance, and, notwithstanding its being an holographic will, was nevertheless witnessed by two witnesses. By the terms of this will, among other provisions, she bequeathed to her nephew, Alfred Malpas, the sum of $1,000 and also one-fifth of the residue of her estate. On July 28, 1931, she wrote and mailed a letter to her nephew, Alfred Malpas, as follows: "Dear Al. In case anything should happen to cause me to pass on, I want you to have $5,000 immediately, to settle up your debts & to give you a little start, so you had better have Amer. T. & T., Gen. Motors, or Union Oil stock which will bring that amt. Am just leaving for the hosp't. If at any time, I pass on, I want all my friends to come to my services, and I want soft music played but no singing & to be put in our lot in Mountain View. There is just room for me. A big heart full of love to you, dear, from your

Aunt Nell Hughes. Oakland, July 28th, 1931. My will is in my safe box in Oakland Bank." At the time this letter was written she was about to go into the hospital to undergo a surgical operation, and after writing and mailing this letter she did go to the hospital, either that day or the following day, and underwent the operation as planned. From this operation she recovered and lived until February 1, 1933, when she died—nearly two years later—of a complaint or illness, entirely unconnected with the subject of her previous operation.

The will of June 24, 1928, was filed and admitted to probate, and the letter above mentioned was filed, together with a petition for its probate as a testamentary document. The probate of such instrument was opposed in the court below and, after hearing, the superior court denied probate of the document on two grounds: (1) On the ground that the document was not testamentary in character; and (2) that if it was testamentary in character, it was conditional upon her dying as the result of the pending operation and that, if she did not die as the result thereof, the document never became effective. From this order denying probate to the instrument in question this appeal is prosecuted.

[1] In determining the validity or effectiveness of an instrument claimed to be testamentary in character, there are certain considerations which must guide the court in its conclusions: First, the testamentary capacity of the decedent; second, the conformity with the statutory requirements in the execution of the instrument in question; and, third, the intention of the testator in the execution of the document in question.

[2] When, as in this case, the capacity of the testator is conceded and the statutory formalities have been complied with, there remains to the court only a consideration of the last element of the intention of the testator in executing the document in question. The testator, having testamentary capacity and her act being unchallenged as free and voluntary and understandingly done, and the statutory requirements being observed, the character of the instrument will be determined by the test of the intention of the testator. If she intended this as a will or codicil this court is bound to give it effect as such, and in determining such intention the court is guided primarily by the words of the instrument itself. If these are not sufficiently clear, a resort is had to the conditions under which the same was executed.

[3] There are no definite forms or fixed terms which will invariably determine the testamentary character of an instrument. The same expressions may lead the court to determine one instrument as testamentary in character which, under different circumstances, would lead the same court to determine another instrument to be not testamentary in character. In construing such an instrument, effect must be given, if possible, to all terms and expressions therein contained, and where a doubt arises resort may be had to the conditions under which the instrument was written to determine what was in the mind of the party when it was written.

Taking the instrument here in question in its entirety without the aid of any extraneous circumstances, it cannot be said, with any degree of certainty, that this instrument was intended by the writer as a testamentary disposition of any of her property, and therefore in its construction the court is forced to an examination of the circumstances under which it was written and such other extraneous circumstances as are presented and appear to have a bearing on the testamentary question.

[4] At the outset, it is significant that the two instruments—the will of June 24, 1928, and the contested document of July 28, 1931—are both holographic in form; but the former is drawn with much technical detail and care, showing a belief in the testator of the necessity of a formal document to effect a disposition of her estate, while the latter shows no such care, but is merely in the form of an abbreviated note which expresses an apparent fear of the result of her impending operation, some suggestions as to the services at her funeral and the disposition of her remains, and some advice to her nephew to whom the note is addressed, and an expression of a desire that he should have $5,000 immediately upon her death. Another very significant circumstance is found in the concluding sentence of this document, in which she advises that her will is in her safe deposit box in the Oakland Bank. There is no discussion or suggestion that that will should be changed. There is nothing in this document to indicate that it is intended to change the terms of that will. On the contrary, she indicates with the last sentence of this note that the document therein referred to is her will and directs where it is to be found. While at the time of her death the value of her estate was such that, by the terms of her will of June, 1928, this nephew would not receive in all a sum equal to $5,000, it is ex-

tremely probable that at the time she penned the letter of July, 1931, she was still under the impression that her bequest to him would amount to that sum; and it is far more reasonable to assume that that was in her mind when she wrote this note than to assume the other conclusion contended for here; that she was intending thereby to execute a codicil to her former will.

We are of opinion that the instrument in question was not intended to be testamentary in character. This conclusion renders it unnecessary to pass upon the other questions raised.

Accordingly, the order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

PACIFIC NAT. AGRICULTURAL CREDIT CORPORATION v. WILBUR et al. *

Civ. 5050.

District Court of Appeal, Third District, California.

July 27, 1934.

Hearing Granted by Supreme Court Aug. 23, 1934.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

On petition for rehearing.

Prior opinion, 34 P.(2d) 212.

George R. Freeman, of Willows, and Erling S. Norby, of Marysville, for appellant.

Huston, Huston & Huston, of Woodland, and Rich, Weis & Carlin, of Marysville, for respondent.

PER CURIAM.

It further appearing to the court, upon a reconsideration of the record in this cause, that the findings entered by the trial court, not being supported by the testimony, should be practically reconstructed.

It is ordered that the paragraph beginning with the words, "It follows from what we have said that Finding No. 5 of the trial court should be, and the same is hereby corrected to read as follows," appearing on page 14 of the typewritten copy of the opinion of this court, down to and including the following, "That Finding No. 12 be corrected by eliminating therefrom the following words: That thereafter, the said Wilbur paid on account of said note the sum of $4,500.00," be stricken from the opinion of this court filed in this action on the 27th day of June, 1934, and that there be substituted therefor the following: After receipt of the $4,000 just mentioned, the record shows that there still remains due to the appellant some $25,000; that for the payment of this indebtedness the record shows that the plaintiff holds a chattel mortgage on some furniture of the probable value of $500. While the law is well established that where there is a renewal of a mortgage, the person taking the renewal mortgage must first resort to any property mentioned therein not included in the original mortgage in order to protect the rights of intervening parties, it clearly appears that if a further credit be given on the obligation of the defendant Wilbur to the plaintiff of the value of the chattel mortgage upon the furniture, there still remains due over $24,000 from Wilbur to the plaintiff, and the respondent is not entitled to any credit by reason of the chattel mortgage covering the furniture. The same is true as to the $4,000 received for the sale of 500 head of sheep which were included only in the September mortgage to secure the repayment of moneys advanced for the sheep purchased and brought over from the state of Oregon.

It follows from what we have said that the findings of the court should read as follows:

Finding No. 5.

It is true that said note and mortgage of September 13, 1930, was made as a renewal of the first described chattel mortgage attached to said second amended complaint and marked Exhibit A.

Finding No. 6.

It is true that said mortgage of September 13, 1930, was never intended as a satisfaction or discharge of said first described chattel mortgage.

Finding No. 7.

It is true that said mortgage of September 13, 1930, described the same sheep described in said mortgage marked Exhibit A, and additional sheep, and it did include the description of the 1,439 head of sheep referred to in said complaint.

Finding No. 8.

It is true that on or about the 25th day of July, 1930, the defendant Hazel Hoke Smith

took into her possession the said 1,439 head of sheep described in the complaint, and that the said defendant Hazel Hoke Smith converted the same to her own uses and purposes.

Finding No. 9.

That at the time of the taking of said sheep by the defendant Hazel Hoke Smith the plaintiff was entitled to the possession of said sheep under the terms of its chattel mortgage hereinbefore described.

Finding No. 10.

That on the 25th day of July, 1930, when the defendant Hazel Hoke Smith took possession of said sheep, there was due on account of the promissory note described and included in the chattel mortgage executed March 27, 1930, and attached to said second amended complaint, and marked Exhibit A, the sum of $9,414.44.

Finding No. 11.

That on the 11th day of September, 1930, the sum of $1,771.50 was paid by said Wilbur on account of said note.

Finding No. 12.

That the allegations of paragraph X of plaintiff's second amended complaint are true.

Finding No. 13.

That by reason of the conversion of said sheep by the said defendant Hazel Hoke Smith, plaintiff has been damaged in the sum of $7,642.94.

Finding No. 14.

That the debt secured to be paid by the mortgage of March 19, 1930, attached to said complaint marked Exhibit A, has not been paid, but was carried into and became a part of the note dated September 13, 1930.

Finding No. 15.

That the assignments made by the plaintiff to the Federal Intermediate Credit Bank of Berkeley, of the notes and mortgages herein referred to, were made only for the purposes of collateral security to secure the payment of moneys borrowed by the plaintiff from said bank.

Finding No. 16.

That the plaintiff is the real party in interest, and was, at the time of the commencement of this action, the owner of said mortgages and the holder of the mortgage dated September 13, 1930, and the Federal Intermediate Credit Bank of Berkeley was a pledgee only.

The petition for a rehearing is denied.

140 Cal.App. 130

PORTER v. CITY OF SANTA BARBARA et al.

Civ. 8299.

District Court of Appeal, Second District, Division 1, California.

July 24, 1934.

Municipal corporations ⇐592(2)

Prohibition of public contests or exhibitions of boxing or wrestling within Santa Barbara *held* a "municipal affair" concerning which city prohibitory ordinance, and not general law, which provided for licensing such contests, prevailed, in view of city charter provision that city could make and enforce all laws and regulations in respect to municipal affairs, and as to other matters it should be subject to general laws (Gen. Laws 1931, art. 6129; St. 1927, p. 2065; Const. art. 11, §§ 6, 8, 8½).

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

Appeal from Superior Court, Santa Barbara County; Wm. D. Dehy, Judge.

Action by V. H. Porter against the City of Santa Barbara and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

W. J. Galbraith, of Santa Barbara, for appellant.

Julian F. Goux, of Santa Barbara, for respondents.

CONREY, Presiding Justice.

By his amended complaint in this action plaintiff asked that the defendant city, and the other defendants, officers of said city, be enjoined from enforcing certain ordinances, and particularly an ordinance which prohibits the holding of boxing or wrestling contests or exhibitions within the city of Santa Barbara. The cause was heard in the court below upon the amended complaint and the demurrer thereto, and judgment in favor of the defendants was entered pursuant to an order sustaining the demurrer. From that judgment the plaintiff appeals.

It is admitted, of course, that the business of promoting and conducting such sports as boxing, sparring, or wrestling contests or exhibitions for prizes, or where an admission fee is received, constitutes an affair within the scope of the police power of the state, to the extent either of prohibition or regulation.

In the present instance it appears that there is a state law which provides for the licensing of such contests, and for conducting the same under state regulation, and at the same time there is a city ordinance prohibiting such contests within the city of Santa Barbara. The case for appellant rests upon his contention that by reason of the existence of the state law, known as the State Athletic Commission Act, a person who has obtained the license provided for in that law has thereby obtained a right which may not be limited or defeated by any city ordinance.

The State Athletic Commission Act was adopted in 1924 (St. 1925, p. xci, Deering's Gen. Laws [1931 Ed.] Act 6129). Under the provisions of that act a state athletic commission is created, and is authorized to issue licenses of the description above mentioned. That such license was obtained by the plaintiff is not denied. Thus he was placed in a position which entitled him to conduct the enterprise in question, at the specified place in the city of Santa Barbara, unless the right thus obtained under the state law is cut off by the superior force and effect of the prohibitory ordinance.

The city of Santa Barbara is governed in accordance with a city charter adopted under and in accordance with the provisions of section 6 and sections 8 and 8½ of article 11 of the state Constitution. In said section 8 we find this: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." The charter of defendant city does thus provide. St. 1927, p. 2065. If the subject of the ordinance, viz., the conducting of public contests or exhibitions in boxing and wrestling, and the right to prohibit or control the same by city ordinance, is a municipal affair, then the ordinance may be enforced, notwithstanding the existence of the state law. Storke v. City of Santa Barbara, 76 Cal. App. 40, 47, 244 P. 158.

Through many years, the Penal Code has prohibited prize fighting. Pen. Code, § 412. The State Athletic Commission Act contains a limited withdrawal of that prohibition, and prescribes conditions with which an applicant must comply, before he may be licensed to carry on the business. It needs no argument to prove that the establishment of an arena for prize fighting, boxing, sparring, or wrestling, under appropriate safeguards, might be accepted without protest in some of our metropolitan centers, whereas the same thing would be a nuisance in a suburban or residence city of different characteristics. The acceptance, or nonacceptance by a city, of such a business and of the conditions which go with such a business, presents essentially a local question, involving locally special and peculiar interests, not affecting the state at large. These facts drive directly to the conclusion that the matter of local prohibition of the business is "a municipal affair," concerning which the city ordinance, and not the general law, must prevail.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

140 Cal.App. 429

WEBB v. DE VAN.

Civ. 8111.

District Court of Appeal, Second District, Division 1, California.

Aug. 16, 1934.

Rehearing Denied Sept. 7, 1934.

Hearing Denied by Supreme Court Oct. 15, 1934.

1. Bills and notes ⇐92(1)

Secretary's giving up other advantageous business and professional arrangements to return to former employment *held* consideration for execution of note by employer to secretary.

2. Executors and administrators ⇐221(9)

In secretary's action against executor on note given by deceased employer, evidence on issue of undue influence *held* to support findings and judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Lois Webb against D. S. De Van, as executor of the last will and testament of R. Fred Vogel, deceased. From a judgment for plaintiff, defendant appeals.

Affirmed.

Joseph L. Lewinson, O'Melveny, Tuller & Myers, Paul E. Schwab, Fredericks, Hanna & Morton, and Percy V. Clibborn, all of Los Angeles, for appellant.

Chapman & Chapman, of Los Angeles, for respondent.

YORK, Justice.

This action was brought in order to establish a claim against the estate of R. Fred Vogel, deceased, based upon a promissory note for $25,000, executed by decedent in his lifetime in favor of the plaintiff.

Upon conclusion of the trial in the lower court, it was found to be untrue that the execution of the note was obtained by undue influence, or that it was without consideration to the decedent. It was found that plaintiff was regularly employed by decedent as secretary from about the year 1910 until the early part of 1925, when she ceased to be in his employ, and was not again regularly employed by him until she returned to him in the same capacity in March of 1928, pursuant to agreement between plaintiff and said decedent which resulted in the giving of the note sued upon in this action, and she remained in his employ in that capacity up to the time of decedent's death. The court also found that during the period when she was not regularly employed by decedent, the plaintiff was occasionally employed by him to assist in the preparation of his income tax returns and in the matter of the payment of state and county taxes and special assessments; and that during the period of her regular employment it was incumbent upon her, as a part of her duties, to assist in maintaining tenants in decedent's various properties, collect the rents thereof, and assist in clerical or other work called upon to perform, but that it was not true that she was ever employed or acted as manager of decedent's properties, nor did she occupy a position or relationship of a confidential or fiduciary or trust character, and at the time the note was executed there was no confidential or trust relationship existing between plaintiff and decedent. It was found that in addition to the business relations existing between them, plaintiff and decedent sustained to some extent social or friendly relations; but that it is not true that plaintiff, by reason of any professional or business or social relations existing between them, exercised or exerted over decedent on the 17th day of March, 1928 (the date of the execution of the note) or for any period of time prior thereto, nor at any time thereafter, a dominating or controlling influence.

As conclusions of law from the foregoing findings of fact the court declared that the plaintiff was entitled to judgment to the effect that the claim presented against the estate of decedent is a valid claim against defendant, as executor of said estate, and that said claim be established and allowed and that the executor be required to pay the same in accordance with the terms of said note in due course of administration of the estate. It is from the judgment entered pursuant to the quoted findings of fact that this appeal is taken.

After a careful examination of the record before this court, we believe that, in the main, this appeal resolves itself solely into the question of whether or not the findings of fact are supported by the evidence.

The testimony shows that decedent for many years had been addicted to the habitual use of intoxicating liquors, but in spite of this the evidence is overwhelmingly to the effect that the decedent was a man of great independence and shrewdness in his business affairs; that he was of an exacting and domineering nature, and was accustomed to having his instructions carried out by those whom he employed. After plaintiff had been in decedent's employ some fifteen years, decedent and his wife became involved in marital difficulties, the plaintiff sympathizing with decedent, and when a reconciliation was accomplished, it was only upon condition on the part of decedent's wife that plaintiff be dismissed. This condition was complied with, whereupon plaintiff undertook to establish herself as a practitioner in the legal profession. During this interval, decedent had employed various assistants but with no degree of satisfaction. In the early part of 1928, his then secretary became ill, and he besought plaintiff to return to him, and it was then that decedent and plaintiff entered into the agreement, evidenced by the terms of the note itself: "This note is made and accepted by the payee upon the agreement that she shall return to the employ of the undersigned," which was fully complied with by the plaintiff, who remained with the decedent until the time of his death.

[1] The fact that plaintiff gave up other advantageous business and professional arrangements in order to return to decedent's employment, and did so return, is ample consideration for the execution of the note by

decedent. There is nowhere in the record any uncontradicted or compelling evidence that would justify the contention made by appellant that the execution of the note was obtained by undue influence exerted upon decedent by the plaintiff.

[2] We are of the opinion that the findings of fact and the judgment are amply supported by the evidence. We find no merit in the other points raised by appellant, i. e., that the action was prematurely brought, and that the court erred in admitting certain evidence, in rejecting evidence and in striking evidence from the record, and for that reason we will dispense with a discussion of them.

The judgment is affirmed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

140 Cal.App. 14

FLEMING v. FLICK et al.

Civ. 5071.

District Court of Appeal, Third District, California.

July 19, 1934.

Rehearing Denied Aug. 18, 1934.

Rehearing Denied by Supreme Court Sept. 15, 1934.

1. Automobiles ⇐245(67)

In action for injuries sustained when defendants' automobile ran head-on into car attempting to remove plaintiff's disabled vehicles from embanked road, plaintiff's contributory negligence in failing to leave at least 15 feet of highway open to traffic, in not posting danger sign at top of grade ahead of disabled vehicles, and in not following some other method of extricating disabled vehicles, *held* for jury (St. 1931, p. 2128, § 136).

2. Automobiles ⇐246(27, 58)

In action for injuries sustained in head-on collision with automobile attempting to remove plaintiff's disabled vehicles from road, instruction that, if vehicles were so disabled as to make it impossible to avoid stopping and temporarily leaving vehicles on roadway, such conduct did not violate Motor Vehicle Act provision, *held* not erroneous as ignoring plaintiff's negligence before his vehicles became disabled, nor as absolving plaintiff of all negligence (St. 1931, p. 2128, § 136).

3. Appeal and error ⇐1068(1)
Trial ⇐296(3)

In automobile accident case, erroneous instruction that automobile driver must exercise "high degree" of care *held* not prejudicial, in view of previous part of instruction, and repeated instructions, to effect that only reasonable care was required, and in view of propriety of verdict (Const. art. 6, § 4½).

4. Appeal and error ⇐712

Giving of instruction is not reversible error, in absence of showing that instruction was offered by respondent.

5. Automobiles ⇐246(23)

In automobile accident case, instruction that defense of contributory negligence was unavailable unless defendants proved that plaintiff's negligence was proximate cause, or contributed to proximate cause, of accident, or had some causal connection with accident, or co-operated with negligent act of defendant in being proximate cause of injury, *held* proper.

6. Appeal and error ⇐1066

In action for injuries sustained when defendants' automobile ran down hill head-on into car attempting to remove disabled vehicles from highway, based on defendant's excessive speed and negligent lookout, instructions, that motorist traversing defiles, canyons, or mountain highways must hold automobile under control and as near right side of highway as reasonably possible, and, upon approaching curve where view is obstructed, give audible warning within 200 feet, while technically inapplicable, *held* not prejudicial (St. 1931, pp. 2120, 2130, §§ 113, 139).

7. Automobiles ⇐246(20)

In action for injuries sustained when defendants' automobile ran down hill head-on into car attempting to remove plaintiff's disabled vehicles from highway, instruction requiring motorist, when vision is obscured by hill, to regulate speed in same manner as though his view was obstructed by any other obstacle, *held* not prejudicial error as limiting speed under such circumstances to 15 miles per hour (St. 1931, p. 2120, § 113).

8. Automobiles ⇐246(27)

In action for injuries sustained when defendants' automobile ran head-on into car attempting to remove disabled vehicles from embanked highway, instruction that "parking" of car attempting to remove disabled

vehicles so as to leave less than 15 feet of highway unobstructed would be negligence as matter of law *held* properly refused, since necessary blocking of highway for temporary purpose is not violation of statute (St. 1931, p. 2128, § 136).

"Park," under automobile statutes, means, in substance, the voluntary act of leaving a car on the main-traveled portion of the highway when not in use, and is something more than a mere temporary or momentary stoppage on the road for a necessary purpose.

[Ed. Note.—For other definitions of "Park," see Words & Phrases.]

9. Evidence ⇐222(2)

In automobile accident case, testimony that defendant stated that he had insurance and that insurer would take care of matter *held* competent as tending to establish defendant's negligence by admission, although also showing that defendant was insured.

10. Trial ⇐48

Evidence competent because addressed to valid issue is admissible, although it may incidentally disclose that insurance company is interested in litigation.

11. Trial ⇐127

In automobile accident case, argument that evidence that defendant told plaintiff that his insurance company would take care of matter tended to show admission of negligence *held* proper, where evidence commented on was elicited without objection and apparently without deliberation.

12. Appeal and error ⇐1060(1)

In automobile accident case, argument that, if defendant were sitting with jury up at his mill, he would say that he wanted to see plaintiff get something, *held* not prejudicial misconduct, in view of evidence that defendant admitted driving too fast and stated that insurance company would take care of matter.

13. Damages ⇐177

In automobile accident case, plaintiff's testimony that he owed $115 hospital bill *held* competent to show one item of expense incurred as result of accident.

14. Appeal and error ⇐1053(1)
Damages ⇐171

In automobile accident case, plaintiff's testimony that he was unable to pay hospital bill *held* incompetent, but harmless, where testimony was stricken from record and jury instructed to disregard it.

15. Trial ⇐110

In automobile accident case, asking defendant excluded question whether automobile was carried in mother's name to preclude recovery against defendant *held* not prejudicial.

Appeal from Superior Court, Amador County; A. Caminetti, Jr., Judge.

Action by Jack Fleming against Clarence Flick and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Len H. Honey, of Stockton, and A. L. Pierovich, of Jackson, for appellants.

T. B. Scott, of Modesto, and Gumpert & Mazzera, of Stockton, for respondent.

Mr. Justice R. L. THOMPSON delivers the opinion of the court.

The defendants have appealed from a judgment for damages which was rendered against them for injuries sustained by the plaintiff as the result of an automobile casualty caused by the defendants' machine colliding with plaintiff's car while it was stalled on the roadside because of a broken axle.

The evidence is conflicting, but the record supports the following statement of facts: At 2 o'clock on the morning of August 24, 1932, the plaintiff was engaged in hauling five head of cattle to a mountain ranch in Placer county. He was driving his Marmon automobile which had been converted into a truck in which he was carrying three cows. Behind the truck there was a trailer containing two other cows. The two vehicles with the combined load weighed 6,000 pounds. The plaintiff had nearly reached the top of a 2 per cent. grade beyond Plymouth when the rear axle of the Marmon car broke, leaving the machine without means of being propelled. The vehicles stopped. The roadway was a trifle less than 23 feet in width at that point and occupied the entire space between embankments on either side. When the axle broke, the plaintiff immediately applied his emergency brake and then gradually released it, permitting the vehicles to slowly roll back down the grade. It was impossible to accurately guide the trailer in its downward course. At a point about 200 feet below the top of the grade the trailer ran into the embankment on the western side of the road, breaking the tongue. This predicament prevented any further attempt to reach the bottom of the grade. Both vehicles were effectually stalled close to the western side of the road. There remained, however, a

clear space of approximately 15 feet on the other side of the road for passing vehicles.

For fear that some automobile might run into the stalled machines in the nighttime, the plaintiff sat in his Marmon car watching until daylight with the headlights burning and a flashlight in hand to be used in case of an emergency. During the night one or two machines arrived and passed without difficulty. At 6 o'clock in the morning the plaintiff walked back to Plymouth, a distance of two miles, to obtain assistance. He found no garage open, but telephoned to Stockton for a Marmon axle with which to replace the broken one. He chanced to meet R. E. McComic at Plymouth, who was driving his Studebaker machine. The plaintiff persuaded McComic to drive him to the scene of the accident to assist in hauling the disabled vehicles to town. They arrived at that point about 8 o'clock a. m. The trailer stood at a slight angle close to the west side of the road with one wheel embedded in the bank. The Marmon car was stationed a few feet above the trailer, parallel with and adjacent to the western border of the roadway. The men attempted to first dislodge the trailer, since it was nearer the foot of the grade. Mr. McComic drove the Studebaker car above the trailer to which they attached a rope with the intention of hauling it out into the center of the roadway, to then back it down the grade. The first attempt resulted in breaking the rope. Again the Studebaker car was backed to a position 3 feet from the rear end of the trailer. The plaintiff crept under the trailer to fasten the rope to the axle. The Studebaker machine stood headed up grade with the outside front wheel, as McComic testified, "about the center of the road. It wouldn't vary six inches one way or another." That left 11 feet of the roadway open on the easterly side of the highway for machines to pass. While they were in that position, two other machines arrived and passed without difficulty. A few moments later, while McComic sat at the wheel of his car, and, while the plaintiff was still under the trailer, C. W. Flick came driving the defendants' automobile from the north over the crest of the hill and down the grade at the rate of 55 or 60 miles an hour. He was not watching the highway ahead of his machine. There was ample time and space within which to stop his machine had he been observing the roadway or driving at a lawful rate of speed. There was also a clear space of 11 feet of open roadway through which his automobile might have safely passed by the exercise of reasonable care. McComic was evidently alert, for he saw the approach of Flick's machine the moment it arrived at the crest of the hill 200 feet away. McComic saw the inattention of Flick and sounded the horn of the Marmon machine several times to attract his attention. He also waved his hat to indicate that the approaching car was to take the opposite side of the roadway. Flick evidently failed to see the stalled machines until he was close upon them. He was less than 100 feet away when he applied his brakes. His automobile skidded. It swerved to one side of the road and then to the other side, crashing into the Studebaker car and driving it back upon the trailer with such force as to pinion the plaintiff beneath it, seriously injuring him. Regarding the accident, McComic testified:

"I could see the top of the car coming. * * * Before he got to the crest of the hill I could get a view of the man in the car. He wasn't looking towards me at all. He was looking off to the right. * * * As I clamped my hand on the horn, * * * I didn't get any response (from him) or his attention; the second time I done it a great deal louder, and he looked down and saw me, reached for his brake, and I grabbed my old hat and begin waving over to this side of the road. * * * He could have come through without a bit of trouble. * * * Instead of pulling over to that side of the road he reached for all his brakes. * * * The wheels begin to creak and scream, * * * and his car wheels were skidding, and he come on down. * * * He swayed into my right bank,—his left, and as he swayed out again, and as he come out he crossed pretty well over the center of the road, went right in, caught my right fender here, this side, swung my car almost completely around with his car coming in at this angle against the bank."

The defendant C. W. Flick admitted that he was driving "too fast" and that he was unable to stop his car. The plaintiff suffered a broken leg and a dislocated hip and kneecap. He also sustained a hernia and an injury to his back. A bolt was driven through the flesh of his left leg above the knee. There is evidence of a permanent disability of the right leg as a result of the accident. Suit for damages was brought against the owners and the driver of the defendants' machine. The cause was tried with a jury. A verdict of $7,500 was returned in favor of the plaintiff. On a motion for new trial this judgment was reduced to $5,000. Judgment was rendered for that

amount. From that judgment the defendants have appealed.

The appellants concede there is sufficient evidence to sustain the implied finding of the jury that the defendants were guilty of negligence which resulted in the accident. The amount of the judgment is not criticized. But it is contended the evidence shows the plaintiff to have been guilty of contributory negligence as a matter of law in blocking the highway and in failing to leave at least 15 feet thereof open to traffic, that the court erred in giving and refusing certain instructions, and that counsel for the plaintiff was guilty of prejudicial misconduct in disclosing to the jury the fact that the defendants carried indemnity insurance on their automobile which was involved in the accident.

[1] The evidence does not show contributory negligence on the part of the plaintiff as a matter of law. Under the circumstances of this case that was a question for the determination of the jury. An emergency existed. Through no fault of plaintiff, his automobile and trailer were stalled close to the westerly side of the highway. Embankments on either side of the roadway prevented him from getting the vehicles off the highway. A clear space of 15 feet remained on the opposite side of the road for automobiles to pass until the tow machine arrived. Out of precaution the plaintiff prudently remained in the Marmon car throughout the night with the headlights burning and a flashlight in his hand to guard against a possible collision with a passing car. When daylight arrived, he walked to town to procure aid. He promptly returned with McComic and his Studebaker machine for the purpose of hauling the disabled vehicles to Plymouth for repairs. When McComic and the plaintiff returned to the scene of the accident they immediately undertook to haul the trailer from its position on the western side of the roadway. Since the Marmon car stood above the trailer, adjacent to the bank, it was necessary for the Studebaker machine to park by its side temporarily. Apparently no more space on the highway was occupied than was necessary under the circumstances. The Studebaker machine stood within one foot of the Marmon car. There were still 11 feet of clear space on the opposite side of the highway which afforded safe passage for a carefully driven vehicle.

About 200 feet intervened between the point of collision and the top of the grade. This was sufficient to enable any machine to stop provided it was running at a lawful rate of speed. The exercise of ordinary care would not require one to anticipate that an automobile driver would recklessly come over the hill and down the grade at a grossly excessive rate of speed or that he would spend his time gazing off into the fields instead of watching the road along which he was traveling. It may not be said as a matter of law that ordinary prudence would have required the plaintiff to post a danger sign at the top of the grade to warn some reckless driver of the presence of machines 200 feet beyond. Nor may we say that ordinary prudence would have required the plaintiff to follow some other method of extricating the disabled cars. These are questions which were properly left for the determination of the jury. Even if reasonable minds may differ regarding the conduct which should be followed by one in the exercise of due care under such circumstances, still the established rule of law requires this court to support the decision of the jury in that regard.

It is asserted the plaintiff was guilty of contributory negligence as a matter of law under the provisions of section 136 of the California Vehicle Act (St. 1923, p. 561, § 136, as amended by St. 1931, p. 2128), for attempting to remove the disabled machines without leaving 15 feet of the highway clear for the passing of automobiles. That section provides in part:

"No person shall park or leave standing any vehicle * * * upon the paved or improved or main traveled portion of any public highway, * * * when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle whether attended or unattended upon any public highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for the free passage of other vehicles thereon.

"The provisions of this subsection shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a public highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

Under the circumstances of this case, the temporary use of the highway which left less than 15 feet thereof clear for passing vehicles, for the necessary purpose of removing the disabled machines, was not a violation of the preceding section, and did not consti-

tute negligence as a matter of law. Mitsuda v. Isbell, 71 Cal. App. 221, 234 P. 928; Silvey v. Harm, 120 Cal. App. 561, 568, 8 P.(2d) 570; Rath v. Bankston, 101 Cal. App. 274, 281 P. 1081; 3–4 Huddy's Cyc. of Auto. Law, p. 109, § 62. The last paragraph of section 136 of the California Vehicle Act specifically exempts the application thereof to machines which are disabled so as to render it impossible to remove them during a temporary period of time. It is the willful or careless parking of automobiles contrary to the inhibition of that statute which renders the conduct unlawful. In the present case the Marmon machine and trailer were stationed at the side of the roadway through no fault of the plaintiff. The Studebaker car temporarily occupied as little of the roadway as was reasonably possible in the necessary effort to extricate the trailer and get it out of the narrow pass and into town for repairs. Conceding that the negligence of McComic would be imputed to the plaintiff, it was a question for the determination of the jury as to whether their conduct constituted contributory negligence under the circumstances of this case. In view of the facts of this case, the decision of the jury in that regard may not be interfered with on appeal.

[2] The appellants assign as error the giving of the last paragraph of an instruction which was offered by the plaintiff with respect to the foregoing quotation from section 136 of the California Vehicle Act, with reference to which the court said: "If, therefore, from the evidence in this case you find that the truck and trailer operated by plaintiff was disabled while on the paved, or improved, or mainly traveled portion of the highway in such a manner and to such an extent that it was impossible to avoid stopping, and temporarily leaving such vehicle in such position, then in such circumstances I charge you that the plaintiff was not guilty of violating, and did not violate, the foregoing provisions of the Motor Vehicle Act."

It is asserted this language "ignores the issue of plaintiff's negligence prior to the time that his vehicle became disabled," and that it purports to charge the jury with relation to disputed facts. The objection to this language is without merit. There is no evidence in the record, and no contention on the part of the defendants, that the plaintiff was guilty of negligence "prior to the time that his vehicle became disabled." The challenged instruction does not purport to charge the jury that the plaintiff was not guilty of conduct constituting negligence on his part other than the violation of section 136 of the California Vehicle Act. This instruction does not assume to discuss any alleged negligence of the plaintiff occurring prior to the breaking of the axle of his machine. It merely declares that "If * * * you find that the truck and trailer * * * was disabled * * * in such a manner * * * that it was impossible to avoid stopping, and temporarily leaving such vehicle in such position," such conduct "did not violate the foregoing provisions of the Motor Vehicle Act." That language appears to constitute a correct statement of the law. It left the jury to determine whether the machines were so disabled as to render it impossible to avoid stopping on the highway, and whether the machines were permitted to remain in that position only temporarily.

Moreover, at the request of the defendants, the jury was elsewhere fully instructed regarding the alleged negligence of the plaintiff consisting of leaving the machines on the side of the road from 2 o'clock in the morning, when the axle of the Marmon car broke, until 6 o'clock a. m., when Mr. McComic arrived with his Studebaker car. No accident occurred during that period of time. In the instruction last mentioned, the jury was charged that any violation of section 136 of the California Vehicle Act by the plaintiff constituted negligence on his part. It concludes by saying: "If you find from the evidence that the vehicle of Mr. Fleming was by him parked or stopped in violation of this law, and you further find that such vehicle was disabled, then the law only permitted him to temporarily leave such vehicle upon the roadway, if you find that he did so leave it. Also, if you should find from the evidence that it was possible to avoid stopping and temporarily leaving such vehicle upon the roadway in such a position as to not leave 15 feet upon the main traveled portion of said highway opposite such standing vehicle, and if you find that such vehicle was so left by the plaintiff, then the plaintiff was guilty of negligence as a matter of law for so stopping and leaving such vehicle, and if such negligence in the slightest degree proximately contributed to said accident, and his resulting injuries, if any, your verdict must be for the defendants."

This instruction does not appear to be misleading or prejudicially erroneous.

[3, 4] Another instruction is challenged, wherein the court correctly informed the jury that the plaintiff and the driver of the defendants' machine "were both chargeable with the exercise of reasonable care at the

time in question, namely, such care as a reasonably prudent person would have exercised under like or similar circumstances." To this instruction the court inadvertently added the following language: "The law requires a high degree of care of persons driving or operating automobiles which are capable of inflicting death or serious injury upon others lawfully upon the highway. * * * When driving his automobile the defendant Flick was in charge and control of a dangerous instrumentality capable of inflicting serious consequences and injuries and for that reason was charged by the law with a high degree of care. * * * You are also instructed that the plaintiff, Fleming as well as any other person there present and under the control and direction of the plaintiff, were also charged by the law with the exercise of a high degree of care."

The preceding quotation is not a correct statement of the law. But it is not necessarily prejudicial. De Greek v. Freeman, 108 Cal. App. 645, 291 P. 854. In this instruction the jury was clearly charged that both parties were required to exercise only that degree of reasonable care which a prudent person should use under similar circumstances. The jury was also repeatedly instructed that reasonable care on the part of the driver of an automobile is all that the law requires. We are persuaded the jury was not misled by that instruction. Moreover, it does not appear from the record whether the instruction which contains this objectionable language was offered by the plaintiff or the defendants. The appellants merely point to the general charge of the court containing this challenged language, which does not indicate which party offered the instruction. It does appear from the clerk's transcript that an instruction similar to this challenged one was offered by the plaintiff, but it affirmatively appears that instruction was refused by the court as "misleading." It has been frequently held that the giving or refusal of an instruction may not become the basis of reversible error in the absence of a showing that it was offered by the respondent. In support of a judgment, under such circumstances, it will be presumed the erroneous instruction was offered by the appellants. Knight v. Gosselin, 124 Cal. App. 290, 297, 12 P.(2d) 454; Gray v. Eschen, 125 Cal. 1, 57 P. 664; 2 Cal. Jur. 870, § 509. Assuming that the foregoing portion of the general charge of the court was erroneous, it is not reversible error for the further reason that it appears from the record that there was not a miscarriage of justice in this case. Article 6, § 4½, of the Constitution, justifies an affirmance of the judgment on that ground.

[5] The appellants assign as error the giving of two other instructions in the first of which the jury was told that in order for the defendants to avail themselves of the defense of contributory negligence, they must prove "that such negligence on the part of the plaintiff was the proximate cause or contributed to the proximate cause of said accident." The second one contains the following language: "To sustain such a defense [of contributory negligence, it must be shown to have had] * * * some causal connection with the accident, * * * or [that it] cooperates with the negligent act of the defendant, if any, in being the proximate cause of the injury." These instructions appear to contain correct declarations of the law. It will be observed they do not state that the acts or omissions of the plaintiff must necessarily become "the proximate cause of the accident." They merely declare that such negligence of the plaintiff must "contribute to the proximate cause," or that it must have "some causal connection with the accident." Certainly the negligence of the plaintiff which has nothing to do with the cause of the accident, or that which is so remote and inconsequential that it does not affect the transaction in any manner whatever, will not debar him from recovering damages for the negligence of a defendant. Clearly the negligence which creates a liability on the part of the defendant, or that which will defeat a cause of action on the part of the plaintiff, is the negligence only which proximately causes the accident or which contributes to the cause thereof. It would be an absurd and unjust rule of law that would fasten liability upon one, or that would defeat a just cause of action, merely because the accused is guilty of some negligence which has no bearing upon the cause of an accident. The text-writers make this distinction very clear. In 1 Thompson on Negligence, p. 210, § 216, it is said in that regard: "In order, then, to prevent a recovery by reason of contributory negligence, the plaintiff or person injured must have been guilty of a want of ordinary care; and we shall now see that this want of ordinary care must have been a proximate cause of the injury, and not a remote cause or mere condition. If the negligence of the plaintiff was only remotely connected with the injury, the plaintiff may recover damages, if notwithstanding such remote negligence of the plaintiff the defendant might have avoided the injury by the exercise of ordinary care. But if a want of ordinary care on the part of the

person injured concurs as a proximate cause in producing the injury, the defendant is not liable, although in fault. This doctrine is involved in the meaning of the words we employ to express the negligence on the part of the plaintiff which will bar a recovery,—'contributory negligence.' The negligence of the plaintiff which will bar a recovery of damages for an injury sustained by the defendant's negligence must be such as contributes to the injury complained of; that is, as expressed by a learned and philosophic writer, it 'must be such that, by the usual course of events, it would result, unless independent disturbing moral agencies intervened, in the particular injury.'"

The last-mentioned instructions were not erroneous. The giving of these instructions does not constitute reversible error. Flood v. Miura, 120 Cal. App. 467, 476, 8 P.(2d) 552. In support of their contention in that regard the appellants rely upon the following cases: Straten v. Spencer, 52 Cal. App. 98, 197 P. 540; Flood v. Miura, supra; and Robbins v. Roques, 128 Cal. App. 1, 16 P.(2d) 695. These cases do not appear to uphold the construction placed upon them by the appellants. The language of the instructions which was criticized in those cases was vitally different from that which is involved in this case. We find nothing in those cases in conflict with what we have heretofore said regarding the rule applicable to contributory negligence.

[6] The appellants assign the giving of an instruction based upon the provisions of section 139 of the California Vehicle Act (St. 1923, p. 562, § 139, as amended by St. 1931, p. 2130), as erroneous. This challenged instruction reads: "You are instructed that an individual driving an automobile traversing defiles, canyons or mountain highways shall hold such automobile always under control and as near the right-hand side of the highway as reasonably possible, and upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway shall give audible warning with a horn or other warning device."

It is contended this instruction is misleading and inapplicable to the facts of this case, since there is no evidence of the presence of a curve in the highway at the place where the accident occurred. It is, however, true that the land is hilly, if, indeed, it is not mountainous at that place. The highway is narrow. It cuts through a hill, leaving embankments on either side of the road. There is an elevation in the road which obstructed the view of the disabled machines until Flick reached a point 200 feet from the scene of the collision. The highway does not curve to the right nor to the left, but it does dip down into a swale which prevents a view of that portion of the road from beyond the crest of the hill. We are not prepared to say that the driver of an automobile must sound the horn of his machine on a straight course every time he approaches an elevation which obstructs his view for a distance of more than 200 feet, but it is not unreasonable to assume that the driver of a machine should reduce his speed and regulate the control of his machine with a greater degree of caution as he approaches the crest of a hill where his view of the highway is limited to a short distance ahead. When the vision of a driver is obstructed either by curves in the highway or by the presence of a hill or other obstacle, he should regulate the control of his machine accordingly. He should anticipate the possibility of approaching machines beyond the point of his vision. The jury was repeatedly told, as provided in section 113 of the California Vehicle Act (St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120), that the driver of an automobile should reasonably regulate the operation of his machine in accordance with surrounding conditions so as to avoid accidents, when a clear and unobstructed view is not afforded. Even though the language of the last-mentioned instruction is technically inapplicable to the circumstances of this case, it is nevertheless harmless. It seems apparent the jury could not have been misled thereby. The negligence which was relied upon by the plaintiff at the trial, was evidently the excessive rate of speed at which Flick drove his machine down the grade and his careless inattention to the highway along which he was traveling. This instruction may well have been modified or even refused, but we are of the opinion it was not prejudicial.

[7] For the same reason assigned with relation to the preceding instruction, we are of the opinion the giving of the one which is next challenged was not prejudicial. In effect this instruction informed the jury that, when the vision of the driver of an automobile was obscured by a hill or swale "so that he has no clear or unobstructed view" of the highway, the speed of his machine should be regulated in the same manner as though his view was obstructed by any other obstacle. It is argued that this language limits the rate of speed under such circumstances to 15 miles an hour as provided by section 113 of the California Vehicle Act. We think this instruction is not subject to that construction. A specific limitation of the rate of speed under

such circumstances is not mentioned in that instruction. The jury could not have reasonably so understood the charge.

[8] It is asserted the court erred in refusing to give to the jury an instruction at the request of the defendants which was founded on the provisions of section 136 of the California Vehicle Act. This instruction declares that, if the jury found that Mr. McComic's Studebaker car was parked on the highway in a position which failed to leave at least 15 feet of the width thereof clear and unobstructed, then he was guilty of negligence as a matter of law, which negligence was imputed to the plaintiff, and that, if the position of the Studebaker car contributed in the slightest degree to the accident, then the defendants would be relieved of liability, and the verdict must be for the defendants.

We are of the opinion the refusal of this instruction was not erroneous or prejudicial. It is not contended that the Studebaker car was parked or left on the highway except momentarily for the purpose of removing the disabled machines belonging to the plaintiff. Section 136, supra, provides that "No person shall park or leave standing any vehicle * * * upon the paved or improved or main traveled portion of any public highway," unless a clear and unobstructed width of not less than 15 feet remains. Clearly the temporary parking or leaving of a vehicle standing momentarily on a public highway for the necessary purpose of hauling out a disabled car which was obstructing the roadway does not come within the inhibition of this statute. It would be unreasonable and possibly a serious menace to traffic to hold that it is negligence as a matter of law for a tow car to stop necessarily and momentarily with the object of removing a wrecked machine from the highway, but which, in doing so, leaves less than 15 feet thereof open and unobstructed. It is just as absurd to say that the driver of an ambulance is guilty of negligence as a matter of law who necessarily stops on the highway for a moment only to remove an injured person, but who, in doing so, is unable to leave 15 feet of the roadway unobstructed. Statutes should receive a reasonable construction. It is said in 3-4 Huddy on Automobile Law, p. 104, § 59, that "Under the automobile statutes the term 'park' has been defined by the courts as meaning, in substance, the voluntary act of leaving a car on the main-traveled portion of the highway when not in use. It means something more than a mere temporary or momentary stoppage on the road for a necessary purpose."

The instruction which was refused is fatally defective in failing to recognize the fact that a necessary blocking of the highway for a brief and temporary purpose is not a violation of section 136 of the California Vehicle Act, and therefore, under such circumstances, it does not constitute negligence as a matter of law. The omission to so instruct the jury, in the present case, is particularly misleading for the reason that it appears that McComic's Studebaker car occupied for only a moment or two just as little of the highway as possible for the necessary purpose of extricating the disabled trailer. Moreover, the jury was elsewhere clearly instructed that any negligence on the part of McComic which contributed to the cause of the accident would be imputed to the plaintiff so as to prevent him from recovering a judgment in this case. It was therefore not prejudicial for the court to refuse to give to the jury this instruction.

[9, 10] Finally, the appellants contend that the plaintiff's attorney was guilty of prejudicial misconduct in disclosing to the jury the fact that the defendants were insured against accident, and by referring to the evidence of that fact in his argument to the jury.

The evidence of the defendants' insurance was developed for the first time on the cross-examination of C. W. Flick, who drove their machine at the time of the accident. Immediately after the accident occurred, another machine containing several ladies appeared at the scene of the accident and stopped to take the plaintiff to town for medical aid. Counsel for the plaintiff interrogated the defendant Flick on the witness stand regarding his admission of negligence. This colloquy occurred:

"Did he (Mr. McComic) start to take your number? * * * A. After we had Mr. Fleming in this car and these ladies were taking him to the doctor he did, and I took his number.

"Q. Yes. What was said? A. Oh, he asked me if I had any insurance and I think I told him yes.

"Q. Go ahead. What did you say about the accident?"

No motion was made to strike the defendant's answer from the record. No motion was made to direct the jury to disregard it. While Mr. McComic was being examined as plaintiff's witness, in response to interrogations, he related in detail the circumstances of the accident. After a lengthy narrative he paused. Plaintiff's attorney then said: "Q. Go ahead." He then resumed his narra-

tive, in the course of which he said: "I asked Mr. Flick to give me aid putting Mr. Fleming in their car, so they (the ladies heretofore referred to) did and drove away to Plymouth. I took my pencil, I remember, from my pocket, started to take Mr. Flick's car number, and Mr. Flick says not to mind the car number, and he says, 'I have insurance and they will take care of this.'"

No objection was made to this testimony, and no motion was made to instruct the jury to disregard it. It is therefore competent for the jury to consider this evidence in determining the question of defendants' negligence.

The courts have frowned upon the unnecessary developing of the interest of a surety company in the trial of a damage case when the company is not a party to the suit. This is especially true when the question of negligence is so doubtful as to leave the reasonable inference that the evidence of the interest of the insurance company is likely to have prejudiced the jury, or when it appears that counsel for the plaintiff is not in good faith in presenting the evidence. Citti v. Bava, 204 Cal. 136, 266 P. 954.

In the case of Baroni v. Rosenberg, 209 Cal. 4, 284 P. 1111, 1112, which is relied upon by the appellants in this case, an order granting a new trial after judgment was rendered in favor of the plaintiff, was affirmed by the Supreme Court, based upon prejudicial misconduct of the attorney for plaintiff by declaring, contrary to the fact, that the claimant in that case was receiving compensation for his injuries and that "he will get it as long as he lives." Clearly that was prejudicial. There appeared to have been no valid excuse for the declaration. In the present case the plaintiff's attorney did not intentionally develop the challenged evidence. Plaintiff contends that it was competent as tending to show the negligence of defendants from the admissions of the driver of their automobile.

It is a well-established rule of law in accordance with justice and reason that, when evidence is competent because it is addressed to a valid issue in the case, it is admissible even though it may incidentally disclose the fact that an insurance company is interested in the outcome of the litigation. Dermer v. Pistoresi, 109 Cal. App. 310, 315, 293 P. 78; Elsey v. Domecq, 114 Cal. App. 42, 50, 299 P. 794; Rowe v. Rennick, 112 Cal. App. 576, 297 P. 603. In the present case the evidence which is objected to appears to have been competent. It was introduced without objection, and remains in the record without a motion to strike it out. It is legitimate argument that it tends to establish the negligence of the defendants by their admission. The appellants may therefore not complain of its presence or effect upon the verdict of the jury.

[11] In the course of his argument to the jury, counsel for the plaintiff subsequently referred to these statements regarding the insurance, claiming that they were competent as admissions of negligence on the part of the defendant who drove the car. Counsel for the plaintiff was interrupted by the attorney for the defendants who assigned the reference to defendants' insurance as prejudicial misconduct and asked that it be stricken from the record and that the jury be admonished to disregard it. The motion was granted and the jury was so instructed. The following colloquy occurred regarding that incident:

(Argument to the jury by Mr. Mazzera):

"And what did Mr. Flick say to Mr. Fleming and Mr. McComic there? He said: 'My insurance company will take care of this'—

"(Mr. Honey, attorney for defendants) Just a moment, just a moment. I assign that as misconduct, and ask to have this jury panel discharged. * * *

"(Mr. Mazzera) And that is an admission of liability, your honor, and we are arguing it from that viewpoint.

"The Court: The jury will disregard the remarks just made by counsel."

The appellants concede that error may not be predicated on the admission of the evidence which disclosed the fact that the defendants carried insurance. In their opening brief they say: "Appellants are not complaining of the manner in which the subject of insurance was first mentioned, as disclosed by the above testimony." They do, however, insist that it was prejudicial misconduct on the part of plaintiff's attorney to refer to that subject in his argument to the jury, and that his conduct constituted reversible error in spite of the fact that the court instructed the jury to disregard it.

Under the circumstances of this case we do not consider the conduct of plaintiff's attorney prejudicial. It does not constitute reversible error. We are unable to say from the record that plaintiff's attorney purposely elicited this evidence, or that he was not in good faith in referring to it in his argument to the jury. In the first place, the defendant himself who drove the machine which was

involved in the accident volunteered the statement that McComic "asked me if I had any insurance, and I think I told him yes." In the second place, McComic in a lengthy narrative of the details of the accident volunteered the statement that Mr. Flick told him "I have insurance and will take care of this." There is nothing in the record indicating bad faith on the part of plaintiff's attorney with relation to this evidence. These statements of the driver of defendants' machine furnish some valid evidence of admissions on his part that he was guilty of negligence. They are in accord with his first admission that he was "driving too fast." These statements having been introduced as competent evidence of admissions of negligence, and, having remained in the record without objection on the part of the defendants, it was legitimate argument to refer to them in support of the contention that the defendants were guilty of negligence. This was the asserted purpose of the attorney for plaintiff in referring to this evidence. Even though there be a doubt regarding the right of counsel to refer to this evidence in his argument, it appears to have been done in good faith in the belief that it was legitimate argument, and it was harmless for the reason that the evidence remained in the record for the consideration of the jury regardless of whether or not counsel was permitted to comment upon it in his argument. The evidence of the fact that the defendants were insured does not appear to have been deliberately elicited. It was voluntarily referred to first by the defendant C. W. Flick and then by Mr. McComic. It was not objected to by the defendants. The appellants concede that it is a proper part of the record.

In the case of Rowe v. Rennick, 112 Cal. App. 576, 297 P. 603, a judgment against the defendant in an automobile casualty was affirmed and a hearing by the Supreme Court denied, wherein evidence was adduced at the trial that the defendant said: "Don't worry, everything is all right. I got 100,000. or 200,000. dollars insurance, and you don't have to worry about insurance; I will take care of everything." In that case the statement was stricken from the record and the jury was instructed to disregard it. The court said: "From an examination of the record, we find that the jury could not, consistently with their oaths, have rendered any verdict for the defendant. It is not a question of where the testimony is evenly balanced, but one where it is only a question of how much."

That language is quite applicable to the facts of the present case. In this case, the defendants clearly appear to have been guilty of negligence, and the plaintiff appears to have been exceedingly cautious to prevent an accident. We are unable to see how the jury could have conscientiously reached any other verdict than the one which was rendered for the plaintiff.

[12] The attorney for plaintiff is further charged with prejudicial misconduct in saying to the jury in the course of his argument, "I believe Mr. Flick if sitting with you up at his mill would say, 'I want to see this man get something.'" Upon motion this statement was also stricken from the record and the jury was instructed to disregard it. That statement does not constitute prejudicial misconduct. An attorney is permitted to argue to the jury any theory of the evidence of which it is reasonably susceptible. It is not unreasonable to assume that the attorney for plaintiff meant by this language to say that from Mr. Flick's admissions that he "drove too fast" and that "I have insurance and they will take care of this," he conceded that he knew the accident occurred as a result of his own negligence and therefore he would "like to see this man get something" to compensate him for his injuries because he was entitled to it.

[13, 14] The plaintiff's testimony that he owed a bill of $115 at the county hospital was competent to show one item of expense which he had incurred as a result of the accident. His further statement that he was unable to pay that bill was incompetent. That was stricken from the record and the jury was instructed to disregard it. It was harmless.

[15] Finally the attorney for plaintiff is charged with prejudicial misconduct in asking Mr. C. W. Flick, who had admitted that defendants' automobile was paid for by himself and his brother, but that the title stood in the name of their mother, "Isn't it a fact you carried that car in your mother's name so that there could be no recovery against you?" An objection to that question was sustained. It was incompetent, and should not have been asked. There is no evidence that it was prejudicial. We must assume that a jury will make some allowance for the zeal and occasional prejudice of respective counsel in behalf of their clients. The jury was very fully charged upon all the material issues of the case. It was admonished to disregard evidence which was stricken from the record, and to refrain from considering unanswered questions to which objections were sustained. The trial judge appears to have been very

careful to see that the defendants should have a fair and an impartial trial. The verdict of the jury is warranted by the record.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

140 Cal.App. 217

ROSE v. WHEELER.

Civ. 9115.

District Court of Appeal, First District, Division 2, California.

July 30, 1934.

Hearing Denied by Supreme Court Sept. 27, 1934.

1. Usury ⇐11

In usurious transaction there must be loan of money which is to be repaid to lender with compensation for its use in an amount constituting charge in excess of highest permissible rate, and corrupt intent to exact illegal charge for use of money lent.

2. Usury ⇐72

In considering alleged usurious transaction, presumptions of law are in favor of legality, so that if transaction is open to two constructions, one legal and the other illegal, in absence of evidence pointing clearly to usury, it is duty of court to adopt construction in favor of lawfulness.

3. Usury ⇐31

Usury law has no application to transaction which is bona fide purchase and sale and not loan or forbearance of money.

4. Usury ⇐113

In determining whether alleged usurious transaction was sale of stock or loan of money, where buyer made written declaration at time of transaction that it was sale, burden was on buyer to show that declaration was not true when it was made.

5. Usury ⇐15

"Usury" is exacting, taking, or receiving of greater rate of interest than is allowed by law for use or loan of money.

[Ed. Note.—For other definitions of "Usury," see Words & Phrases.]

6. Usury ⇐12

For transaction to be usurious, there must exist corrupt purpose on one side to lend money at usurious interest and on other side to borrow on usurious terms dictated by lender.

7. Usury ⇐12

Question in determining whether transaction is usurious is disclosed intention of parties, which is question of fact.

8. Usury ⇐31

Transaction whereby stock which had cost seller $17,506.25 was sold through bank, to which it had been pledged by seller, for benefit of buyer for $12,500, and seller executed notes for $17,506.25 in favor of buyer *held* sale of stock and not loan of money, where seller in letter written at time notes were executed stated he was delivering notes as evidence of indebtedness covering price of stock purchased, so that usury law would not apply.

9. Usury ⇐32

Seller could not be charged with taking usury because purchase price fixed for sale of stock exceeded current cash market price of stock, where sale was made wholly on credit.

10. Usury ⇐119

When contract is honest on its face, existence of usurious intent is question of fact for court or jury, and it is only when undisputed evidence shows usury that question becomes one of law.

11. Appeal and error ⇐1078(4)

Where no argument was made in support of assignments of error concerning admission and rejection of testimony and assignments were not claimed to be prejudicial, they would not be considered.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Lou H. Rose against Clayton E. Wheeler, for treble damages for usurious interest alleged to have been paid. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson (by Baldwin Robertson and Hewlings Mumper), all of Los Angeles, for appellant.

Livingston & Livingston, of San Francisco, for respondent.

NOURSE, Presiding Justice.

In the year 1927 the plaintiff was a real estate broker operating in Los Angeles. The defendant was a physician practicing in San Francisco. The plaintiff approached the defendant and asked for a loan of $12,500. The defendant informed him that he had no mon-

ey to loan; that his assets were pledged to a San Francisco bank as security for a loan from the bank. At the suggestion of the plaintiff an express contract was entered into whereby the plaintiff agreed to purchase from the defendant on credit, and at cost to the defendant, so much of this pledged stock as, when sold on the public market, would net plaintiff the sum of $12,500. Under this agreement an official of the bank selected the shares of stock to be sold, arranged for the sale, and charged the plaintiff $17,506.25, which represented the cost to defendant of those shares. The plaintiff thereafter in writing confirmed the transaction and acknowledged his indebtedness in the amount so charged to him. In February, 1929, the plaintiff commenced this action, alleging that the transaction was a loan of $12,500, and that the excess was a bonus within the inhibitions of the Usury Act for which he claimed treble damages.

The cause was tried before the court sitting without a jury and, after a thorough and painstaking trial, the court made its findings that the transaction was a bona fide sale and not a loan, and that the broker did not pay the defendant in money, but procured a real estate company to transfer to the defendant certain equities in incumbered real property subdivisions "of problematical marketability and speculative value." In support of the judgment for defendant the learned trial judge prepared and filed a written opinion which fully covers all the issues tried and which we adopt as the opinion of this court:

"The question in this case is whether the transaction between the parties resulted in usury.

"The notes executed by plaintiff to defendant, dated March 19, 1927, bear interest only at the rate of 7 per cent. per annum payable semiannually. Hence the transaction is not usurious on its face; and it is for the court to determine from all the facts and circumstances whether the method by which plaintiff procured assistance from defendant operated as a violation of the usury law.

[1] "In a usurious transaction, there must be a loan of money, which is to be repaid to the lender, with compensation for its use in an amount constituting a charge in excess of the highest permissible rate. And as a necessary concomitant there must exist the corrupt intent to exact the illegal charge for the use of the money lent. Lamb v. Herndon, 97 Cal. App. 193, 197, 275 P. 503.

[2] "The presumptions of law are in favor of legality; and therefore if the transaction in question is open to two constructions, one making for legality, the other for illegality, then in the absence of evidence pointing clearly to usury, it is the duty of the court to adopt the construction in favor of lawfulness. Coley v. Wolcott, 103 Cal. App. 140, 284 P. 241; Shelley v. Byers, 73 Cal. App. 44, 57, 238 P. 177.

"In the present case the plaintiff contends that he borrowed from the defendant $12,500, agreeing by his notes to pay therefor $17,506.25 with interest until paid at the rate of 7 per cent. per annum, payable semiannually. He further contends that he actually paid in addition to the amount borrowed the sum of $6,629.94 for use thereof, and prays for judgment against defendant in treble this amount, or $19,889.82, together with interest thereon from August 4, 1928.

"The contention of the defendant is that the transaction was not a loan of money, but a sale of certain corporate stock to plaintiff upon credit, and further that defendant has not even yet been able to realize the return of any of his money.

[3] "If there was a bona fide transaction of purchase and sale, and not a loan or forbearance of money, the usury law has no application. Verbeck v. Clymer, 202 Cal. 557, 562, 563, 261 P. 1017; Lagorio v. Yerxa, 96 Cal. App. 113, 116, 117, 273 P. 856.

"The fundamental question is, then, whether plaintiff really executed his notes to defendant for money borrowed, or for the purchase price of stock acquired from defendant.

[4] "The evidence presents the following situation to my mind: Rose and Wheeler were close friends, Rose being a real estate broker in Los Angeles, and Wheeler a physician practicing in San Francisco and making also periodical professional visits to Los Angeles. Rose was in need of $12,500; and seeking out his friend Wheeler, then on one of his visits to Los Angeles, endeavored to persuade Wheeler to lend him that amount. Wheeler was not a money lender and had not the ready money. He owned, however, certain stocks, which were held in pledge by his bank in San Francisco as security for a large indebtedness of his own. These stocks could not then be sold at the ruling prices, except at a considerable loss; and though Rose kept pressing for a loan, Wheeler was averse to subjecting himself to the loss that would ensue. Thereupon Rose, whose previous activities had engendered a nimbleness of mind, proposed to buy at cost to Wheeler enough of Wheeler's stocks to supply Rose with $12,500 net upon sale of the stocks for his account, and to execute to

Wheeler a promissory note for the amount representing his resulting indebtedness to Wheeler for the stocks so taken. The note was to be secured by a secondary deed of trust of certain realty, which Rose stipulated should not be recorded, and also by 75 shares of stock of Rose's brokerage company. To this arrangement Wheeler assented after he had returned to San Francisco accompanied by Rose, and they had together conferred with Wheeler's counsel and with the official at Wheeler's bank who had charge of his pledge account. The bank selected such of Wheeler's stocks as it was willing to release for sale to accomplish Rose's purpose, without jeopardizing its own position as a creditor of Wheeler; and the stocks so released were then sold through the bank for the benefit of Rose. To produce the net amount of $12,500 required by Rose and duly received by him from the proceeds of sale, stocks were thus sold in the market, at prices so much under their cost to Wheeler as to create an indebtedness in his favor of $17,506.25 on the part of Rose. Accordingly, Wheeler was provided by his counsel with a promissory note in this amount, bearing interest at 7 per cent. per annum, to be executed by Rose, together with the deed of trust as agreed. When these papers got into Rose's hands, however, he assumed, without the attorney's knowledge, to substitute for the note prepared two notes drafted by himself, one for $12,500 and the other, which in this action he dubs a bonus, for $5,006.25. He changed also the deed of trust so that instead of securing an indebtedness of $17,506.25, it was made to recite an indebtedness of only $12,500. This alteration was made without being brought to Wheeler's attention, and was not observed by him. Rose now insists that the transaction so proposed by himself was nothing but a loan, and was conceived and carried out with the corrupt intent, and with the effect, of exacting usury of him. This contention is in contrast with Rose's letter of March 19, 1927, transmitting the two notes to Wheeler, and saying that he was delivering them 'as evidence of my indebtedness covering purchase price of certain corporation stock which I have purchased from you at the price originally paid by you for said stock, and I hereby acknowledge my indebtedness to you in said sum.' Such having been Rose's own written declaration at the time, the burden is now upon him to show that what he himself wrote was not true when he uttered it. If he then correctly described the transaction, his present complaint is destitute of merit; for a bona fide sale, whatever the price, imports no usury. Thus in Tyler on Usury, page 92, it is said: 'But there can be no usury where there is no debt contracted upon the loan of money. The rule is simple and decided, that the transaction must be one involving the loan or forbearance of money. A person may sell his credit, his responsibility, his goods or his lands; and if he deals fairly, he may take as large a price for either as he can get, and there can be no usury in the case. The authorities are clear and explicit that to constitute usury there must be a loan, directly or indirectly, and that a real sale, without any intent to loan, though it may be oppressive, cannot be usurious. The inquiry often arises, whether the transaction was a real sale in the regular course of business, or a colorable sale, with intent to disguise a loan, and evade the statute against usury; but if the case is proved to be that of a sale, and not a loan, the courts uniformly hold that usury cannot attach, and indeed, a sale can in no case be prima facie evidence of usury; for it is valid unless it be a loan in disguise, and the burden of proof lies on the party claiming it to be usury, and it is necessary for him to show the circumstances which bring it within the statute.'

[5] "The distinction between usury and a purchase at the seller's price, exorbitant though it may be, is likewise emphasized in General Motors Accept. Corp. v. Weinrich, 218 Mo. App. 68, 77, 78, 262 S. W. 425, 428, where the court speaks thus:

"'However, it is necessary to clearly keep in mind just what usury is, and what is necessary to constitute it. Usury is the exacting, taking or receiving of a greater rate than is allowed by law for the use or loan of money. In order for a transaction to be usurious there must be in it a loan at more than the legal rate of interest, or the exaction of a greater than the legal rate for the forbearance of a debt or sum of money due. Struthers v. Drexel, 122 U. S. 487, 496, 7 S. Ct. 1293, 30 L. Ed. 1216; Moncure v. Dermott, 13 Pet. 345, 356, 10 L. Ed. 193; Coast Finance Corp. v. Powers Furn. Co., 105 Or. 339, 209 P. 614, 615, 24 A. L. R. 855. "In order to constitute usury there must be an express or an implied loan. * * * In the absence of a loan there can be no usury. Usury is not predicable of a purchase." State ex rel. v. Boatmen's Savings Institution, 48 Mo. 189, 193. In Nichols v. Fearson, 7 Pet. 103, 108, 8 L. Ed. 623, it is said: "There are two cardinal rules in the doctrine of usury. * * * The first is, that to constitute usury, there must be a loan in contemplation by the parties; and the second, that a contract, which, in its inception, is un-

affected by usury, can never be invalidated by any subsequent usurious transaction."

"'It is true, a loan may be cloaked in the outward form and appearance of a purchase, in which case that will not change the substance of the transaction nor hide the usury. But if there is a real and bona fide purchase, not made as the occasion or pretext for a loan, the transaction will not be usurious even though the sale be for an exorbitant price, and a note is taken, at legal rates, for the unpaid purchase money. The reason is that the statute against usury is striking at and forbidding the exaction or receipt of more than a specified legal rate for the hire of money and not of anything else; and a purchaser is not like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller. So that a sale in good faith of property, merchandise, or of an indorsement, or guaranty, or even of credit, if the seller has no other interest in the transaction, is valid and not open to the objection of usury whatever the price. White v. Anderson, 164 Mo. App. 132, 136, 147 S. W. 1122.'

"And in Jackson v. State, 5 Ga. App. 177, 183, 62 S. E. 726, 728, the court, referring to certain statutory inhibitions aimed at the prevention of usury, said: 'It is only when these things, otherwise legitimate and valid, are used as devices for the exaction of usury beyond this fixed amount that they fall within the prohibition of the act. The Legislature never intended to revolutionize the general law on the subject of sales of property, or the right of every man to sell what he owned for any price he desired, or to prohibit any man from buying any sort of property for any price for which he could purchase it. "The policy of our law is against restrictions upon the alienation of property. It is woven in the warp and woof of all of our laws, concerning the disposition of property, that an adult shall be unrestricted in the disposition of his property." Singleton v. Close, 130 Ga. 720, 61 S. E. 724.'

"Likewise in Blackmore Inv. Co. v. Johnson (C. C. A.) 32 F.(2d) 433, 435, involving the usury law of this state, Judge Gilbert declared: 'The authorities fully sustain the proposition that a sale of one's property for whatever price, no matter how unconscionable it may be, does not in itself constitute usury.'

"The language of the court is to the same effect in Philadelphia Warehouse Co. v. Seeman (C. C. A.) 7 F.(2d) 999, affirmed in 274 U. S. 403, 47 S. Ct. 626, 71 L. Ed. 1123.

[6] "The real test, of course, is whether there is in very truth a sale, or merely a pretense of sale to disguise a loan in evasion of the usury law. To infect a transaction with the taint of usury, there must exist the corrupt purpose on one side to lend money at usurious interest and on the other side to borrow on usurious terms dictated by the lender.

"Counsel on both sides have cited cases in support of their respective contentions; and in each case the decision has naturally rested upon the findings as to the good or bad faith exhibited in the transaction. This is illustrated in two Minnesota cases reaching, upon their facts, opposite conclusions.

"In Barry v. Paranto, 97 Minn. 265, 106 N. W. 911, 7 Ann. Cas. 984, the defendant, needing money, sought aid from his neighbor, the plaintiff, who had a stock of wheat. The transaction took the form of a sale of wheat to the defendant at an exaggerated price, and the defendant then by selling at the current price obtained the money he needed. The transaction was upheld as a bona fide sale. But in a later case, Trauernicht v. Kingston, 156 Minn. 442, 195 N. W. 278, the finding was that what was really a loan of money was put in the guise of a sale of stock to conceal a usurious purpose; and accordingly the court pronounced the transaction tainted with illegality.

"Another case worthy of notice is Stevens v. Staples, reported first in 64 Minn. 3, 65 N. W. 959, on an appeal from an order overruling a demurrer to an answer, which set up a defense to the complaint charging usury, and again in 69 Minn. 178, 71 N. W. 929, on an appeal from a judgment in favor of the defendant after trial on the merits. On the first appeal, dealing with the defense pleaded, the court held that if the agreement between the parties, requiring the plaintiff to indemnify the defendant for his loss in submitting to sacrifice of his securities, in order to get the money to lend to the plaintiff, was not merely a device to evade the usury law, then the loan was not usurious; and that the question was one of fact, depending on the intent to be ascertained at the trial. Thereafter, upon the trial of the case, the trial court found that the transaction was not usurious; and on the second appeal that conclusion was held to have been justified by the evidence.

"The plaintiff lays stress on two cases from New York, Van Tassell v. Wood, 12 Hun (N. Y.) 388, and Quakenbos v. Sayer, 62 N. Y. 344. In the Van Tassell Case, the trial court had found that the transaction was not u-

rious. That judgment was reversed on appeal to the General Term, whose decision is reported in 12 Hun (N. Y.) 388. An appeal was then taken from that decision to the Court of Appeals, which in 76 N. Y. 614, reversed the judgment of the General Term, and thereby affirmed the judgment of the trial court, upon the ground that the evidence in the case was sufficient to justify the finding that the transaction was not usurious. In the Quakenbos Case, there had been a trial before a referee who had found that there was a sale in good faith, but the referee's judgment was reversed on appeal to the General Term, which ordered a new trial; and its action in ordering a new trial was then affirmed by the Court of Appeals.

[7] "The decisive question in all such cases is the disclosed intention of the parties; and intention is a question of fact. Rose on his own initiative entered into a contract which he found later to be unprofitable; but Wheeler is not for that reason to be adjudged a usurer. Terry Trading Corp. v. Barksy, 210 Cal. 428, 292 P. 474.

"A case comparable to the present case is Greenhow's Adm'x & Heirs v. Harris, 6 Munf. (20 Va.) 472, 8 Am. Dec. 751, where a merchant in need of money entered into an arrangement with the owners of a large amount of bank stock, whereby from time to time he obtained a quantity of stock on his secured note, and then realized the money he needed by selling the stock at a lesser price for cash. In one instance, instead of taking the stock certificate himself, the merchant took merely an agreement for the delivery of the document on demand. That agreement he transferred a few days later to a purchaser from him, and on presentation of the assigned agreement the purchaser obtained the stock certificate directly from the original sellers. It was held that the various transactions for purchase of the stock on credit did not cloak a usurious intention; there being no combination between the parties originally selling the stock on credit and the person to whom their buyer sold in turn for cash.

"Other cases tending to support defendant's contention, some of them cited by plaintiff, some by defendant, are the following: Snow v. Nye, 106 Mass. 413; Keese v. Parnell, 134 S. C. 207, 132 S. E. 620; Bank of Aynor v. Adams, 132 S. C. 107, 128 S. E. 168; Brockenbrough's Ex'rs v. Spindle's Adm'rs, 17 Grat. (58 Va.) 21; Kelley v. Sprague, 58 Hun, 611, 13 N. Y. S. 64; Armstrong v. Freeman, 9 Neb. 11, 2 N. W. 353; Washburn v. Rider, 2 N. Y. City Ct. 127; Comstock v. Wilder, 61 Iowa, 274, 16 N. W. 108.

[8] "My conclusion is that the transaction was not tainted with corruption, and that it was verily a sale of stock and not a loan of money.

[9] "The sale having been made wholly on credit, Wheeler cannot be charged with taking usury because the price fixed exceeded the current cash price of the property sold. Verbeck v. Clymer, 202 Cal. 557, 563, 261 P. 1017; Berger v. Lodge, 90 Cal. App. 19, 21, 265 P. 515; Murphy v. Agen, 92 Cal. App. 468, 268 P. 480; Pac. Finance Corp. v. Lauman, 95 Cal. App. 541, 544, 273 P. 48; Lagorio v. Yerxa, 96 Cal. App. 111, 117, 273 P. 856.

"While Rose's notes were ultimately surrendered to him, what Wheeler received for them was not money, but fractional interests in incumbered real estate subdivisions or lots in or about Los Angeles, in which Rose's company had been interested. To acquire even these interests, Wheeler had to provide an additional sum of $13,000 and obligate himself to pay a further sum of $16,000. The marketability of the property received is problematical and the value speculative. So Wheeler's money is still at hazard.

"To subject Wheeler to payment of the demand made by Rose in this action would, in the language of the court in Baker v. Butcher, 106 Cal. App. 358, 289 P. 236, 'convert the wholesome purpose of the usury law into an engine of injustice.'

"And as is said in Clemens v. Crane, 234 Ill. 215, 238, 239, 84 N. E. 884, 892, quoted approvingly in In re Mansfield Steel Corp. (D. C.) 30 F.(2d) 832, 833, 'Where a transaction is susceptible of an innocent construction, and can only be held usurious by wresting it from its relation to other facts or by imputing to the facts a sense and meaning which they cannot reasonably bear, it is the plain duty of the court not to decree a forfeiture, but to uphold the contract and enforce its obligation.'"

[10] Aside from the questions discussed in the foregoing opinion, the appellant argues that we should reject the finding of the trial court that the transaction was in fact a sale because there is no evidence to support it. What he means is that there is a conflict in the evidence arising from his own testimony. But a reference to the opinion will disclose why the trial court did not accept that testimony. The only rule of law involved in this branch of the case is that when a contract is honest on its face the existence of an usurious intent is ordinarily a question of fact for the court or jury, and that it is only when the undisputed evidence shows usury that the question becomes one of law. O. A. Graybeal Co.

v. Cook, 111 Cal. App. 518, 528, 529, 295 P. 1088.

[11] Finally it is argued that the trial court erred in the admission and rejection of testimony in 108 separate instances. The appellant concedes that "some of these assignments, when taken singly, could not be urged to be prejudicial error." But he does not point to any one of them which he claims to be prejudicial, and does not argue in support of these assignments. It would serve no purpose to discuss them. Our examination of the record satisfied us that the case was fairly and fully tried, and that the judgment rests on findings of fact which in turn rest on the credibility of the witnesses heard.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

140 Cal.App. 228

THOMAS v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9471.

District Court of Appeal, First District, Division 2, California.

July 30, 1934.

Master and servant ⊂=405(4)

Evidence *held* not to support Industrial Accident Commission's finding that employee's injury consisted of aggravation of pre-existing hernia, in absence of offer or admission of expert testimony, given in other hernia cases, as to symptoms of traumatic hernia (St. 1917, p. 849, § 19 (c).

Certiorari to Industrial Accident Commission.

Proceeding for compensation under the Workmen's Compensation Act by A. F. Thomas, employee, opposed by the City and County of San Francisco, employer. To review an award of the Industrial Accident Commission denying compensation other than a surgical operation and hospital care furnished by the employer, the employee applies for a writ of certiorari.

Award annulled.

John K. Hagopian, of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

SPENCE, Justice.

Petitioner filed his application with the respondent commission for adjustment of his claim for compensation. He had suffered a hernia and the employer had provided a surgical operation and hospital care. Respondent commission found that petitioner had sustained an injury arising out of and in the course of his employment "consisting of the aggravation into a disability condition of a preexisting left inguinal hernia." It further found that petitioner had been adequately compensated for the "exacerbation of said hernia" by the furnishing of the surgical operation and hospital care "without compensation for disability" and made its award that petitioner "take nothing further." Petitioner seeks the annulment of said award.

The evidence before the commission was very brief. Petitioner was the only witness examined orally and his testimony covers less than eight pages of the typewritten record. The only other evidence introduced was the written report of the surgeon who performed the operation. Said report contained no statement with respect to the origin or cause of the hernia. The only portion of said report having any bearing upon the situation was as follows: "November 21, 1933. Bassini operation performed. Operative Findings: Small mass size of a marble protruding from external ring, easily reduced. Coverings of sac easily distinguished and separated. No adhesions internal or external, sac containing small loop of bowel, but patient made an uneventful recovery."

The testimony of petitioner showed that he was employed as a concrete worker by the city and county of San Francisco; that on November 12, 1933, he was pushing a "concrete buggy" containing about 300 pounds of concrete; that while so engaged the buggy suddenly tipped to the side, and when petitioner tried to prevent the overturning of the buggy he felt a sharp pain in his left groin; that he was unable to continue work and upon examining himself he "noticed a lump"; that he reported at the office of the employer's physician the same afternoon but the doctor was not available; that he reported to the doctor the following morning and was ordered to the hospital where the operation was subsequently performed. His further

testimony showed that he had never had "any trouble like this before" and had never previously experienced any pain of any sort at his work. He had returned to work but a few days prior to the injury and had been examined, as was the employer's custom, before so returning. The result of this examination does not appear in the record. Petitioner offered in evidence a letter from the acting chief medical officer of the United States veterans' administration stating that petitioner had been thoroughly examined in that office on March 7, 1933; that he did not then "complain of any hernia, and upon physical examination no hernia was found, neither was there found any relaxed inguinal ring." Said letter was not admitted in evidence, the referee saying, "It is merely corroboration. That's unnecessary." Said referee had previously stated: "This is a perfectly simple hernia case. There's no reason to litigate it to any great extent." Counsel for the insurance carrier offered no testimony at the hearing but requested one day to have petitioner examined and to file a report. This request was granted. Counsel for petitioner then said: "I request the same leave to have him examined and submit reports." Whereupon the referee said: "I do not see the reason to go to the expense." No further reports were filed but on the day following the hearing, the respondent commission made its award as above indicated. Thereafter petitioner's application for a rehearing was denied.

Petitioner contends that the award denying him disability compensation should be set aside as there was no evidence whatever to support the finding that petitioner's injury consisted of the aggravation of a pre-existing hernia. In our opinion this contention must be sustained. Respondents do not quote any evidence to sustain said finding, but they argue that the commission applied to the facts of the present case the knowledge gained from expert testimony in other cases involving similar issues. They then proceed to set forth what purports to be the substance of certain expert testimony given in other hernia cases and dealing with the alleged symptoms of "true traumatic hernia." None of such expert testimony is to be found in the record before us. Reference is then made by respondents to section 19, subd. c, of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 849), which provides that the "commission may receive as evidence * * * excerpts from expert testimony received by the commission upon similar issues of scientific fact in other cases and the prior decisions of the commission upon such issues." The fallacy in respondents' argument is found in the fact that while such evidence might have been admitted under the provisions of the section above mentioned, no such evidence was offered or admitted herein and therefore said finding stands wholly unsupported.

The situation is strikingly similar to that presented in Harris v. Industrial Accident Commission, 110 Cal. App. 46, 293 P. 659, and upon the authority of that case the award must be annulled. It is so ordered.

We concur: NOURSE, P. J.; STURTEVANT, J.

140 Cal.App. 254

BRUNIG et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 9226.

District Court of Appeal, First District, Division 2, California.

July 31, 1934.

Rehearing Denied Aug. 30, 1934.

Hearing Denied by Supreme Court Sept. 27, 1934.

1. Gas ⇐20(4)

Whether gas main in settling ground in filled-in section of city broke because of negligence of gas company so as to render it liable for death of person burned in explosion of escaped gas *held* for jury.

2. Gas ⇐20(4)

In action for death of person burned in explosion of gas escaped from pipe broken by settling of soil in filled-in section of city, where plaintiffs introduced direct evidence as to what had happened but relied on indirect evidence as to defendant's negligence, submission of case to jury under doctrine of res ipsa loquitur *held* not error.

3. Gas ⇐20(2)

In action for death of person burned in explosion of gas escaped from pipe broken by settling of soil in filled-in section of city, admission of evidence as to depressions in street and sidewalk and gas troubles over period of 17 years in neighborhood of accident *held* not error, since evidence tended to prove entire installation was defective.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action by Evelyn Brunig and another, minor children, by Charles Brunig, their guardian ad litem, against the Pacific Gas & Electric Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; LANGDON and SPENCE, JJ., being disqualified did not participate.

Thos. J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, for appellant.

Eugene H. O'Donnell and Leland J. Lazarus, both of San Francisco, and Edwin J. Regan, of Weaverville, for respondents.

STURTEVANT, Justice.

In an action brought to recover damages for the loss of their father, the jury brought in a verdict in favor of the plaintiffs. From the judgment entered on the verdict the defendant has appealed.

Before taking up the points made by it we will set forth some facts shown by the record. In their complaint the plaintiffs alleged that at the time of the accident the defendant was engaged in the business of supplying illuminating gas and electricity and had installed and maintained a system of gas mains and pipes under Third street in the neighborhood where the accident occurred. That allegation was not denied by the defendant. The plaintiffs alleged the negligence of the defendant in general terms. Stein v. United Railroads, 159 Cal. 368, 113 P. 663. That allegation was denied by the defendant. After the jury was impaneled the plaintiffs made an opening statement. In it their counsel stated with much detail the facts that they expected to prove. Immediately thereafter the plaintiffs took up the burden of proof. In so doing they called many witnesses and introduced over 500 folios of testimony. By the direct evidence of their witnesses they introduced evidence proving or tending to prove that the accident occurred at 4032 Third street in San Francisco. That number designates a house that is located in what is known as Butchertown, a large portion of which was built on filled in marsh lands. The record does not disclose when the filling in was done but it does show the fact that the defendant's pipes were laid some time prior to 1908. How much before that date the record does not show. On the night of December 22, 23, 1931, it had been raining. The extent of the rain or storm is not shown by the record. However, the next morning immediately in front of 4032 Third street there was a depression in the street, and water had accumulated. Charles Brunig, Jr., was sojourning at 4032 Third street. He was occupying the front room on the second floor. The lower floor constituted a separate flat and was occupied by a different tenancy. At 3 o'clock in the morning of December 23, a young woman who was sleeping in a back room on the first floor awoke and smelled gas. She went to sleep again, and when she awoke about seven she testified that she was nauseated. At about 6 o'clock two men passed by the building going to their places of employment. When they passed the building gas odor was so strong that they stopped and one of them rapped on the window and notified a woman who was occupying that room. At about 8 o'clock in the morning Charles Brunig, Jr., arose. He rolled a cigarette and struck a match to light it. As he did so an explosion occurred that was of such violence as to wreck the front part of the building. The flames of the explosion burned Charles Brunig, Jr., so severely that he died at 10 o'clock that evening. Immediately after the explosion occurred a fire alarm was put in and the firemen appeared in a few minutes. The fire in the building was immediately under control, except at the top of a retaining wall that was on the eastern end of the lot and bordering on the west side of Third street. At that place the gas continued to flow across the top of the wall and so continued to flow until representatives of the defendant arrived and shut off the gas. Thereupon the flames went out. To shut off the gas the service pipe immediately adjacent to the premises was uncovered. It led from the main which was located along the eastern line of Third street. The service pipe was laid about two feet below the surface of the street and passed through and was embedded in the concrete retaining wall. At a point about eighteen inches from the wall out into the street there was a sleeve or coupling. At that point the service pipe was broken and the street end had dropped about an inch and a half. The plaintiffs also introduced evidence that in several places in the immediate neighborhood the ground had sunk and the sidewalks had buckled when the ground sunk below them. When the defendant's representatives uncovered the service pipe at No. 4032, it was found that a space of several inches existed between the level of the soil and the bottom of the concrete sidewalk. Continuing, the plaintiffs introduced evidence of complaints of gas leaks in the immediate neighborhood of No. 4032. Those complaints

covered a period of years from one to seventeen.

At the close of the plaintiffs' case in chief the defendant made a motion for a nonsuit. The motion was denied, and the defendant thereupon introduced its defense. One witness was called in rebuttal. He merely identified the piece of pipe that had been taken out of the concrete wall and it was admitted in evidence.

[1] The first point made by the defendant is that there was no evidence upon which to base a verdict of negligence. We think that may not be said as a matter of law. Taking the direct evidence and the inferences which the jury was entitled to draw therefrom, we think the point may not be sustained. Union, etc., Co. v. San Francisco Gas, etc., Co., 168 Cal. 58, 60, 61, 141 P. 807; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 13, 151 P. 286.

[2] The plaintiffs requested, and the trial court gave, two instructions, which were as follows:

"IV. In civil cases, and this is a civil case, the affirmative of the issue must be proven. The affirmative here is upon the plaintiffs as to all affirmative allegations of the complaint. Upon the plaintiffs, therefore, rests the burden of proof by a preponderance of evidence. However, there is in law a doctrine known as res ipsa loquitur, meaning that the thing or matter speaks for itself. In other words, when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

"XLII. You are instructed that in this case plaintiffs are not required to show particularly what the specific act of negligence was, if any, which produced the accident which resulted in the death of Charles Brunig, Jr., deceased, but are only required to show that the accident was one that would ordinarily not have occurred had due care been employed. The burden of proceeding then shifts to the defendant, Pacific Gas and Electric Company, to show its freedom from negligence."

The defendant asserts that the trial court committed prejudicial error. It bases its assertion on the fact that the exact facts of the accident were put in evidence by the plaintiffs. True it is that the plaintiffs introduced direct evidence of what happened, but their case rested on indirect evidence as to the negligence, if any, of the defendant. Under a similar condition of the record the same contention was made in Lippert v. Pacific Sugar Corporation, 33 Cal. App. 198, 164 P. 810. In deciding the point, at page 208 of 33 Cal. App., 164 P. 810, 815, the court said: "We are satisfied that this is a case where the doctrine of res ipsa loquitur is applicable, and plaintiffs are not precluded from relying upon it because they charged specific omissions of duties or acts of negligence. This latter proposition is well supported in Cassady v. Old Colony Street Ry. Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285, where it was said: 'The defendant also contends that even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine (res ipsa loquitur) because, instead of resting her case solely upon it, she undertook to go further and show particularly the cause of the accident. This position is not tenable. It is true that where the evidence shows the precise cause of the accident, as in Winship v. New York, N. H. & H. R. Co., 170 Mass. 464, 49 N. E. 647, and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been if it had not been shown. But if at the close of the evidence the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon a presumption, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it.' Plaintiffs may therefore rely on the presumption of defendant's negligence, although they endeavored, as did defendant, 'to show particularly the cause of the accident.'" The court did not err in giving either or both of the instructions complained of.

[3] The last point made is that the court committed prejudicial error in admitting, over defendant's objections, testimony of other instances of gas troubles in the neighborhood all arising under different conditions, or from unknown causes, and all occurring in a remote time. To that point there are many answers. The other instances did not arise under different conditions but under the same conditions—sinking ground in filled-in territory. They did not all occur in a re-

mote time. They extended over a long period of time. Some were recent, others not so recent, others still less recent. The admissibility of the incident was addressed to the discretion of the trial court and the weight of the evidence was for the jury. It was the contention of the plaintiffs that Butchertown is built on filled-in marsh lands; that the defendant laid its pipes in that ground as early as 1908 or prior thereto; that the ground under the pipes and in which they were laid continually settled and thus created a strain on the pipes which caused and tended to cause breakage and leakage throughout a long period of time but, nevertheless, the defendant negligently failed to inspect and to make such alterations as would prevent the breaks and leaks. To present that contention they called several witnesses. Mr. Lagrave testified that in 1920 the gas pipe in front of his house, four doors removed from 4032 Third street, blew up. Mrs. Bordenave testified that from 1914 to 1919 she occupied the flat at No. 4032, in which the accident happened. During that time three complaints were made to the defendant regarding escaping gas on the sidewalk in front of the flat. Mrs. Fern lived in the same premises in 1921. During that time the defendant made excavations and located two leaks. Mrs. Robertson testified that about five years before the trial, at the corner of Hudson avenue, one block from No. 4032, gas escaped and came through the blocks in the sidewalk. Mrs. Mercadier testified that in 1921 she saw the defendant's employees digging up the street in front of No. 4034 Third street, the house she lived in. The plaintiffs also introduced evidence that at several places the earth sunk and holes or depressions existed in the streets or sidewalks. The court did not err in admitting the evidence complained of. Long v. John Breuner Co., 36 Cal. App. 630, 640, 172 P. 1132; Lewis v. Boston Gas Light Co., 165 Mass. 411, 43 N. E. 178; Consumers' Gas Trust Co. v. Perrego, 144 Ind. 350, 43 N. E. 306, 309, 32 L. R. A. 146; King v. Equitable Gas Co., 307 Pa. 287, 161 A. 65, 67; E. L. Chester Co. v. Wisconsin Power & Light Co., 211 Wis. 158, 247 N. W. 861; 28 C. J. 601. In the case last cited, at page 867 of 247 N. W., 211 Wis. 158, the Supreme Court of Wisconsin said: "The court received evidence that prior to the breaking of the valve in question, another similar valve located in another part of the system also broke. It is claimed that this was error. Respondent justifies the reception of this evidence because, upon his theory, the entire installation was improper and unsafe, and was bound to give way at the weak or weakest point in the circuit, and that the situation is identical with that of the drive-belt, which it was claimed was defective and had broken upon previous occasions, evidence as to which was held admissible in Brossard v. Morgan Co., 150 Wis. 1, 136 N. W. 181, and numerous other cases on the point are cited by respondent. We conclude that there was no error in the reception of this evidence under the circumstances and under the issue formed."

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

140 Cal.App. 241

PEOPLE v. MILLER.

Cr. 1378.

District Court of Appeal, Third District, California.

July 30, 1934.

Hearing Denied by Supreme Court Aug. 29, 1934.

1. Criminal law ⇐1023(12)

Order denying motion to vacate judgment of conviction *held* appealable, where questions could not have been shown on record by appealing from judgment and court was not asked to pass on issues formerly presented (Pen. Code, § 1237, subd. 3).

2. Criminal law ⇐1186(4)

Entry of plea of guilty to prior convictions in burglary prosecution through counsel, instead of by accused personally, *held* not to require reversal, where such convictions were admitted in accused's testimony (Pen. Code, § 1018; Const. art. 6, § 4½).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Conrad Miller was convicted of burglary, and he appeals.

Affirmed.

See, also, 133 Cal. App. 228, 23 P.(2d) 1034.

Conrad Miller, in pro. per.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the respondent's motion to dismiss the appeal or affirm the judgment appealed from.

The defendant was tried and convicted in the superior court of San Joaquin county upon an information charging him with three separate burglaries, and also charging that the appellant had been twice convicted of felonies, and upon each conviction had served a term in the state penitentiary.

The record before us shows that upon being arraigned upon the information, and asked to plead as to the three charges of burglary, the defendant made no answer. His attorney answering for him stated that the defendant pleaded not guilty.

As to the charges of having suffered two prior convictions and served two terms in the state penitentiary, it appears that the appellant's counsel made the following statement: "Your Honor, the defendant acknowledges that he has been convicted of these other two charges, but pleads not guilty to the present charge." The court ordered the pleas entered and the cause went to trial and resulted in the conviction of the defendant upon the three charges as above stated. Following the conviction the defendant was sentenced under the provisions of section 644 of the Penal Code providing for the punishment of habitual criminals.

It appears that the record in this cause as originally entered did not set forth correctly the manner in which the pleas just referred to were entered. Upon motion of the defendant the minutes were corrected setting forth the manner of the entry of the pleas, as we have just stated. Upon the correction of the minutes, the appellant made a motion to vacate the judgment for the reason that the provisions of section 1018 of the Penal Code, which specifies that pleas of guilty only can be entered by the defendant, had been violated. This motion being denied, the defendant appeals.

[1] Subdivision 3 of section 1237 of the Penal Code provides than an appeal may be taken from any order made after judgment affecting the substantial rights of the party. The motion to dismiss is made upon the theory that the questions presented might have been considered upon an appeal from the judgment, and therefore, under the decision of the court in the case of People v. Brattingham, 91 Cal. App. 527, 267 P. 120, an appeal from the order denying the defendant's motion does not lie. The record shows, however, in these cases that an appeal from the judgment would not have presented the question tendered for our consideration. It was necessary first to make a motion to correct the minutes in order that the grounds of the motion to vacate the judgment be made to appear, just as is shown by the decision in the case of People v. Walker, 132 Cal. 137, 64 P. 133.

The case relied upon by the people is based upon the language of the court found in De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 349, 32 L. R. A. 82, 53 Am. St. Rep. 165. The court there said: "It is also claimed that no appeal lies to this court from an order refusing to set aside the judgment, because the judgment was appealable. To this proposition many decisions of this court are cited. I do not care to review these cases. No doubt it has been held—and, I think, correctly—that, when a motion is made to vacate an order under such circumstances that it merely calls upon the court to repeat or overrule the former ruling on the same facts, the last order is not appealable," etc.

The circumstances presented here are readily distinguishable from the circumstances appearing in the cases relied upon by the respondent. Here, as we have stated, the questions presented could not have been shown by the record by appealing from the judgment, nor is the court asked in this proceeding to pass upon any issues formerly presented to it in this cause. That such a motion will lie, and that an appeal therefrom will be entertained, appears by the decision of the court in People v. Stratton, 133 Cal. App. 309, 24 P.(2d) 174. The latest case on the question here being considered is that of People v. Godfrey, 100 Cal. App. 91, 279 P. 1030. There, it was explicitly held (quoting from the syllabus) as follows: "An order denying a motion to vacate a judgment of conviction is appealable under section 1237 of the Penal Code, permitting an appeal to be taken by defendant from any order made after judgment affecting his substantial rights." A hearing in the Supreme Court, after judgment in the District Court of Appeal, was denied.

Without further citing authorities we are satisfied that the respondent's motion to dismiss the appeal should be, and the same is hereby, denied.

[2] Should the judgment be affirmed? In so far as the plea of not guilty is concerned, the case of People v. Tomsky, 20 Cal. App. 672, 130 P. 184, appears to afford a complete answer. In that case it was held, in an elaborate opinion prepared by Mr. Justice Hart, that the entry of a plea of not guilty by the defendant's attorney being present in court, and the court ordering the plea entered, and trial proceeding thereon on the theory that the defendant had entered a plea of not guilty, put upon the people the necessity of proving the charge against him. The form of entering the plea not affecting his substantial rights amounted only to an irregularity, and if under section 4½ of article 6 of the Constitution it did not appear that there had been a miscarriage of justice, reversal would not be had because the plea of not guilty had been entered through defendant's counsel instead of by himself personally. A hearing of this cause in the Supreme Court was denied. While not mentioned in the Tomsky Case, supra, section 1018 of the Penal Code makes no reference to the manner in which a plea of not guilty may be entered. It is only in instances where pleas of guilty are entered that such pleas must be entered by the defendant himself.

The question then recurs: Has the plaintiff lost any of his substantial rights by reason of his counsel answering as to the two prior convictions instead of the answers thereto being made by the defendant himself? While no case has been called to our attention making any distinction between pleading to a substantive charge of criminality upon which a defendant is about to be tried, and a count in an information or indictment setting forth prior convictions, we are of the opinion that there is a decided distinction between the two, and that it would be mandatory as we have stated in the case of People v. Stratton, supra, that on the plea of guilty to the substantive charge upon which a defendant was arraigned, that the defendant himself, if he desired to waive the trial, must personally enter a plea of guilty, and that such a plea could not be entered for him. The counts setting forth prior convictions do not place the defendant upon trial as to whether he was actually guilty of the offenses for which he suffered prior convictions and served terms in a penitentiary. The charges of prior convictions have nothing to do with the guilt or innocence of the defendant in relation to the charge upon which he is about to be tried, nor do the counts setting forth prior convictions raise any issue or issues as to whether the defendant was guilty of the charges resulting in the prior convictions. The ascertainment of whether prior convictions have been had and terms served is set forth in the statute, we think, simply to guide the court or the sentence fixing body, with the term of imprisonment to be inflicted. If the record shows that no miscarriage of justice has followed by the manner in which such facts were ascertained, we think section 4½ of article 6 of the Constitution applies, and no reversals should be made. In this particular the record before us shows the following: Prior to the pronouncement of sentence the defendant was sworn, placed upon the stand, testified that he had served a term in San Quentin, having been sent there from the county of Los Angeles on a conviction of receiving stolen property; that he had also served a term in Folsom for the crime of burglary committed in the county of Kern, and sent to Folsom from said county; that the defendant was discharged from Folsom in August, preceding the trial of this cause, which was had the following February. It also appears from the record that the prisoner testified that he had served a term in jail in San Bernardino county; that from the time he was discharged from San Quentin, only about five or six months elapsed before he was convicted of burglary and sent to Folsom.

The foregoing facts in relation to the defendant's prior convictions and serving of terms in state penitentiaries therefor are substantiated by his own testimony given under oath.

In the case of Stratton, supra, it appears that no testimony was taken by the court, as required by section 1192 of the Penal Code to determine the degree of the offense committed by the defendant, and that the opinion of an attorney could not be substituted for proof.

In the instant case the fact of prior convictions stated by counsel for the defendant were substantiated by sufficient proof set forth in the defendant's testimony.

The circumstances of the instant case appearing in the record which we have set forth, we think distinguishes it clearly and takes it out from under the ruling had in the case of People v. Stratton, supra, and other cases relied upon by the appellant.

It clearly appearing that there has been no miscarriage of justice, the order denying the appellant's motion to vacate the judgment heretofore rendered against him is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

1 Cal.2d 368

ROSS v. ROSS.

L. A. 14393.

Supreme Court of California.

July 30, 1934.

1. Husband and wife ⇐280

Where interlocutory divorce decree was entered as result of property settlement agreement of parties and followed terms of settlement, but did not incorporate settlement, rights of divorced wife for breach of agreement were enforceable in civil action.

2. Divorce ⇐245(1), 309

That interlocutory divorce decree was entered as result of property settlement agreement of parties and followed terms of settlement did not affect power of court to modify its order awarding alimony and support for children upon showing of changed conditions where settlement agreement was not made part of decree (Civ. Code, § 139).

3. Divorce ⇐245(3), 309

Where interlocutory divorce decree provided for weekly payment of $25 for support of divorced wife and two minor children and 12 years later divorced wife was earning monthly salary of $146, there was sufficient showing of changed conditions to justify modification of decree by reducing support for one minor child to $10 per week and discontinuing alimony payment (Civ. Code, § 139).

4. Divorce ⇐246, 310

While court could modify its order awarding alimony and support for children upon showing of changed conditions, it could not wholly vacate or annul order 12 years after its entry, because, while changed conditions would warrant present cessation of payments, future different conditions might require resumption of payments (Civ. Code, § 139).

In Bank.

Appeal from Superior Court, City and County of Los Angeles; Dudley S. Valentine, Judge.

Action by Daisy E. Ross against Fred W. Ross. From orders modifying provisions of an interlocutory decree of divorce, the plaintiff appeals.

Orders, as modified, affirmed.

Clarke & Bowker and Nathan Newby, all of Los Angeles, for appellant.

C. P. Temple, of Los Angeles, for respondent.

LANGDON, Justice.

Plaintiff appeals from orders of the trial court modifying the provisions of an interlocutory decree of divorce. The decree was given in favor of plaintiff in 1921, and ordered defendant to pay $25 per week for the support of plaintiff and her minor children, "until the further order of the court." On May 10, 1933, after an order to show cause issued at the instance of defendant, the court found that the parties had agreed to a reduction of the payments to twenty dollars in August, 1931, when the eldest child became of age; and the court ordered that the interlocutory decree be modified to require payments of $10 per week until the remaining child reached majority, and thereupon payments should cease. Subsequently the court, on its own motion, amended its order nunc pro tunc by adding the following: "The Court further finds that the plaintiff, at present time, is earning $146.00 per month salary in the Los Angeles County Assessor's Office, and is therefore able to care for herself and the Order for the payment of alimony is hereby vacated, commencing May 15, 1933." Plaintiff appealed from each order.

[1-3] Plaintiff contends that the interlocutory decree was entered as a result of a property settlement agreement of the parties, and followed the terms of an agreement made by them, and that consequently it is not subject to modification. The cases cited, however, are those in which the agreement was incorporated in and made a part of the decree. See Parker v. Parker, 55 Cal. App. 458, 203 P. 420; Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902; note, 19 Cal. Law Rev. 532. This was not done in the instant case, and whatever rights plaintiff may have for breach of the agreement are enforceable in a civil action. The record shows that the court made no attempt to rule on the contractual relations of the parties. The statutory power of the court under section 139 of the Civil Code to modify its order awarding alimony and support for children upon a showing of changed conditions is not affected in such a situation. Hughes v. Hughes, 68 Cal. App. 195, 228 P. 675; Armstrong v. Armstrong, 132 Cal. App. 609, 23 P.(2d) 50. There was here a showing of changed conditions sufficient to justify the exercise of the power, and no contrary showing was made by plaintiff.

[4] One point which plaintiff makes is well taken. The court has undoubted power to

modify the order, but certainly it cannot wholly vacate or annul it years after its entry. Changed conditions now warrant the cessation of all payments, but it is possible that in the future different conditions may require their resumption. Doubtless all that the court intended was such a cessation of payments, and not an annulment of the order itself. See Soule v. Soule, 4 Cal. App. 97, 87 P. 205; Molema v. Molema, 103 Cal. App. 79, 283 P. 956. This is, in fact, conceded by defendant.

The last order of the court is modified by striking therefrom the words "the Order for the payment of alimony is hereby vacated, commencing May 15, 1933," and substituting therefor the following: "the order for the payment of alimony is modified, payments thereunder to cease commencing May 15, 1933, until further order of the court."

As so modified, the orders of the lower court are affirmed. Respondent shall bear the costs of the appeal.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.

1 Cal.2d 381

GRIFFITH v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY et al.

Sac. 4840.

Supreme Court of California.

July 30, 1934.

1. Divorce ⇐243

Where minute order correctly stated court's order awarding alimony subject to modification, but through clerk's misprision interlocutory decree omitted provisions that payments should be made until further order of court, interlocutory decree *held* properly corrected to conform to minute order.

2. Divorce ⇐245(1)

Divorce decree providing for payment of alimony until further order of court may be modified by order reducing or stopping payments thereunder.

3. Divorce ⇐254

Agreement settling property rights of husband and wife which was approved by court in divorce proceeding *held* binding on court and parties and subject of civil action for enforcement, notwithstanding court's exercise of power reserved to modify decree respecting alimony payments.

In Bank.

Application by Helen Griffith for a writ of certiorari to review an order of the Superior Court in and for Mendocino County, W. D. L. Held, Judge, modifying the terms of an interlocutory divorce decree.

Writ discharged.

Prior opinion, 24 P.(2d) 920.

Charles Kasch, of Ukiah, for petitioner.

Taft & Spurr, of Ukiah, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate District. Upon further consideration, we are satisfied with the determination thereof by the said court, and we hereby adopt the following portions of the opinion of Mr. Presiding Justice Pullen as part of the opinion of this court. It reads as follows:

Petitioner herein seeks by this writ to review an order of the superior court modifying the terms of an interlocutory decree of divorce.

Pending the divorce trial, the parties entered into an agreement for a settlement of their property rights. This agreement, among other provisions, contained the following: "It is mutually agreed between the parties hereto that the wife in consideration of the premises and in consideration of the payment to her of $75.00, and $20.00 per month as hereinafter set forth, does by these presents, grant and convey unto the husband all the right, title and interest in and to all property now owned by the said husband and wife as community property; and in consideration for such release and conveyance by the said wife the said husband agrees to pay to the wife the sum of $75.00 plus the further sum of $20.00 per month in advance on the 10th. day of each calendar month commencing with the date hereof, and the wife hereby acknowledges receipt of the payment of said sum of $75.00, together with the further sum of $80.00 for said monthly payments otherwise due on the 10th. days of July, August, September and October, 1930." And "It is further agreed that in the event of the remarriage or death of the wife, that the aforesaid monthly payments of $20.00 shall ter-

minate as of the date of such remarriage or death."

Upon her part the wife released the husband from any debts or liabilities owing by each to the other except the payments above set forth, released any right, interest, or title as heir at law or otherwise to any property of the husband, and waived any claim to contest or oppose the will of the husband or right to homestead allowance, and agreed that in any divorce proceedings pending or hereafter to be brought she would not have the right to recover costs, counsel fees, alimony, support or maintenance, thereby waiving all claims thereto and any claim for future maintenance or support; the agreement being intended as a complete adjustment of all property rights.

At the trial the defendant failed to appear, and his default was entered. Judgment was ordered for plaintiff, and the following was entered in the minutes of the court: "An interlocutory decree of divorce was granted plaintiff, property agreement confirmed. Plaintiff was awarded $20.00 per month for support beginning August 1, 1930, until the further order of the court."

Subsequently a formal decree was signed by the court and filed in the records thereof, which decree embodied in full the agreement hereinbefore referred to between the parties, but made no reference to an allowance until further order of the court, as appeared in the minutes above.

A final decree was entered at the expiration of one year, which by reference adopted the terms of the interlocutory decree. Defendant continued to make payments of $20 monthly as provided in the agreement, but in May, 1933, moved the respondent court to modify the interlocutory decree by reducing the amount of $20 per month allowed therein as permanent support and maintenance, to nothing. This motion was based upon the terms of the minute order, which as will be noted, provided that payments should continue until terminated by order of court. Upon the hearing thereof the motion was granted, and petitioner, being dissatisfied, seeks here to review the order so made, contending that the formal decree submitted to the court and signed by the judge was the order of the court, and that the time had expired within which defendant could move to modify the same.

[1] The lower court in the present proceeding found that the minute order in the divorce proceeding correctly stated the order of the court, in which alimony was awarded, subject to modification by the court. The interlocutory decree as signed omitted the provision that the payments were to be "until the further order of the court," and this omission was found to be a result of clerical misprision. The interlocutory decree was therefore corrected to state the decision of the court as actually rendered. No attack is made upon this conclusion of the lower court with respect to the sufficiency of the evidence to support it, and we think that, in view of the minute order, it was proper for the lower court to conclude that the interlocutory decree did not purport to order the payment of alimony without any power of modification.

[2, 3] It therefore follows that the court, in accordance with its statutory power, could modify the order for the payment of alimony by ordering the reduction or cessation of payments provided thereunder, and that the exercise of the power in this case was within its jurisdiction. The court could not, of course, and did not, attempt to change the terms of the agreement previously entered into and approved by the court in the divorce proceeding, and the terms of that agreement are still binding between the parties, and may be the subject of a civil action for its enforcement.

The order is affirmed.

1 Cal.2d 430

HENDRICKSON v. BERTELSON et al.

Sac. 4784.

Supreme Court of California.

Aug. 16, 1934.

1. Mechanics' liens ⊂=5

Mechanic's lien law is remedial in character and should be liberally construed in its entirety (Code Civ. Proc. § 1188).

2. Mechanics' liens ⊂=149(4)

Mechanics' lien claimants *held* excused from complying with statutory requirement that claimants designate amount due upon each of structures or improvements to which materials were delivered, where materials were delivered under lump-sum contracts to place where six houses were being constructed, and it was impossible to designate how

much of materials was used for particular house (Code Civ. Proc. § 1188).

3. Mechanics' liens ⇐291(1)

In action to foreclose mechanics' liens, court had jurisdiction to apportion amounts of liens decreed as against lots as to which no waivers were filed, since actions to foreclose such liens are regarded in nature of judicial proceedings in equity, and when court of equity once obtains jurisdiction it will do complete justice by deciding whole case.

In Bank.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by A. Hendrickson against C. S. Bertelson and others, wherein Leon T. Smith and others filed a cross-complaint. From a judgment, named defendant and others appeal.

Affirmed.

Breed, Burpee & Robinson, of Oakland, and A. K. Wylie, of Alturas, for appellants.

J. S. Henderson and C. S. Baldwin, both of Alturas, for respondents.

WASTE, Chief Justice.

Appeal from a judgment of the superior court of Modoc county foreclosing liens of materialmen, and ordering a sale of real property to satisfy the same.

The defendant Bertelson engaged in the construction of six dwellings upon six adjacent lots in Mountain View subdivision of Alturas. The building operations were to be financed by construction loans advanced by the defendant and appellant California Mutual Building & Loan Association, secured by trust deeds on each of the six lots. The contracts with the plaintiff and the defendant and cross-complainant Alturas Building Material Company were what are known as "lump-sum" contracts, with but one consideration, and the building materials were to be furnished for all six dwellings without separate designations. The building and loan association commenced making advances when it was discovered that deliveries of material to three of the lots had been made, which would have affected the priority of its liens. It thereupon refused to make further advances. To meet this situation, both lien claimants executed waivers of liens as to these three lots, and the construction work thereupon proceeded upon all six houses. Thereafter it became necessary for the materialmen to file liens against the three lots, as to which waivers had not been given, for the unpaid balances due upon the lump-sum contracts for the materials furnished. For the reasons hereinafter explained, they could not make separate designations of materials furnished each construction, as required by section 1188 of the Code of Civil Procedure. The plaintiff's claim was for $249.90, and the cross-complainant's claim was for $1,210.93. No question of value is raised, and no notice of completion was ever filed.

The action having been tried, the court rendered judgment for the full amount of plaintiff's claim, and costs, and for cross-complainant's claim, and costs, and decreed that plaintiff and cross-complainant have liens for one-half the amount of their respective claims with costs as against said three lots, apportioning the said amounts in equal portions as against each of said lots. It was decreed that no priority existed in favor of either of said liens, and that the same were prior and superior to all rights of the California Mutual Building & Loan Association, holder of the trust deeds, and that said liens be foreclosed and the lots sold to satisfy the same.

Appellants contend that the liens are void by reason of the failure of the lien claimants to designate the amounts of their claims as against the individual lots, as required by section 1188 of the Code of Civil Procedure, and that the trial court was without power to make any apportionment of the liens as against the waiver-free lots.

[1] The mechanics' lien law is remedial in character, and should be liberally construed in its entirety with a view to effect its objects and to promote justice. Hammond Lumber Co. v. Barth Investment Corp., 202 Cal. 606, 610, 262 P. 31. While section 1188 does provide that where a claim of lien is filed against two or more buildings, the lien claimant must, at the same time, designate the amount due on each of such buildings, it has been held not to require impossibilities, and that "the only effect of a failure to designate the amount due on each of two or more structures for which one claim is filed is to postpone the lien to those of other claimants." 17 Cal. Jur., p. 145. In Warren v. Hopkins, 110 Cal. 506, 510, 42 P. 986, 987, it is said: "While section 1188 requires the claimant who files a lien against two or more buildings, or other improvements, to designate the specific amount for which he claims a lien upon each of such improvements, it does not require him to make such designation unless there is in fact a specific 'amount due to him' on each of

such improvements; and it might frequently happen that a contractor would construct several buildings under one contract, and there would not be any specific amount due to him on each of such buildings." The District Court of Appeal for the Third Appellate District said in Southern California Lumber Co. v. Peters, 3 Cal. App. 478, 479, 86 P. 816: "It will not be held that the Legislature intended to defeat the application of the lien law to a particular class of cases by requiring the performance of something impossible; but, on the contrary, the mechanic's lien law, being remedial in its nature, will be given a liberal interpretation to promote justice and carry out its general purpose, and it will be presumed that in enacting section 1188, Code Civ. Proc., the Legislature had in mind those cases only where it was possible to designate the amount due on each of several buildings, and did not intend that the section should apply to any other class of cases."

The trial court found specifically that defendant Bertelson purchased of the lien claimants building materials as specified, and generally, "all to be used, and all of which was used in the construction of said six dwelling houses; that said materials were furnished and delivered upon the ground where the construction of said dwelling houses was in progress on single orders and as one contract without any designation as to the amount of said materials to be used in any particular or specified house * * *."

[2] This finding is not only fully supported by evidence, but might have been supplemented by the evidence showing that no separate records were kept by the lien claimants as to delivery of particular materials to particular improvements; the deliveries being on the ground to the job as a whole, and the impossibility, therefore, of segregating and designating the same in the claims of lien. We are constrained, therefore, to hold that the lien claimants, under these circumstances, were not required to do the impossible, and were excused from complying with the statutory requirement of section 1188 that the lien claimants designate the amount due upon each of the structures or improvements to which materials were delivered.

[3] The remaining question, as to the power of the trial court to apportion the liens to the respective lots, finds answer in the fact that actions to foreclose such liens are in this state regarded in the nature of judicial proceedings in equity. Curnow v. Happy Valley Blue Gravel, etc., Co., 68 Cal. 262, 9 P. 149; Coghlan v. Salvatore Quartararo, 15 Cal. App. 662, 115 P. 664; 17 Cal. Jur. 166; note, Ann. Cas. 1913B, 283. "When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case." Watson v. Sutro, 86 Cal. 500, 528, 24 P. 172, 180, 25 P. 64.

It was therefore properly within the jurisdiction of the court as a court of equity, and in line with the spirit of the mechanics' lien law and constitutional provision, to apportion the amounts of the respective liens decreed as against the lots as to which no waivers were filed, and thereby preserve to the materialmen liens their priority over the liens of the trust deeds. "Equity regards that as done which ought to have been done." 10 Cal. Jur. 505.

Other points raised by appellants are deemed immaterial in view of the conclusions reached.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.

1 Cal.2d 414

CONSOLIDATED TITLE SECURITIES CO. v. HOPKINS, County Assessor.

S. F. 14970.

Supreme Court of California.

Aug. 6, 1934.

Rehearing Denied Sept. 4, 1934.

1. Mandamus ⇐119

Original proceeding in mandamus is proper remedy to compel issuance of official tax receipt in full.

2. Taxation ⇐200

Personal property not owned by insurance company but in its exclusive possession under lease and used by it in conduct of its business *held* not free from local taxation under statute providing for payment of percentage of gross premiums in lieu of other taxes (Const. art. 13, § 14 (a, b).

3. Taxation ⇐140

Gross premiums tax required to be paid by insurance companies, although in lieu of certain taxes upon property, is not a tax upon property, but is franchise tax exacted for privilege of doing business in state (Const. art. 13, § 14 (a, b).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Bank.

Action by the Consolidated Title Securities Company against Ed W. Hopkins, Assessor of Los Angeles County.

Alternative writ of mandate discharged and peremptory writ denied.

Rehearing denied: CURTIS and PRESTON, JJ., dissenting.

Walter B. Kibbey and William H. B. Haymond, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

SEAWELL, Justice.

Petition for writ of mandate. Petitioner, Consolidated Title Securities Company, leases a title searching plant owned by it to Security Title Insurance & Guarantee Company, a title insurance company with offices in the city of Los Angeles. The notice of personal property taxes served on petitioner on July 11, 1933, by respondent county assessor of Los Angeles county charged petitioner with taxes in the sum of $12,029.62, levied on office equipment, a law library, and title searching plant, assessed respectively at $12,070, $750, and $270,230. Petitioner contends that said property is not subject to local taxation by virtue of the fact that it is in the sole possession and use of petitioner's lessee, a title insurance company, which annually pays a tax to the state based on gross premiums under the provisions of article 13, § 14, subd. b, state Constitution. Petitioner is not itself a title insurance company. It tendered to respondent assessor the sum of $74.99, which is the amount charged to it in said tax notice for taxes on notes and solvent credits. Upon the refusal of the assessor to issue a receipt showing payment of the tax bill in full, petitioner deposited the sum tendered in a bank in the name of the assessor, and thereafter brought this proceeding in mandamus to compel the assessor to issue to it a receipt in full. Petitioner alleges that the tax officials of other counties are also seeking to subject similar property in their respective counties owned by petitioner and in the possession of its lessee to local taxation.

[1, 2] Under the decisions of this court in Whitmore v. Brown, 207 Cal. 473, 279 P. 447, and Central Manufacturing Dist. v. State Board of Equalization, 214 Cal. 288, 5 P.(2d) 424, and the decision of the appellate court in Spring Valley Water Co. v. Planer, 88 Cal. App. 170, 263 P. 323, in which a petition for hearing in this court was denied, an original proceeding in mandamus is a proper remedy to compel the issuance of an official receipt in full.

The provision of section 14, subd. b, art. 13, which petitioner contends frees the personal property owned by it and in the possession of its lessee, a title insurance company, from local taxation, is as follows: "Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half per cent upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state; provided, that there shall be deducted from said one and one-half per cent upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this state. This tax shall be in lieu of all other taxes and licenses, state, county and municipal, *upon the property of such companies*, except county and municipal taxes on real estate. * * *" (The balance of the paragraph is not pertinent to the inquiry before us. Italics supplied.)

Section 14 was amended in June, 1933 (see St. 1933 p. 3074), when our tax system was changed in important particulars by initiative vote of the people. The initiative measure provided, however, that the provisions amendatory of section 14 should not go into effect until January 1, 1935. As will appear from our discussion hereinafter, the amendments made in the paragraph of said section which affects insurance companies (section 14, subd. b) do not change the law with regard to the question now before us—whether personal property not owned by an insurance company, but in its exclusive possession under lease and used by it in the conduct of its business, is free from local taxation under the "in lieu" provision of section 14, subd. b, quoted above.

In contending that such leased property cannot be taxed locally to the owner-lessor, petitioner relies strongly on the decisions of this court in Morgan Adams, Inc., v. County of Los Angeles, 209 Cal. 696, 289 P. 811, and Central Manufacturing District, Inc., v. State Board of Equalization, 214 Cal. 288, 5 P.(2d) 424, and the decision of the Supreme Court of the United States in Hopkins v. Southern California Tel. Co., 275 U. S. 393, 48 S. Ct. 180, 72 L. Ed. 329. These cases involved the interpretation of the provisions of section 14, subd. a, art. 13, Constitution, which provide for the payment of a gross receipts tax to the state by certain designated public utility corporations. In the cited cases the leased prop

erty upon which the local authorities sought to charge the owner with local ad valorem property taxes consisted respectively of a concrete building occupied by the lessee telephone company exclusively for its office quarters; real property and improvements consisting of railroad tracks, rights of way, buildings, structures, and appliances suitable to the operation of a railroad, which property was owned by a private nonpublic utility corporation and leased to a public utility railroad corporation; and, in the federal case, 300,000 telephone instruments, or "talking sets," used by the lessee company in the operation of its telephone system. In each case it was held that the property was not subject to local taxation.

There are important distinctions between those provisions of section 14, subd. a, art. 13, establishing the public utilities gross receipts tax, and the provisions of section 14, subd. b, under which insurance companies are required to pay a gross premiums tax, by reason of which the decisions under the public utilities tax provision are not necessarily controlling as to insurance companies. Under the constitutional provision as it continues in effect until January 1, 1935, the enumerated public utilities are required to pay to the state a tax equal to fixed percentages of their gross receipts from operation within this state "*upon* their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and *other property*, or any part thereof *used exclusively in the operation of their business in this state*." The section makes provision for determining "gross receipts * * * within this state," when such companies are operating partly within and partly without the state. The tax based on gross receipts is "in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided." (Italics supplied.) Sections 3664–3671, Political Code, restate the constitutional provision, define the term "operative property," and otherwise elaborate the scheme of taxation provided for by the Constitution.

It is held that payment of the gross receipts tax by the lessee public utility company frees leased property used by the utility in the operation of its business from local taxation, for the reason that the gross receipts tax is a tax upon all property used in the operation of the utilities business in this state, whether such property is leased or owned by the utility. Morgan Adams, Inc., v. County of Los Angeles, supra; Central Manufacturing District, Inc., v. State Board of Equalization, supra; Hopkins v. Southern California Tel. Co., 275 U. S. 393, 48 S. Ct. 180, 72 L. Ed. 329. By the terms of the constitutional provision the tax is upon all property used in the operation of the business in this state. In our decision in Southern California Tel. Co. v. Los Angeles County, 212 Cal. 121, 298 P. 9, 11, we said concerning it: "* * * The tax levied upon gross receipts is a substituted tax, intended to be the equivalent of a tax on the property, and only differing from a tax directly on the property by reason of the fact that a different method of computation is employed. See San Francisco v. Pacific Tel. & Tel. Co., 166 Cal. 244, 135 P. 971; Pullman Co. v. Richardson, 185 Cal. 484, 197 P. 346." The theory of the tax, as explained in the decisions, is that gross receipts from operation furnish a fair measure for estimating the value of operative property and computing the tax upon it. Inasmuch as the gross revenues from operation do not depend upon whether the operative property is leased or owned, and the amount of the tax is the same whether such property is leased or owned, the tax rests upon *operative* property without regard to its ownership, and to assess a local ad valorem tax against the owner on leased operative property is unauthorized double taxation. Morgan Adams, Inc., v. Los Angeles County, supra, at page 702 of 209 Cal., 289 P. 811; Central Manufacturing District, Inc., v. State Board of Equalization, supra. That is, the criterion adopted by the constitutional provision to determine freedom from local taxation is *use* in the public utility's business, rather than *ownership* by the utility. Property which is not in use in the operation of the business of the utility, such as a building in course of construction and the land upon which it is situate, although owned by the utility, are nevertheless subject to local taxation. Southern California Tel. Co. v. County of Los Angeles, supra.

[3] But the provisions of section 14, subd. b, art. 13, which provide for the gross premiums tax to be paid by insurance companies, make no such classification between operative property without regard to ownership, on the one hand, and nonoperative property on the other. Intangibles, such as stocks, bonds, mortgages, and other securities in which the average insurance company invests a large portion of its receipts in order to provide a fund to meet losses, are free from local taxation under the in lieu provision of section 14, subd. b, but are not "used" in the conduct of the insurance company's business in the sense that operative property of a public utility cor-

poration is used in the operation of its business. The gross premiums tax required to be paid by insurance companies, although in lieu of certain taxes *upon* property, is not, like the public utilities gross receipts tax, by the terms of the constitutional provision itself a tax *upon* property. Rather, it is a franchise tax exacted for the privilege of doing business in this state, and is recognized as such in the amendment to section 14 which goes into effect on January 1, 1935. Said amendment abolishes the public utilities gross receipts tax, and provides that all property *owned or used* by the specified utilities, other than their franchises, shall be subject to taxation to the same extent and in the same manner as other property at a value fixed by the state board of equalization annually. Said amendment further provides that the specified utilities shall pay a franchise tax to the state measured by net income under section 16 of article 13, but this provision is especially made inapplicable to insurance companies, as to which the gross premiums tax is continued in force. Federal securities exempt from a property tax are generally included in an insurance company's holdings.

The insurance company gross premiums tax frees from local taxation, except taxes on real estate, all "property of such companies." Use of personal property in the conduct of the insurance company's business is not the factor which determines freedom from local taxation. From a consideration of the constitutional provision relating to the gross premiums tax as a whole, and particularly the provision permitting the deduction from the amount of the gross premiums tax of all taxes paid by an insurance company on real estate "owned" by it, we are convinced that ownership by the insurance company is the factor which determines freedom of personal property from local ad valorem taxation. The gross premiums tax is not in lieu of taxes on real estate, but real property owned by an insurance company, or in its possession under lease from the owner, is subject to local ad valorem property taxes. The constitutional section provides, however, that insurance companies may deduct from the fixed percentage of gross premiums payable as a tax the amount of any taxes paid "on real estate *owned* by them in this state." Thus, although as regards the tax collecting authorities the real property owned by an insurance company remains subject to a local ad valorem tax, in so far as the taxpaying company is concerned, it is made clear that it shall not be required to pay an ad valorem tax on real property owned by it in addition to the full amount of the gross premiums tax, but the fixed percentage of gross premiums is the full measure of the tax burden upon it. By the terms of the constitutional provision the offset or deduction is allowed only for taxes paid on real *estate* owned by insurance companies. Ad valorem taxes assessed against real property in their possession under lease from the owner are not permitted to be deducted. Any other construction would do violence to the meaning of the word "owned." Personal property *owned* by an insurance company is relieved of the burden of local ad valorem taxes directly under the "in lieu" provision, rather than indirectly by deduction of the tax paid locally from the sum payable as a gross premiums tax, as in the case of real property. But we are unable to find that, by virtue of this difference, personal property *leased* to an insurance company is free from local taxes, while real property leased to such a company remains subject thereto. The constitutional provision does not authorize a different rule to be applied to personal property leased to an insurance company than is applied to real property leased to such a company.

We are mindful that under section 14, subd. a, art. 13, property used in the operation of the business of public utilities is "their property" and the "property of such companies," but this is because use in the operation of the utilities business is the test therein adopted.

The alternative writ of mandate is discharged, and the peremptory writ is denied.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.

1 Cal.2d 392

PEOPLE v. TWEDT.

Cr. 3733.

Supreme Court of California.

July 30, 1934.

1. Criminal law ⇐112(1)

In prosecution for selling securities without permit, that defendant's acceptance of complaining witness' offer to purchase stock was mailed in county other than where he was prosecuted did not take jurisdiction of case out of county of prosecution (St. 1917, p. 673, as amended; Civ. Code, §§ 1726, 1729; Pen. Code, § 781).

2. Criminal law ⇐200(1)

Co-operative acts constituting but one offense when committed by same person at same time, when combined, charge but one crime, and but one punishment can be inflicted.

3. Criminal law ⇐155

Contract for sale of corporation stock was complete on posting of seller's letter, accepting offer in buyer's letter to purchase stock.

4. Time ⇐9(1)

In computing time for purpose of determining whether prosecution is barred by limitations, day of commission of offense is excluded (Code Civ. Proc. § 12).

5. Criminal law ⇐149

Trial for violating Corporate Securities Act on theory that crime was committed on day within limitation period, though evidence showed merely mailing of letter to defendant by purchaser of stock, with money therefor, on such day, *held* prejudicial error, requiring reversal of conviction (St. 1917, p. 673, as amended).

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

O. J. Twedt was convicted of violations of the Corporate Securities Act, and he appeals.

Reversed.

Prior opinion, 27 P.(2d) 90.

Glenn M. De Vore and Thomas F. Lopez, both of Fresno, and G. W. Cartwright, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Fourth Appellate District. Upon further consideration, we hereby adopt the following portions of the opinion of Mr. Justice Marks as part of the opinion of this court:

Appellant was charged by an information filed by the district attorney of Fresno county on May 19, 1933, with three separate offenses consisting of violations of the Corporate Securities Act (St. 1917, p. 673, as amended). The first count alleges that on or about the 20th day of May, 1930, in Fresno county, he offered for sale, to Eveline Kloster, securities of the Linda Mineral Products Company without having a permit from the commissioner of corporations. The second count alleges that at the same time and place he negotiated for the sale of securities of the same company with Eveline Kloster without any such permit. The third count alleges that at the same time and place he sold securities of the same company to Eveline Kloster without the necessary permit. It is further alleged in the information "that the offenses set out in the three counts of this information are different offenses arising out of the same transaction and connected in their commission." Appellant was found guilty on all three counts and was sentenced on each of them to confinement in the state penitentiary. His motions for new trial and for arrest of judgment were denied. He is here on appeal from the judgment and orders denying his motions.

The Linda Mineral Products Company is a California corporation. On September 17, 1928, it was granted a permit to sell certain of its capital stock. This permit was suspended on January 4, 1930. An amended permit was issued to it on May 21, 1930. It is admitted by counsel for both parties that the only criminal acts which may be considered here in support of the judgment are those which were committed on May 19 and May 20, 1930, as the statute of limitations had run against all prior acts and the permit of the commissioner of corporations became effective on May 21, 1930, so that offering for sale, negotiating for the sale of, or selling the stock of the Linda Mineral Products Company was lawful on and after that date.

Miss Kloster, who was a teacher in the Fresno High School, had a brother who had become acquainted with a sister of appellant while attending a university. At the request of her brother, Miss Kloster called upon Miss Twedt and her mother at their residence in Los Angeles during the Christmas holidays of 1929. She there met appellant and heard him recount in the most glowing terms the prospects for the financial success of the Lin-

da Mineral Products Company, of which he was president. In 1930 Miss Kloster called upon Miss Twedt and her mother at their home in Oakland during the Easter school vacation of that year. She did not then see appellant.

About May 2, 1930, while Miss Kloster was teaching her class in Fresno, she was called by appellant over a long-distance telephone, probably from San Francisco. He told her that the Linda Mineral Products Company had been suddenly disappointed in raising $5,000 from another party; that it was financially embarrassed because of the failure to receive this money and that it needed it badly. He asked her to purchase stock in the company to this amount. She replied that she did not have the money. He then asked her if the members of her family could not make up the amount as he did not want to place the stock in small amounts with a number of purchasers. The conversation ended by appellant asking Miss Kloster to think it over. She sent him a night letter on the same evening, the contents of which are not in the record.

About May 6, 1930, Miss Kloster received a telegram from appellant advising her that he would arrive in Fresno at 10 o'clock that evening and asking to see her. Appellant had a long conference with Miss Kloster and one of her sisters that evening when the prospects of the company and the sale of its stock were discussed in considerable detail. Miss Kloster informed him that she might buy $700 worth of the stock, one of her sisters $300, and a Miss Smith $500. Appellant still wanted to sell $5,000 worth in a single transaction and again asked that the matter be further considered.

About May 13, Miss Kloster received another telegram from appellant asking for another appointment with her in Fresno at 10 o'clock that night. He then informed Miss Kloster that he had decided to let the three women have the $1,500 worth of stock and wanted the check immediately. Miss Kloster informed him that her money was not immediately available; that she hoped to be able to get it together so that it might be sent by the 20th of May. He suggested a postdated check, but it was not given him. On Saturday, May 17, 1930, Miss Kloster sent appellant a special delivery letter to his Oakland residence address which he received the next day, the contents of which appellant described as follows:

"She said she had talked to Dorothy Smith the next morning and that Dorothy and I agreed, was very happy to put in $500, and that—so if it was all right with me, why then she would take $500 worth of stock. * * * Oh, yes, she was going to take,—she and her sister had agreed, decided to take the stock, and also that if it was all right, why that they would take that, and also Dorothy Smith would take it. * * * She said that she did—that she would send the money, that they had decided to take the stock, and that she was going to send the money on Tuesday, as I recall it.

"Q. She said—do you recall whether there was any mention as to the amount of money? A. Yes, there was. They were taking $1500 worth."

Appellant replied to this letter by one dated May 18, 1930, and which was postmarked at Oakland, California, May 19, 1930, at 12:30 p. m. This letter contains the following: "Sending the 'Proceeds' on Tues. as you state is perfectly alright. It would have been O. K. to have sent the check because I would have held it till you told me it was good but is it just as O. K." "Tuesday" was May 20, 1930. On the afternoon of that day Miss Kloster and Miss Smith inclosed two checks in an envelope, one signed by the former for $1,000, and one signed by the latter for $500, in payment of the stock, and mailed them in Fresno. They were received and cashed the next day in San Francisco. The stock was issued and delivered in June, 1930.

Our study of the evidence leads to the following conclusions: (1) On May 2, 1930, appellant, over the telephone, offered to sell Miss Kloster $5,000 worth of the stock of the Linda Mineral Products Company. This offer was rejected. (2) On May 6, 1930, in Fresno, appellant renewed the offer to sell the same amount of stock to Miss Kloster. She rejected this offer, but did discuss with him the purchase of $1,500 worth of stock, $700 for herself, $300 for her sister, and $500 for Miss Smith. Appellant did not accept this offer of purchase, if it could be so termed, and left asking Miss Kloster to think the matter over further. (3) On May 13, 1930, appellant, in Fresno, offered to sell Miss Kloster $1,500 worth of the stock of the corporation if the purchase price was paid in cash, or if a postdated check were given him for it. This offer was rejected as Miss Kloster did not have the cash available and would not give him a postdated check. (4) By her letter of May 17, 1930, Miss Kloster offered to purchase $1,500 worth of the stock, provided she could pay for it on May 20, 1930. This offer was accepted by appellant in his letter dated May 18, 1930,

postmarked May 19, 1930. (5) The checks in payment of the stock were mailed May 20, 1930, cashed on May 21, 1930, and the stock issued in June, 1930.

The provisions of the Civil Code in effect at the time of the transaction provided that "an agreement for sale is * * * a mutual agreement to sell and buy." Section 1726. "An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor." Section 1729.

It is evident that the conversations between appellant and Miss Kloster on the 2d, 6th, and the 13th days of May did not result in any contract of sale, but in rejections of the offers to sell by Miss Kloster. "A communication from the offeree to the offeror, stating in effect that the offeree declines to accept the offer is a rejection." "A counter offer by the offeree, relating to the same matter as the original offer, is a rejection of the original offer, unless the offeror in his offer, or the offeree in his counter-offer states that in spite of the counter-offer the original offer shall not be terminated." Restatement of the Law, Contracts, §§ 37, 38.

[1] The first time the minds of the parties met on the transaction was in the exchange of the letters dated May 17, and May 18, 1930. There arose from these letters an agreement to buy and sell. It makes no difference here that the acceptance was mailed in Alameda county and the case tried in Fresno county. Where a public offense is committed, part in one county and part in another, the jurisdiction of the case is in either county. Section 781, Pen. Code; United States v. Ford (D. C.) 3 F.(2d) 643–647; People v. Boggess, 194 Cal. 212, 228 P. 448; People v. Bocchio, 80 Cal. App. 138, 251 P. 672.

In 6 California Jurisprudence, 57, it is said: "When the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, assent in any other mode will not be presumed. But where no condition is provided by the proposer concerning the communication of the acceptance, any reasonable and usual mode may be adopted, and consent will be deemed to have been fully communicated between the parties as soon as the acceptance is put in the course of transmission, and beyond the control of the party accepting. A telegram accepting an offer takes effect on its deposit for transmission. And it seems to be settled that when the proposal is unconditionally accepted by a letter deposited in the mail properly addressed to the proposer the contract is complete." * * *

Subdivision 8 of section 2 of the Corporate Securities Act in effect at the time of the transaction here involved provided in part as follows: "'Sale' or 'sell' shall include every disposition, or attempt to dispose, of a security or interest in a security for value. * * * 'Sale' or 'sell' shall also include a contract of sale, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a subscription or an offer to sell, directly or by an agent, or a circular letter, advertisement or otherwise." St. 1929, pp. 1251, 1252.

[2] It is evident under this definition that an offer to sell stock must be included in the sale where one is made to the offeree. It is also difficult to understand how a sale can be completed without negotiations for it. It has long been the rule in California "that co-operative acts constituting but one offense, when committed by the same person at the same time, when combined, charge but one crime, and but one punishment can be inflicted as one offense. 'Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table, and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same person, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted.' Wharton, Criminal Law, approved in People v. Shotwell, 27 Cal. 394." People v. Clemett, 208 Cal. 142, 280 P. 681. See, also, People v. Buchanan, 106 Cal. App. (Supp.) 765, 288 P. 50, and Schroeder v. United States (C. C. A.) 7 F.(2d) 60.

In examining the evidence to determine whether it supports the judgment, and in searching the record for error, it should be remembered that there is only a narrow period during which acts committed can now be deemed punishable. All charges of criminality arising out of the negotiations in the early part of May are barred by the statute of limitations. The convictions on the counts of offering and negotiating for sale are clearly improper, and the sole question is as to the propriety of the conviction on the count of actual sale.

[3, 4] The letter of Miss Kloster, sent on May 17, 1930, was an offer to purchase the stock on the condition that she might pay for it on May 20. Defendant's answer was an acceptance of the offer, and the contract of sale was complete upon posting of the letter of acceptance. Hence it is of great importance to fix definitely the time when the defendant's letter was posted. The letter was dated May 18, 1930, and, if deposited in the mail on this date, no conviction could be had, for the statute of limitations had run. It bore a postmarked date of May 19, 1930, and, if deposited on that date, would have warranted a conviction. The rule seems generally recognized, though with some dissent, that, in computing time, the day of commission of the offense is excluded. This is the rule in civil cases, and no compelling reason for a different rule in criminal cases has been advanced. See Cal. Code Civ. Proc., § 12; 16 C. J. 230. On this theory, the statute had not run if the letter was deposited in the mail on the date it was postmarked, and perhaps, from the evidence before it, the jury might have inferred that this was the case.

[5] But the record shows that the case was tried on another theory, and this fact resulted in manifest injustice to defendant, preventing a fair trial, as will hereinafter appear. The prosecution in the court below proceeded upon the theory that the essential date upon which the crime was committed, was May 20th. The statements of the prosecution clearly showed such a limitation. In consonance with this theory, the trial court instructed the jury that the 20th was the only date; and the 20th was within the period of the statute of limitations, as we have seen. But the evidence shows nothing more than the mailing of a letter by Miss Kloster with the money on that date. The actual contract was completed when defendant's letter was posted—either on the 18th or the 19th. The sending of the money was not a necessary part of the making of the contract, any more than the delivery of the stock, which did not take place until June. Hence the evidence lends no support to the conclusion that a crime was committed on the 20th. Yet, because of the erroneous theory and instructions, defendant applied himself to the disproof of this theory alone, and made no effort to disprove a contract completed on the 19th.

It is entirely possible, and defendant so contends, that, in the event the question of a possible conviction based upon a contract on the 19th were presented, he might produce evidence to show the actual time of posting of the letter, and might be able to establish its posting on the 18th, which would render a conviction impossible. It therefore appears that the erroneous theory of the prosecution and the trial court seriously prejudiced the defendant, and prevented a fair trial.

The judgment and order denying a new trial are reversed.

KNOKE v. SWAN.*

L. A. 12955.

Supreme Court of California.

Aug. 29, 1934.

Rehearing Granted Sept. 28, 1934.

1. Judgment ⇐570(5)

Judgment of dismissal in former action between same parties to quiet title *held* not to estop either party from asserting whatever title he may have in subsequent action to quiet title.

2. Taxation ⇐665

Fact that property was sold at tax sale for slightly less than amount due would not vitiate tax deed issued in pursuance of such sale.

In Bank.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by A. H. Knoke against Emma L. Swan. Judgment for plaintiff, and defendant appeals.

Affirmed.

A. G. Alm, Elliott H. Barrett, and Charles J. Kelly, all of Los Angeles, for appellant.

McKenna & McKenna, Catherine A. McKenna, and J. Irving McKenna, all of Los Angeles, for respondent.

CURTIS, Justice.

Action to quiet title to a city lot in San Francisco. Plaintiff claims title to said lot through a tax deed and by adverse possession. Defendant denies title in plaintiff, and alleges that she is the record owner of said lot, and as a separate defense sets up in her amended answer that plaintiff was estopped from asserting title to said lot by a judgment of the superior court of the county of Los Angeles duly entered on August 3, 1928, entitled,

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 42 P.2d 1019.

"Knoke v. Knight et al." The action was tried upon the issues made by the above-mentioned pleadings. Judgment was in plaintiff's favor, and the defendant has appealed on a bill of exceptions. The court found generally that all of the allegations of the complaint were true and that all of the allegations of the answer were untrue.

[1] We will first discuss the defense of estoppel interposed by the defendant. If this defense be sustained, the other questions need not be further considered. Plaintiff received a tax deed to said property dated July 31, 1922. On August 8 of the same year, plaintiff instituted an action to quiet his title to said lot against a number of defendants, but the defendant in this action, Emma L. Swan, was not made a party defendant in said action. However, on February 11, 1926, Emma L. Swan filed a complaint in intervention in said action. The plaintiff filed his answer to said complaint in intervention in which he set forth that he was the owner of said lot. This action came on for trial upon said complaint in intervention and the answer thereto. The trial was terminated by the signing and filing by the trial judge of an order dismissing the case. Thereafter the clerk of the court entered the same as a judgment in the proper book kept for that purpose.

Assuming that this document is a final determination of said action, can it be held to be a judgment determining the rights of either of said parties to the real property in controversy? It does not by its terms purport to determine the ownership of said lot. In express terms it ordered the dismissal of said action. In the body of the document are certain recitals in which the court apparently gave its reason for ordering the action dismissed, that is, that neither party had proven that he was the owner of said lot. If we give effect to the recitals in the order, the plaintiff herein is estopped from claiming title to said lot through said tax deed, and the defendant is estopped from claiming title to said lot through any means. If, therefore, it is res adjudicata as to these matters of recital, both of the parties thereto (and as they are the same, both of the parties hereto) are estopped from asserting any right or title to said lot. The introduction of this order or judgment cannot avail the defendant, for the instant we give effect to it as an estoppel of the parties thereto, it must be held to estop both the plaintiff and the defendant from claiming to be the owner of said lot. In our opinion the order cannot be given any such effect. As we construe its terms, it is at most merely a judgment of dismissal and as such does not estop either party from asserting in this action whatever title he or she may have to the lot in question. Pyle v. Piercy, 122 Cal. 383, 55 P. 141, 142. In 15 California Jurisprudence, § 185, p. 131, the rule is given by a quotation from Pyle v. Piercy as follows: "When there has been no adjudication of the cause upon its merits, it will only be in exceptional cases that this court will hold that a judgment of dismissal is the equivalent of a judgment of res adjudicata upon the facts." Defendant's plea of estoppel is not therefore sustained.

[2] As to the tax deed under which the plaintiff claims title to said lot, defendant points out that it was sold for 2 cents less than the legal amount of taxes, penalties, and costs due at the time of said sale. In a sale where the difference between the true amount due and the amount for which the property was sold amounted to only two cents, will this discrepancy vitiate the sale? Defendant relies upon Hotchkiss v. Hansberger, 15 Cal. App. 603, 115 P. 957; Simmons v. McCarthy, 118 Cal. 622, 50 P. 761, 763; and Warden v. Broome, 9 Cal. App. 172, 174, 98 P. 252. In the last of these three cases, the facts show that the property was sold for fifty cents more than the amount due. For that reason the court held that the sale was invalid. In Hotchkiss v. Hansberger, supra, the property was sold for $1.40 in excess of the amount due. The opinion of Simmons v. McCarthy, supra, while containing language from which it might be inferred that a sale for three cents in excess of the true amount due for taxes, penalties, and costs would not be sustained, cannot be regarded as authority on that question for the reason that that part of the opinion which was a departmental opinion was concurred in by only two members of the court. Chief Justice Beatty rendered a separate concurring opinion "upon the ground that the affidavit did not show a proper service of the notice to redeem."

In all of these cases, the sale was made for an excessive amount. As noted above, the property here involved was sold for less than the amount due, and not for an excessive amount. We have been unable to find any authority in this state bearing upon the question as to whether a sale for taxes in an amount less than the amount due is invalid. In Doland v. Mooney, 79 Cal. 137, 21 P. 436, 437, there was a discrepancy of 50 cents between the certificate and the tax deed. In discussing the validity of the sale, the court said: "We cannot say that because the certificate and deed differ in such recitals the sale

was for a sum in excess of the tax and legal costs. If an excessive amount was demanded, and the property sold therefor, it would invalidate the sale, and that fact may be shown." Here is a clear intimation by this court that it is only in cases where the property was sold for an excessive amount that the sale would be invalidated. We find few cases in the reports where the property involved was sold for less than the amount due for taxes, penalties, and costs. In Minnesota such a case came before the Supreme Court of that state, in which it was shown that the amount for which the property was sold was 75 cents less than the true amount due. In a well-reasoned opinion the court applied the de minimis rule and sustained the sale. London & Northwest American Mtg. Co. v. Gibson, 77 Minn. 394, 80 N. W. 205, 208, 777. The Supreme Court of Iowa sustained a tax sale when the amount for which the property was sold was less than the amount due. Kessey v. Connell, 68 Iowa, 430, 27 N. W. 365. The Supreme Court of Kansas has applied the same rule. Ireland v. George, 41 Kan. 751, 755, 21 P. 776. The courts of some of the other states hold a contrary doctrine, notably the supreme judicial court of Massachusetts, which applies the rule of strictissimi juris to all tax sales whether the amount for which the property was sold was less than the amount due as well as when it exceeded that amount. Shurtleff v. Potter, 206 Mass. 286, 92 N. E. 331. In that case the difference in the two amounts was 50 cents. Of the two rules followed respectively in these different jurisdictions, we think the former appeals to us to be more reasonable and more in accordance with equitable principles. Where the sale is for less than the amount due, the owner of the property suffers no damage whatever by reason of such sale. This was the basis of the decision of the Minnesota Supreme Court in the case just cited from that court. In that case that court said: "The plaintiff, as owner of the lot, was not in any way injured by the sale, for it was sold for an amount less than the law required." Under these authorities the fact that the property herein involved was sold for slightly less than the amount of taxes, penalties, and costs due at the date of the sale, would not vitiate the tax deed issued in pursuance of such sale. Said tax deed is, therefore, valid.

It is unnecessary for us to determine whether the plaintiff, in addition to his rights under said tax deed, has also acquired title to said lot by adverse possession. At most, whatever right the plaintiff has acquired to said lot by being in possession thereof would simply strengthen his title acquired through the tax deed. As he has a valid title to said lot under the tax deed, any additional muniments of title would be of no value to him.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.

140 Cal.App. 336

ROGERS v. BURNHAM.

Civ. 1107.

District Court of Appeal, Fourth District, California.

Aug. 4, 1934.

1. Account stated ⇐4

In account stated, there must be admission by debtor at time of striking balance that definite amount, or amount which can be definitely determined, was due as debt.

2. Account stated ⇐19(3)

Evidence that $10,000 check was given to nurse by patient and that extra services were performed for patient did not make out prima facie case of account stated, where there was evidence that all of patient's bills, including charges for extra services, were being paid each month.

3. Account stated ⇐19(3)

Evidence concerning transaction at which $10,000 check was given to nurse by patient *held* insufficient to establish account stated because it did not show settlement of any account, admission of debt, or agreement to pay existing debt, but justified inference that check was given by way of gift.

4. Account stated ⇐4

Expressions which merely imply gratuitous intentions are not sufficient to constitute admission of debt and agreement to pay, which are requisite to an account stated.

5. Evidence ⇐588

While court cannot arbitrarily disregard unimpeached testimony of single witness, inconsistencies in such testimony and inherent improbabilities appearing from surrounding circumstances may affect amount of credit to be given to such testimony.

6. Evidence ⇐588

In action on $10,000 check given by patient to nurse, inconsistencies in testimony

of witness as to who wrote date on check, and as to how many checks were given nurse, together with appearance of check, which did not correspond to witness' story as to how it was written, justified court in not accepting testimony at its face value.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Margaret Rogers against Donald C. Burnham, as executor of the estate of Julia Ann Smith, deceased. Judgment for the defendant, and the plaintiff appeals.

Affirmed.

See, also (Cal. App.) 29 P.(2d) 806.

Bertrand L. Comparet, of San Diego, for appellant.

Stearns, Luce & Forward and Fred Kunzel, all of San Diego, for respondent.

BARNARD, Presiding Justice.

In May, 1927, Julia Ann Smith went to live at a nursing home operated by the plaintiff. She was then about 80 years old, had no living relatives, and was convalescing from a broken hip. By agreement she was to pay the plaintiff $100 per month for board, room, and ordinary daytime nursing care. It was also understood that, in addition, she was to pay for any massages and night nursing which might be required. She remained at the plaintiff's home until the middle of October, 1930, the monthly compensation being paid each month by check, and during that time fourteen additional payments were made to the plaintiff, totaling $139.56. Early in August, 1930, she fell and again injured her hip, after which time she remained either in bed or in a wheel chair. During that month the plaintiff requested an increase in compensation and, by agreement, the monthly compensation was raised to $135, which amount was thereafter paid. Beginning in August, 1930, a Mrs. Burton, a niece of the plaintiff, was employed as a night nurse for some five or six weeks and was paid by six separate checks which total $154. The first of these checks, one for $15, was given on August 28, 1930. On the same day a check for $135 was given to the plaintiff, and also another check, for $10,000, which is the basis of this action.

On September 1, 1930, Miss Smith's bank account was transferred into a joint tenancy account with one Caroline Wood, who thereafter wrote and signed all checks for Miss Smith because she was unable to write. On October 15, 1930, Miss Smith was removed from the plaintiff's home, and on October 31, 1930, she was judicially declared to be incompetent and a guardian appointed. On November 5, 1930, the check for $10,000, dated August 28, 1930, was first presented to the bank and was returned to the plaintiff because of insufficient funds. It appears from the evidence that on August 28, 1930, Miss Smith had only $1,200 in her checking account in the bank. A claim against the estate of the incompetent, based on the check, which was presented on November 13, 1930, was rejected on November 14, 1930, and no further action was taken during the lifetime of Miss Smith. She died on July 19, 1931, and on January 25, 1932, a claim was filed against her estate in the sum of $10,000 "for agreed compensation for services rendered." The claim was rejected by the executor on January 29, 1932, and this action was filed on June 3, 1932. The court found in all respects in favor of the defendant and the plaintiff has appealed.

The only point raised is that the evidence is not sufficient to support two findings which read as follows:

"That it is not true that within two years last past, or at any time, at the special request and instance of Julia Ann Smith, deceased, the plaintiff performed certain special services for said Julia Ann Smith; that it is not true that said services consisted of taking care of Julia Ann Smith during serious illness and spending much time with said Julia Ann Smith, both day and night, during said serious illness; that it is not true that said extra services were not contemplated in the contract or agreement of employment theretofore entered into between the plaintiff and said Julia Ann Smith; that it is not true that immediately after the termination of said special services and after her recovery from said serious illness, and on or about the 28th day of August, 1930, the said Julia Ann Smith promised and agreed to pay the plaintiff herein as payment for said special services rendered the sum of Ten Thousand Dollars ($10,000), or any other sum; that it is not true that the said sum of Ten Thousand Dollars ($10,000), or any other sum, is now due, owing and unpaid to the plaintiff."

"That it is not true that there was ever an account stated between said Julia Ann Smith, deceased, and the plaintiff herein."

In support of this contention the appellant argues that the $10,000 check and the testimony of Mrs. Burton as to what occurred at the time it was executed are each sufficient to make out a prima facie case of an account stated; that no evidence was introduced by the respondent sufficient to rebut the prima facie showing; that the only evidence as to

what occurred at the time the check was signed, that given by Mrs. Burton, proves an account stated; and that since this evidence was not inherently incredible, the court was not justified in rejecting or disbelieving the same.

The general requisites of an account stated are set forth in Bennett v. Potter, 180 Cal. 736, 183 P. 156, 160, as follows: "The theory upon which the action on an account stated is allowed is that transactions have occurred between the parties from which the relation of debtor and creditor has arisen, that thereafter one or both have rendered or made statements or declarations specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a certain sum is due from him on such account, together with an express or implied promise to pay the same."

[1] There must be an admission by the debtor at the time of striking the balance that a definite amount, or an amount which can be definitely determined, was due as a debt. Beltaire v. Rosenberg, 129 Cal. 164, 61 P. 916; Outwaters v. Brownlee, 22 Cal. App. 535, 135 P. 300.

[2] In addition to the check itself, the appellant relies upon the testimony of Mrs. Burton, to the effect that some extra services were performed for Miss Smith, as establishing such a relationship of debtor and creditor. It is also claimed that the testimony of this witness shows the required definite admission of the debtor that a definite amount was due as a debt, with an agreement to pay that sum. With reference to the extra services claimed to have been rendered, Mrs. Burton testified that she was in the appellant's home at frequent intervals from October, 1929, until Miss Smith left in October, 1930; that Miss Smith was receiving from the appellant board, room, and nursing care; that Miss Smith's condition was such as to require extra attention on more than one occasion although not constantly; that the services ordinarily rendered by the appellant, which were rendered without extra charge, were the services needed during the daytime; that the appellant gave massage treatments without extra charge a time or two but not as a regular thing; and that during the time she was there the appellant "did small things" for Miss Smith other than the services customarily given. When asked as to what she had herself observed, this witness testified that she had seen the appellant rendering some extra services to Miss Smith; that at different times massages were given without extra charge but not always; and that an extra charge was customarily made for night nursing. When asked whether or not the appellant "rendered any nursing services at night to Miss Smith," she replied, "Yes." It will be noted that while this testimony was to the effect that some extra services were rendered by the appellant to Miss Smith, there is no evidence as to the amount of such services, as to their frequency or as to exactly what was done. On the other hand, Caroline Wood testified as follows:

"The agreement was for One Hundred Dollars a-month, and when she had special massages she paid her a little bit extra, but the general agreement was for One Hundred Dollars a-month."

"A. During the whole time Miss Smith was there, except the last two months when she had her last illness and was in bed she paid One Hundred and Thirty-Five Dollars, except now and then a little bit extra for massages."

This evidence is to the effect that the extra services therein mentioned were paid for. The respondent introduced into evidence fourteen checks given from Miss Smith to the appellant during the period in question, in addition to her regular monthly payments, which total $139.56. There is also evidence that after Miss Smith's second fall in August, 1930, the appellant asked for and was thereafter paid an increased compensation of $35 per month. In addition, Mrs. Burton was employed as a night nurse during most of the remaining time that Miss Smith remained in appellant's home.

The showing that an indebtedness existed on August 28, 1930, was far from satisfactory and it cannot be said that there is no evidence to the contrary. The agreed compensation was paid regularly and extra payments were made on several occasions. The indefinite evidence to the effect that "some" extra services were rendered was met by proof that "some" such services had been paid for. The evidence justifies the inference that all bills were being paid each month, and it cannot be held, under the circumstances, that no further proof on the part of the appellant was necessary to establish an indebtedness.

[3, 4] The only evidence as to what was said at the time the check was signed on August 28, 1930, was given by Mrs. Burton and, in our opinion, this testimony fails to show the settlement of any account at that time, disputed or otherwise, and fails to show either an admission of a debt in that amount or an agreement to pay the same as an indebtedness. Mrs. Burton testified that "Miss Smith asked Mrs. Rogers for the check she

1 Cal.2d 368

ROSS v. ROSS.

L. A. 14393.

Supreme Court of California.

July 30, 1934.

1. Husband and wife ⇐280

Where interlocutory divorce decree was entered as result of property settlement agreement of parties and followed terms of settlement, but did not incorporate settlement, rights of divorced wife for breach of agreement were enforceable in civil action.

2. Divorce ⇐245(1), 309

That interlocutory divorce decree was entered as result of property settlement agreement of parties and followed terms of settlement did not affect power of court to modify its order awarding alimony and support for children upon showing of changed conditions where settlement agreement was not made part of decree (Civ. Code, § 139).

3. Divorce ⇐245(3), 309

Where interlocutory divorce decree provided for weekly payment of $25 for support of divorced wife and two minor children and 12 years later divorced wife was earning monthly salary of $146, there was sufficient showing of changed conditions to justify modification of decree by reducing support for one minor child to $10 per week and discontinuing alimony payment (Civ. Code, § 139).

4. Divorce ⇐246, 310

While court could modify its order awarding alimony and support for children upon showing of changed conditions, it could not wholly vacate or annul order 12 years after its entry, because, while changed conditions would warrant present cessation of payments, future different conditions might require resumption of payments (Civ. Code, § 139).

In Bank.

Appeal from Superior Court, City and County of Los Angeles; Dudley S. Valentine, Judge.

Action by Daisy E. Ross against Fred W. Ross. From orders modifying provisions of an interlocutory decree of divorce, the plaintiff appeals.

Orders, as modified, affirmed.

Clarke & Bowker and Nathan Newby, all of Los Angeles, for appellant.

C. P. Temple, of Los Angeles, for respondent.

LANGDON, Justice.

Plaintiff appeals from orders of the trial court modifying the provisions of an interlocutory decree of divorce. The decree was given in favor of plaintiff in 1921, and ordered defendant to pay $25 per week for the support of plaintiff and her minor children, "until the further order of the court." On May 10, 1933, after an order to show cause issued at the instance of defendant, the court found that the parties had agreed to a reduction of the payments to twenty dollars in August, 1931, when the eldest child became of age; and the court ordered that the interlocutory decree be modified to require payments of $10 per week until the remaining child reached majority, and thereupon payments should cease. Subsequently the court, on its own motion, amended its order nunc pro tunc by adding the following: "The Court further finds that the plaintiff, at present time, is earning $146.00 per month salary in the Los Angeles County Assessor's Office, and is therefore able to care for herself and the Order for the payment of alimony is hereby vacated, commencing May 15, 1933." Plaintiff appealed from each order.

[1-3] Plaintiff contends that the interlocutory decree was entered as a result of a property settlement agreement of the parties, and followed the terms of an agreement made by them, and that consequently it is not subject to modification. The cases cited, however, are those in which the agreement was incorporated in and made a part of the decree. See Parker v. Parker, 55 Cal. App. 458, 203 P. 420; Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902; note, 19 Cal. Law Rev. 532. This was not done in the instant case, and whatever rights plaintiff may have for breach of the agreement are enforceable in a civil action. The record shows that the court made no attempt to rule on the contractual relations of the parties. The statutory power of the court under section 139 of the Civil Code to modify its order awarding alimony and support for children upon a showing of changed conditions is not affected in such a situation. Hughes v. Hughes, 68 Cal. App. 195, 228 P. 675; Armstrong v. Armstrong, 132 Cal. App. 609, 23 P.(2d) 50. There was here a showing of changed conditions sufficient to justify the exercise of the power, and no contrary showing was made by plaintiff.

[4] One point which plaintiff makes is well taken. The court has undoubted power to

modify the order, but certainly it cannot wholly vacate or annul it years after its entry. Changed conditions now warrant the cessation of all payments, but it is possible that in the future different conditions may require their resumption. Doubtless all that the court intended was such a cessation of payments, and not an annulment of the order itself. See Soule v. Soule, 4 Cal. App. 97, 87 P. 205; Molema v. Molema, 103 Cal. App. 79, 283 P. 956. This is, in fact, conceded by defendant.

The last order of the court is modified by striking therefrom the words "the Order for the payment of alimony is hereby vacated, commencing May 15, 1933," and substituting therefor the following: "the order for the payment of alimony is modified, payments thereunder to cease commencing May 15, 1933, until further order of the court."

As so modified, the orders of the lower court are affirmed. Respondent shall bear the costs of the appeal.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.

1 Cal.2d 381

GRIFFITH v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY et al.

Sac. 4840.

Supreme Court of California.

July 30, 1934.

1. Divorce ⇐243

Where minute order correctly stated court's order awarding alimony subject to modification, but through clerk's misprision interlocutory decree omitted provisions that payments should be made until further order of court, interlocutory decree *held* properly corrected to conform to minute order.

2. Divorce ⇐245(1)

Divorce decree providing for payment of alimony until further order of court may be modified by order reducing or stopping payments thereunder.

3. Divorce ⇐254

Agreement settling property rights of husband and wife which was approved by court in divorce proceeding *held* binding on court and parties and subject of civil action for enforcement, notwithstanding court's exercise of power reserved to modify decree respecting alimony payments.

In Bank.

Application by Helen Griffith for a writ of certiorari to review an order of the Superior Court in and for Mendocino County, W. D. L. Held, Judge, modifying the terms of an interlocutory divorce decree.

Writ discharged.

Prior opinion, 24 P.(2d) 920.

Charles Kasch, of Ukiah, for petitioner.

Taft & Spurr, of Ukiah, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate District. Upon further consideration, we are satisfied with the determination thereof by the said court, and we hereby adopt the following portions of the opinion of Mr. Presiding Justice Pullen as part of the opinion of this court. It reads as follows:

Petitioner herein seeks by this writ to review an order of the superior court modifying the terms of an interlocutory decree of divorce.

Pending the divorce trial, the parties entered into an agreement for a settlement of their property rights. This agreement, among other provisions, contained the following: "It is mutually agreed between the parties hereto that the wife in consideration of the premises and in consideration of the payment to her of $75.00, and $20.00 per month as hereinafter set forth, does by these presents, grant and convey unto the husband all the right, title and interest in and to all property now owned by the said husband and wife as community property; and in consideration for such release and conveyance by the said wife the said husband agrees to pay to the wife the sum of $75.00 plus the further sum of $20.00 per month in advance on the 10th. day of each calendar month commencing with the date hereof, and the wife hereby acknowledges receipt of the payment of said sum of $75.00, together with the further sum of $80.00 for said monthly payments otherwise due on the 10th. days of July, August, September and October, 1930." And "It is further agreed that in the event of the remarriage or death of the wife, that the aforesaid monthly payments of $20.00 shall ter-

minate as of the date of such remarriage or death."

Upon her part the wife released the husband from any debts or liabilities owing by each to the other except the payments above set forth, released any right, interest, or title as heir at law or otherwise to any property of the husband, and waived any claim to contest or oppose the will of the husband or right to homestead allowance, and agreed that in any divorce proceedings pending or hereafter to be brought she would not have the right to recover costs, counsel fees, alimony, support or maintenance, thereby waiving all claims thereto and any claim for future maintenance or support; the agreement being intended as a complete adjustment of all property rights.

At the trial the defendant failed to appear, and his default was entered. Judgment was ordered for plaintiff, and the following was entered in the minutes of the court: "An interlocutory decree of divorce was granted plaintiff, property agreement confirmed. Plaintiff was awarded $20.00 per month for support beginning August 1, 1930, until the further order of the court."

Subsequently a formal decree was signed by the court and filed in the records thereof, which decree embodied in full the agreement hereinbefore referred to between the parties, but made no reference to an allowance until further order of the court, as appeared in the minutes above.

A final decree was entered at the expiration of one year, which by reference adopted the terms of the interlocutory decree. Defendant continued to make payments of $20 monthly as provided in the agreement, but in May, 1933, moved the respondent court to modify the interlocutory decree by reducing the amount of $20 per month allowed therein as permanent support and maintenance, to nothing. This motion was based upon the terms of the minute order, which as will be noted, provided that payments should continue until terminated by order of court. Upon the hearing thereof the motion was granted, and petitioner, being dissatisfied, seeks here to review the order so made, contending that the formal decree submitted to the court and signed by the judge was the order of the court, and that the time had expired within which defendant could move to modify the same.

[1] The lower court in the present proceeding found that the minute order in the divorce proceeding correctly stated the order of the court, in which alimony was awarded, subject to modification by the court. The interlocutory decree as signed omitted the provision that the payments were to be "until the further order of the court," and this omission was found to be a result of clerical misprision. The interlocutory decree was therefore corrected to state the decision of the court as actually rendered. No attack is made upon this conclusion of the lower court with respect to the sufficiency of the evidence to support it, and we think that, in view of the minute order, it was proper for the lower court to conclude that the interlocutory decree did not purport to order the payment of alimony without any power of modification.

[2, 3] It therefore follows that the court, in accordance with its statutory power, could modify the order for the payment of alimony by ordering the reduction or cessation of payments provided thereunder, and that the exercise of the power in this case was within its jurisdiction. The court could not, of course, and did not, attempt to change the terms of the agreement previously entered into and approved by the court in the divorce proceeding, and the terms of that agreement are still binding between the parties, and may be the subject of a civil action for its enforcement.

The order is affirmed.

1 Cal.2d 430

HENDRICKSON v. BERTELSON et al.

Sac. 4784.

Supreme Court of California.

Aug. 16, 1934.

1. Mechanics' liens ⇨5

Mechanic's lien law is remedial in character and should be liberally construed in its entirety (Code Civ. Proc. § 1188).

2. Mechanics' liens ⇨149(4)

Mechanics' lien claimants *held* excused from complying with statutory requirement that claimants designate amount due upon each of structures or improvements to which materials were delivered, where materials were delivered under lump-sum contracts to place where six houses were being constructed, and it was impossible to designate how

much of materials was used for particular house (Code Civ. Proc. § 1188).

3. Mechanics' liens ⇐291(1)

In action to foreclose mechanics' liens, court had jurisdiction to apportion amounts of liens decreed as against lots as to which no waivers were filed, since actions to foreclose such liens are regarded in nature of judicial proceedings in equity, and when court of equity once obtains jurisdiction it will do complete justice by deciding whole case.

In Bank.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by A. Hendrickson against C. S. Bertelson and others, wherein Leon T. Smith and others filed a cross-complaint. From a judgment, named defendant and others appeal.

Affirmed.

Breed, Burpee & Robinson, of Oakland, and A. K. Wylie, of Alturas, for appellants.

J. S. Henderson and C. S. Baldwin, both of Alturas, for respondents.

WASTE, Chief Justice.

Appeal from a judgment of the superior court of Modoc county foreclosing liens of materialmen, and ordering a sale of real property to satisfy the same.

The defendant Bertelson engaged in the construction of six dwellings upon six adjacent lots in Mountain View subdivision of Alturas. The building operations were to be financed by construction loans advanced by the defendant and appellant California Mutual Building & Loan Association, secured by trust deeds on each of the six lots. The contracts with the plaintiff and the defendant and cross-complainant Alturas Building Material Company were what are known as "lump-sum" contracts, with but one consideration, and the building materials were to be furnished for all six dwellings without separate designations. The building and loan association commenced making advances when it was discovered that deliveries of material to three of the lots had been made, which would have affected the priority of its liens. It thereupon refused to make further advances. To meet this situation, both lien claimants executed waivers of liens as to these three lots, and the construction work thereupon proceeded upon all six houses. Thereafter it became necessary for the materialmen to file liens against the three lots, as to which waivers had not been given, for the unpaid balances due upon the lump-sum contracts for the materials furnished. For the reasons hereinafter explained, they could not make separate designations of materials furnished each construction, as required by section 1188 of the Code of Civil Procedure. The plaintiff's claim was for $249.90, and the cross-complainant's claim was for $1,210.93. No question of value is raised, and no notice of completion was ever filed.

The action having been tried, the court rendered judgment for the full amount of plaintiff's claim, and costs, and for cross-complainant's claim, and costs, and decreed that plaintiff and cross-complainant have liens for one-half the amount of their respective claims with costs as against said three lots, apportioning the said amounts in equal portions as against each of said lots. It was decreed that no priority existed in favor of either of said liens, and that the same were prior and superior to all rights of the California Mutual Building & Loan Association, holder of the trust deeds, and that said liens be foreclosed and the lots sold to satisfy the same.

Appellants contend that the liens are void by reason of the failure of the lien claimants to designate the amounts of their claims as against the individual lots, as required by section 1188 of the Code of Civil Procedure, and that the trial court was without power to make any apportionment of the liens as against the waiver-free lots.

[1] The mechanics' lien law is remedial in character, and should be liberally construed in its entirety with a view to effect its objects and to promote justice. Hammond Lumber Co. v. Barth Investment Corp., 202 Cal. 606, 610, 262 P. 31. While section 1188 does provide that where a claim of lien is filed against two or more buildings, the lien claimant must, at the same time, designate the amount due on each of such buildings, it has been held not to require impossibilities, and that "the only effect of a failure to designate the amount due on each of two or more structures for which one claim is filed is to postpone the lien to those of other claimants." 17 Cal. Jur., p. 145. In Warren v. Hopkins, 110 Cal. 506, 510, 42 P. 986, 987, it is said: "While section 1188 requires the claimant who files a lien against two or more buildings, or other improvements, to designate the specific amount for which he claims a lien upon each of such improvements, it does not require him to make such designation unless there is in fact a specific 'amount due to him' on each of

such improvements; and it might frequently happen that a contractor would construct several buildings under one contract, and there would not be any specific amount due to him on each of such buildings." The District Court of Appeal for the Third Appellate District said in Southern California Lumber Co. v. Peters, 3 Cal. App. 478, 479, 86 P. 816: "It will not be held that the Legislature intended to defeat the application of the lien law to a particular class of cases by requiring the performance of something impossible; but, on the contrary, the mechanic's lien law, being remedial in its nature, will be given a liberal interpretation to promote justice and carry out its general purpose, and it will be presumed that in enacting section 1188, Code Civ. Proc., the Legislature had in mind those cases only where it was possible to designate the amount due on each of several buildings, and did not intend that the section should apply to any other class of cases."

The trial court found specifically that defendant Bertelson purchased of the lien claimants building materials as specified, and generally, "all to be used, and all of which was used in the construction of said six dwelling houses; that said materials were furnished and delivered upon the ground where the construction of said dwelling houses was in progress on single orders and as one contract without any designation as to the amount of said materials to be used in any particular or specified house * * *."

[2] This finding is not only fully supported by evidence, but might have been supplemented by the evidence showing that no separate records were kept by the lien claimants as to delivery of particular materials to particular improvements; the deliveries being on the ground to the job as a whole, and the impossibility, therefore, of segregating and designating the same in the claims of lien. We are constrained, therefore, to hold that the lien claimants, under these circumstances, were not required to do the impossible, and were excused from complying with the statutory requirement of section 1188 that the lien claimants designate the amount due upon each of the structures or improvements to which materials were delivered.

[3] The remaining question, as to the power of the trial court to apportion the liens to the respective lots, finds answer in the fact that actions to foreclose such liens are in this state regarded in the nature of judicial proceedings in equity. Curnow v. Happy Valley Blue Gravel, etc., Co., 68 Cal. 262, 9 P. 149; Coghlan v. Salvatore Quartararo, 15 Cal. App. 662, 115 P. 664; 17 Cal. Jur. 166; note, Ann. Cas. 1913B, 283. "When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case." Watson v. Sutro, 86 Cal. 500, 528, 24 P. 172, 180, 25 P. 64.

It was therefore properly within the jurisdiction of the court as a court of equity, and in line with the spirit of the mechanics' lien law and constitutional provision, to apportion the amounts of the respective liens decreed as against the lots as to which no waivers were filed, and thereby preserve to the materialmen liens their priority over the liens of the trust deeds. "Equity regards that as done which ought to have been done." 10 Cal. Jur. 505.

Other points raised by appellants are deemed immaterial in view of the conclusions reached.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.

1 Cal.2d 414

CONSOLIDATED TITLE SECURITIES CO. v. HOPKINS, County Assessor.

S. F. 14970.

Supreme Court of California.

Aug. 6, 1934.

Rehearing Denied Sept. 4, 1934.

1. Mandamus ⇐119

Original proceeding in mandamus is proper remedy to compel issuance of official tax receipt in full.

2. Taxation ⇐200

Personal property not owned by insurance company but in its exclusive possession under lease and used by it in conduct of its business *held* not free from local taxation under statute providing for payment of percentage of gross premiums in lieu of other taxes (Const. art. 13, § 14 (a, b).

3. Taxation ⇐140

Gross premiums tax required to be paid by insurance companies, although in lieu of certain taxes upon property, is not a tax upon property, but is franchise tax exacted for privilege of doing business in state (Const. art. 13, § 14 (a, b).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Bank.

Action by the Consolidated Title Securities Company against Ed W. Hopkins, Assessor of Los Angeles County.

Alternative writ of mandate discharged and peremptory writ denied.

Rehearing denied: CURTIS and PRESTON, JJ., dissenting.

Walter B. Kibbey and William H. B. Haymond, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

SEAWELL, Justice.

Petition for writ of mandate. Petitioner, Consolidated Title Securities Company, leases a title searching plant owned by it to Security Title Insurance & Guarantee Company, a title insurance company with offices in the city of Los Angeles. The notice of personal property taxes served on petitioner on July 11, 1933, by respondent county assessor of Los Angeles county charged petitioner with taxes in the sum of $12,029.62, levied on office equipment, a law library, and title searching plant, assessed respectively at $12,070, $750, and $270,230. Petitioner contends that said property is not subject to local taxation by virtue of the fact that it is in the sole possession and use of petitioner's lessee, a title insurance company, which annually pays a tax to the state based on gross premiums under the provisions of article 13, § 14, subd. b, state Constitution. Petitioner is not itself a title insurance company. It tendered to respondent assessor the sum of $74.99, which is the amount charged to it in said tax notice for taxes on notes and solvent credits. Upon the refusal of the assessor to issue a receipt showing payment of the tax bill in full, petitioner deposited the sum tendered in a bank in the name of the assessor, and thereafter brought this proceeding in mandamus to compel the assessor to issue to it a receipt in full. Petitioner alleges that the tax officials of other counties are also seeking to subject similar property in their respective counties owned by petitioner and in the possession of its lessee to local taxation.

[1, 2] Under the decisions of this court in Whitmore v. Brown, 207 Cal. 473, 279 P. 447, and Central Manufacturing Dist. v. State Board of Equalization, 214 Cal. 288, 5 P.(2d) 424, and the decision of the appellate court in Spring Valley Water Co. v. Planer, 88 Cal. App. 170, 263 P. 323, in which a petition for hearing in this court was denied, an original proceeding in mandamus is a proper remedy to compel the issuance of an official receipt in full.

The provision of section 14, subd. b, art. 13, which petitioner contends frees the personal property owned by it and in the possession of its lessee, a title insurance company, from local taxation, is as follows: "Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half per cent upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state; provided, that there shall be deducted from said one and one-half per cent upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this state. This tax shall be in lieu of all other taxes and licenses, state, county and municipal, *upon the property of such companies*, except county and municipal taxes on real estate. * * *" (The balance of the paragraph is not pertinent to the inquiry before us. Italics supplied.)

Section 14 was amended in June, 1933 (see St. 1933 p. 3074), when our tax system was changed in important particulars by initiative vote of the people. The initiative measure provided, however, that the provisions amendatory of section 14 should not go into effect until January 1, 1935. As will appear from our discussion hereinafter, the amendments made in the paragraph of said section which affects insurance companies (section 14, subd. b) do not change the law with regard to the question now before us—whether personal property not owned by an insurance company, but in its exclusive possession under lease and used by it in the conduct of its business, is free from local taxation under the "in lieu" provision of section 14, subd. b, quoted above.

In contending that such leased property cannot be taxed locally to the owner-lessor, petitioner relies strongly on the decisions of this court in Morgan Adams, Inc., v. County of Los Angeles, 209 Cal. 696, 289 P. 811, and Central Manufacturing District, Inc., v. State Board of Equalization, 214 Cal. 288, 5 P.(2d) 424, and the decision of the Supreme Court of the United States in Hopkins v. Southern California Tel. Co., 275 U. S. 393, 48 S. Ct. 180, 72 L. Ed. 329. These cases involved the interpretation of the provisions of section 14, subd. a, art. 13, Constitution, which provide for the payment of a gross receipts tax to the state by certain designated public utility corporations. In the cited cases the leased prop

erty upon which the local authorities sought to charge the owner with local ad valorem property taxes consisted respectively of a concrete building occupied by the lessee telephone company exclusively for its office quarters; real property and improvements consisting of railroad tracks, rights of way, buildings, structures, and appliances suitable to the operation of a railroad, which property was owned by a private nonpublic utility corporation and leased to a public utility railroad corporation; and, in the federal case, 300,000 telephone instruments, or "talking sets," used by the lessee company in the operation of its telephone system. In each case it was held that the property was not subject to local taxation.

There are important distinctions between those provisions of section 14, subd. a, art. 13, establishing the public utilities gross receipts tax, and the provisions of section 14, subd. b, under which insurance companies are required to pay a gross premiums tax, by reason of which the decisions under the public utilities tax provision are not necessarily controlling as to insurance companies. Under the constitutional provision as it continues in effect until January 1, 1935, the enumerated public utilities are required to pay to the state a tax equal to fixed percentages of their gross receipts from operation within this state "*upon* their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and *other property*, or any part thereof *used exclusively in the operation of their business in this state*." The section makes provision for determining "gross receipts * * * within this state," when such companies are operating partly within and partly without the state. The tax based on gross receipts is "in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided." (Italics supplied.) Sections 3664–3671, Political Code, restate the constitutional provision, define the term "operative property," and otherwise elaborate the scheme of taxation provided for by the Constitution.

It is held that payment of the gross receipts tax by the lessee public utility company frees leased property used by the utility in the operation of its business from local taxation, for the reason that the gross receipts tax is a tax upon all property used in the operation of the utilities business in this state, whether such property is leased or owned by the utility. Morgan Adams, Inc., v. County of Los Angeles, supra; Central Manufacturing District, Inc., v. State Board of Equalization, supra; Hopkins v. Southern California Tel. Co., 275 U. S. 393, 48 S. Ct. 180, 72 L. Ed. 329. By the terms of the constitutional provision the tax is upon all property used in the operation of the business in this state. In our decision in Southern California Tel. Co. v. Los Angeles County, 212 Cal. 121, 298 P. 9, 11, we said concerning it: "* * * The tax levied upon gross receipts is a substituted tax, intended to be the equivalent of a tax on the property, and only differing from a tax directly on the property by reason of the fact that a different method of computation is employed. See San Francisco v. Pacific Tel. & Tel. Co., 166 Cal. 244, 135 P. 971; Pullman Co. v. Richardson, 185 Cal. 484, 197 P. 346." The theory of the tax, as explained in the decisions, is that gross receipts from operation furnish a fair measure for estimating the value of operative property and computing the tax upon it. Inasmuch as the gross revenues from operation do not depend upon whether the operative property is leased or owned, and the amount of the tax is the same whether such property is leased or owned, the tax rests upon *operative* property without regard to its ownership, and to assess a local ad valorem tax against the owner on leased operative property is unauthorized double taxation. Morgan Adams, Inc., v. Los Angeles County, supra, at page 702 of 209 Cal., 289 P. 811; Central Manufacturing District, Inc., v. State Board of Equalization, supra. That is, the criterion adopted by the constitutional provision to determine freedom from local taxation is *use* in the public utility's business, rather than *ownership* by the utility. Property which is not in use in the operation of the business of the utility, such as a building in course of construction and the land upon which it is situate, although owned by the utility, are nevertheless subject to local taxation. Southern California Tel. Co. v. County of Los Angeles, supra.

[3] But the provisions of section 14, subd. b, art. 13, which provide for the gross premiums tax to be paid by insurance companies, make no such classification between operative property without regard to ownership, on the one hand, and nonoperative property on the other. Intangibles, such as stocks, bonds, mortgages, and other securities in which the average insurance company invests a large portion of its receipts in order to provide a fund to meet losses, are free from local taxation under the in lieu provision of section 14, subd. b, but are not "used" in the conduct of the insurance company's business in the sense that operative property of a public utility cor-

poration is used in the operation of its business. The gross premiums tax required to be paid by insurance companies, although in lieu of certain taxes *upon* property, is not, like the public utilities gross receipts tax, by the terms of the constitutional provision itself a tax *upon* property. Rather, it is a franchise tax exacted for the privilege of doing business in this state, and is recognized as such in the amendment to section 14 which goes into effect on January 1, 1935. Said amendment abolishes the public utilities gross receipts tax, and provides that all property *owned or used* by the specified utilities, other than their franchises, shall be subject to taxation to the same extent and in the same manner as other property at a value fixed by the state board of equalization annually. Said amendment further provides that the specified utilities shall pay a franchise tax to the state measured by net income under section 16 of article 13, but this provision is especially made inapplicable to insurance companies, as to which the gross premiums tax is continued in force. Federal securities exempt from a property tax are generally included in an insurance company's holdings.

The insurance company gross premiums tax frees from local taxation, except taxes on real estate, all "property of such companies." Use of personal property in the conduct of the insurance company's business is not the factor which determines freedom from local taxation. From a consideration of the constitutional provision relating to the gross premiums tax as a whole, and particularly the provision permitting the deduction from the amount of the gross premiums tax of all taxes paid by an insurance company on real estate "owned" by it, we are convinced that ownership by the insurance company is the factor which determines freedom of personal property from local ad valorem taxation. The gross premiums tax is not in lieu of taxes on real estate, but real property owned by an insurance company, or in its possession under lease from the owner, is subject to local ad valorem property taxes. The constitutional section provides, however, that insurance companies may deduct from the fixed percentage of gross premiums payable as a tax the amount of any taxes paid "on real estate *owned* by them in this state." Thus, although as regards the tax collecting authorities the real property owned by an insurance company remains subject to a local ad valorem tax, in so far as the taxpaying company is concerned, it is made clear that it shall not be required to pay an ad valorem tax on real property owned by it in addition to the full amount of the gross premiums tax, but the fixed percentage of gross premiums is the full measure of the tax burden upon it. By the terms of the constitutional provision the offset or deduction is allowed only for taxes paid on real *estate* owned by insurance companies. Ad valorem taxes assessed against real property in their possession under lease from the owner are not permitted to be deducted. Any other construction would do violence to the meaning of the word "owned." Personal property *owned* by an insurance company is relieved of the burden of local ad valorem taxes directly under the "in lieu" provision, rather than indirectly by deduction of the tax paid locally from the sum payable as a gross premiums tax, as in the case of real property. But we are unable to find that, by virtue of this difference, personal property *leased* to an insurance company is free from local taxes, while real property leased to such a company remains subject thereto. The constitutional provision does not authorize a different rule to be applied to personal property leased to an insurance company than is applied to real property leased to such a company.

We are mindful that under section 14, subd. a, art. 13, property used in the operation of the business of public utilities is "their property" and the "property of such companies," but this is because use in the operation of the utilities business is the test therein adopted.

The alternative writ of mandate is discharged, and the peremptory writ is denied.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.

1 Cal.2d 392

PEOPLE v. TWEDT.

Cr. 3733.

Supreme Court of California.

July 30, 1934.

1. Criminal law ⇐112(1)

In prosecution for selling securities without permit, that defendant's acceptance of complaining witness' offer to purchase stock was mailed in county other than where he was prosecuted did not take jurisdiction of case out of county of prosecution (St. 1917, p. 673, as amended; Civ. Code, §§ 1726, 1729; Pen. Code, § 781).

2. Criminal law ⇐200(1)

Co-operative acts constituting but one offense when committed by same person at same time, when combined, charge but one crime, and but one punishment can be inflicted.

3. Criminal law ⇐155

Contract for sale of corporation stock was complete on posting of seller's letter, accepting offer in buyer's letter to purchase stock.

4. Time ⇐9(1)

In computing time for purpose of determining whether prosecution is barred by limitations, day of commission of offense is excluded (Code Civ. Proc. § 12).

5. Criminal law ⇐149

Trial for violating Corporate Securities Act on theory that crime was committed on day within limitation period, though evidence showed merely mailing of letter to defendant by purchaser of stock, with money therefor, on such day, *held* prejudicial error, requiring reversal of conviction (St. 1917, p. 673, as amended).

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

O. J. Twedt was convicted of violations of the Corporate Securities Act, and he appeals.

Reversed.

Prior opinion, 27 P.(2d) 90.

Glenn M. De Vore and Thomas F. Lopez, both of Fresno, and G. W. Cartwright, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Fourth Appellate District. Upon further consideration, we hereby adopt the following portions of the opinion of Mr. Justice Marks as part of the opinion of this court:

Appellant was charged by an information filed by the district attorney of Fresno county on May 19, 1933, with three separate offenses consisting of violations of the Corporate Securities Act (St. 1917, p. 673, as amended). The first count alleges that on or about the 20th day of May, 1930, in Fresno county, he offered for sale, to Eveline Kloster, securities of the Linda Mineral Products Company without having a permit from the commissioner of corporations. The second count alleges that at the same time and place he negotiated for the sale of securities of the same company with Eveline Kloster without any such permit. The third count alleges that at the same time and place he sold securities of the same company to Eveline Kloster without the necessary permit. It is further alleged in the information "that the offenses set out in the three counts of this information are different offenses arising out of the same transaction and connected in their commission." Appellant was found guilty on all three counts and was sentenced on each of them to confinement in the state penitentiary. His motions for new trial and for arrest of judgment were denied. He is here on appeal from the judgment and orders denying his motions.

The Linda Mineral Products Company is a California corporation. On September 17, 1928, it was granted a permit to sell certain of its capital stock. This permit was suspended on January 4, 1930. An amended permit was issued to it on May 21, 1930. It is admitted by counsel for both parties that the only criminal acts which may be considered here in support of the judgment are those which were committed on May 19 and May 20, 1930, as the statute of limitations had run against all prior acts and the permit of the commissioner of corporations became effective on May 21, 1930, so that offering for sale, negotiating for the sale of, or selling the stock of the Linda Mineral Products Company was lawful on and after that date.

Miss Kloster, who was a teacher in the Fresno High School, had a brother who had become acquainted with a sister of appellant while attending a university. At the request of her brother, Miss Kloster called upon Miss Twedt and her mother at their residence in Los Angeles during the Christmas holidays of 1929. She there met appellant and heard him recount in the most glowing terms the prospects for the financial success of the Lin-

da Mineral Products Company, of which he was president. In 1930 Miss Kloster called upon Miss Twedt and her mother at their home in Oakland during the Easter school vacation of that year. She did not then see appellant.

About May 2, 1930, while Miss Kloster was teaching her class in Fresno, she was called by appellant over a long-distance telephone, probably from San Francisco. He told her that the Linda Mineral Products Company had been suddenly disappointed in raising $5,000 from another party; that it was financially embarrassed because of the failure to receive this money and that it needed it badly. He asked her to purchase stock in the company to this amount. She replied that she did not have the money. He then asked her if the members of her family could not make up the amount as he did not want to place the stock in small amounts with a number of purchasers. The conversation ended by appellant asking Miss Kloster to think it over. She sent him a night letter on the same evening, the contents of which are not in the record.

About May 6, 1930, Miss Kloster received a telegram from appellant advising her that he would arrive in Fresno at 10 o'clock that evening and asking to see her. Appellant had a long conference with Miss Kloster and one of her sisters that evening when the prospects of the company and the sale of its stock were discussed in considerable detail. Miss Kloster informed him that she might buy $700 worth of the stock, one of her sisters $300, and a Miss Smith $500. Appellant still wanted to sell $5,000 worth in a single transaction and again asked that the matter be further considered.

About May 13, Miss Kloster received another telegram from appellant asking for another appointment with her in Fresno at 10 o'clock that night. He then informed Miss Kloster that he had decided to let the three women have the $1,500 worth of stock and wanted the check immediately. Miss Kloster informed him that her money was not immediately available; that she hoped to be able to get it together so that it might be sent by the 20th of May. He suggested a postdated check, but it was not given him. On Saturday, May 17, 1930, Miss Kloster sent appellant a special delivery letter to his Oakland residence address which he received the next day, the contents of which appellant described as follows:

"She said she had talked to Dorothy Smith the next morning and that Dorothy and I agreed, was very happy to put in $500, and that—so if it was all right with me, why then she would take $500 worth of stock. * * * Oh, yes, she was going to take,—she and her sister had agreed, decided to take the stock, and also that if it was all right, why that they would take that, and also Dorothy Smith would take it. * * * She said that she did—that she would send the money, that they had decided to take the stock, and that she was going to send the money on Tuesday, as I recall it.

"Q. She said—do you recall whether there was any mention as to the amount of money? A. Yes, there was. They were taking $1500 worth."

Appellant replied to this letter by one dated May 13, 1930, and which was postmarked at Oakland, California, May 19, 1930, at 12:30 p. m. This letter contains the following: "Sending the 'Proceeds' on Tues. as you state is perfectly alright. It would have been O. K. to have sent the check because I would have held it till you told me it was good but is it just as O. K." "Tuesday" was May 20, 1930. On the afternoon of that day Miss Kloster and Miss Smith inclosed two checks in an envelope, one signed by the former for $1,000, and one signed by the latter for $500, in payment of the stock, and mailed them in Fresno. They were received and cashed the next day in San Francisco. The stock was issued and delivered in June, 1930.

Our study of the evidence leads to the following conclusions: (1) On May 2, 1930, appellant, over the telephone, offered to sell Miss Kloster $5,000 worth of the stock of the Linda Mineral Products Company. This offer was rejected. (2) On May 6, 1930, in Fresno, appellant renewed the offer to sell the same amount of stock to Miss Kloster. She rejected this offer, but did discuss with him the purchase of $1,500 worth of stock, $700 for herself, $300 for her sister, and $500 for Miss Smith. Appellant did not accept this offer of purchase, if it could be so termed, and left asking Miss Kloster to think the matter over further. (3) On May 13, 1930, appellant, in Fresno, offered to sell Miss Kloster $1,500 worth of the stock of the corporation if the purchase price was paid in cash, or if a postdated check were given him for it. This offer was rejected as Miss Kloster did not have the cash available and would not give him a postdated check. (4) By her letter of May 17, 1930, Miss Kloster offered to purchase $1,500 worth of the stock, provided she could pay for it on May 20, 1930. This offer was accepted by appellant in his letter dated May 18, 1930,

postmarked May 19, 1930. (5) The checks in payment of the stock were mailed May 20, 1930, cashed on May 21, 1930, and the stock issued in June, 1930.

The provisions of the Civil Code in effect at the time of the transaction provided that "an agreement for sale is * * * a mutual agreement to sell and buy." Section 1726. "An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor." Section 1729.

It is evident that the conversations between appellant and Miss Kloster on the 2d, 6th, and the 13th days of May did not result in any contract of sale, but in rejections of the offers to sell by Miss Kloster. "A communication from the offeree to the offeror, stating in effect that the offeree declines to accept the offer is a rejection." "A counter offer by the offeree, relating to the same matter as the original offer, is a rejection of the original offer, unless the offeror in his offer, or the offeree in his counter-offer states that in spite of the counter-offer the original offer shall not be terminated." Restatement of the Law, Contracts, §§ 37, 38.

[1] The first time the minds of the parties met on the transaction was in the exchange of the letters dated May 17, and May 18, 1930. There arose from these letters an agreement to buy and sell. It makes no difference here that the acceptance was mailed in Alameda county and the case tried in Fresno county. Where a public offense is committed, part in one county and part in another, the jurisdiction of the case is in either county. Section 781, Pen. Code; United States v. Ford (D. C.) 3 F.(2d) 643–647; People v. Boggess, 194 Cal. 212, 228 P. 448; People v. Bocchio, 80 Cal. App. 138, 251 P. 672.

In 6 California Jurisprudence, 57, it is said: "When the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, assent in any other mode will not be presumed. But where no condition is provided by the proposer concerning the communication of the acceptance, any reasonable and usual mode may be adopted, and consent will be deemed to have been fully communicated between the parties as soon as the acceptance is put in the course of transmission, and beyond the control of the party accepting. A telegram accepting an offer takes effect on its deposit for transmission. And it seems to be settled that when the proposal is unconditionally accepted by a letter deposited in the mail properly addressed to the proposer the contract is complete." * * *

Subdivision 8 of section 2 of the Corporate Securities Act in effect at the time of the transaction here involved provided in part as follows: "'Sale' or 'sell' shall include every disposition, or attempt to dispose, of a security or interest in a security for value. * * * 'Sale' or 'sell' shall also include a contract of sale, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a subscription or an offer to sell, directly or by an agent, or a circular letter, advertisement or otherwise." St. 1929, pp. 1251, 1252.

[2] It is evident under this definition that an offer to sell stock must be included in the sale where one is made to the offeree. It is also difficult to understand how a sale can be completed without negotiations for it. It has long been the rule in California "that co-operative acts constituting but one offense, when committed by the same person at the same time, when combined, charge but one crime, and but one punishment can be inflicted as one offense. 'Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table, and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same person, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted.' Wharton, Criminal Law, approved in People v. Shotwell, 27 Cal. 394." People v. Clemett, 208 Cal. 142, 280 P. 681. See, also, People v. Buchanan, 106 Cal. App. (Supp.) 765, 288 P. 50, and Schroeder v. United States (C. C. A.) 7 F.(2d) 60.

In examining the evidence to determine whether it supports the judgment, and in searching the record for error, it should be remembered that there is only a narrow period during which acts committed can now be deemed punishable. All charges of criminality arising out of the negotiations in the early part of May are barred by the statute of limitations. The convictions on the counts of offering and negotiating for sale are clearly improper, and the sole question is as to the propriety of the conviction on the count of actual sale.

[3, 4] The letter of Miss Kloster, sent on May 17, 1930, was an offer to purchase the stock on the condition that she might pay for it on May 20. Defendant's answer was an acceptance of the offer, and the contract of sale was complete upon posting of the letter of acceptance. Hence it is of great importance to fix definitely the time when the defendant's letter was posted. The letter was dated May 18, 1930, and, if deposited in the mail on this date, no conviction could be had, for the statute of limitations had run. It bore a postmarked date of May 19, 1930, and, if deposited on that date, would have warranted a conviction. The rule seems generally recognized, though with some dissent, that, in computing time, the day of commission of the offense is excluded. This is the rule in civil cases, and no compelling reason for a different rule in criminal cases has been advanced. See Cal. Code Civ. Proc., § 12; 16 C. J. 230. On this theory, the statute had not run if the letter was deposited in the mail on the date it was postmarked, and perhaps, from the evidence before it, the jury might have inferred that this was the case.

[5] But the record shows that the case was tried on another theory, and this fact resulted in manifest injustice to defendant, preventing a fair trial, as will hereinafter appear. The prosecution in the court below proceeded upon the theory that the essential date upon which the crime was committed, was May 20th. The statements of the prosecution clearly showed such a limitation. In consonance with this theory, the trial court instructed the jury that the 20th was the only date; and the 20th was within the period of the statute of limitations, as we have seen. But the evidence shows nothing more than the mailing of a letter by Miss Kloster with the money on that date. The actual contract was completed when defendant's letter was posted—either on the 18th or the 19th. The sending of the money was not a necessary part of the making of the contract, any more than the delivery of the stock, which did not take place until June. Hence the evidence lends no support to the conclusion that a crime was committed on the 20th. Yet, because of the erroneous theory and instructions, defendant applied himself to the disproof of this theory alone, and made no effort to disprove a contract completed on the 19th.

It is entirely possible, and defendant so contends, that, in the event the question of a possible conviction based upon a contract on the 19th were presented, he might produce evidence to show the actual time of posting of the letter, and might be able to establish its posting on the 18th, which would render a conviction impossible. It therefore appears that the erroneous theory of the prosecution and the trial court seriously prejudiced the defendant, and prevented a fair trial.

The judgment and order denying a new trial are reversed.

KNOKE v. SWAN.*

L. A. 12955.

Supreme Court of California.

Aug. 29, 1934.

Rehearing Granted Sept. 28, 1934.

1. Judgment ⇐570(5)

Judgment of dismissal in former action between same parties to quiet title *held* not to estop either party from asserting whatever title he may have in subsequent action to quiet title.

2. Taxation ⇐665

Fact that property was sold at tax sale for slightly less than amount due would not vitiate tax deed issued in pursuance of such sale.

In Bank.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by A. H. Knoke against Emma L. Swan. Judgment for plaintiff, and defendant appeals.

Affirmed.

A. G. Alm, Elliott H. Barrett, and Charles J. Kelly, all of Los Angeles, for appellant.

McKenna & McKenna, Catherine A. McKenna, and J. Irving McKenna, all of Los Angeles, for respondent.

CURTIS, Justice.

Action to quiet title to a city lot in San Francisco. Plaintiff claims title to said lot through a tax deed and by adverse possession. Defendant denies title in plaintiff, and alleges that she is the record owner of said lot, and as a separate defense sets up in her amended answer that plaintiff was estopped from asserting title to said lot by a judgment of the superior court of the county of Los Angeles duly entered on August 3, 1928, entitled,

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 42 P.2d 1019.

"Knoke v. Knight et al." The action was tried upon the issues made by the above-mentioned pleadings. Judgment was in plaintiff's favor, and the defendant has appealed on a bill of exceptions. The court found generally that all of the allegations of the complaint were true and that all of the allegations of the answer were untrue.

[1] We will first discuss the defense of estoppel interposed by the defendant. If this defense be sustained, the other questions need not be further considered. Plaintiff received a tax deed to said property dated July 31, 1922. On August 8 of the same year, plaintiff instituted an action to quiet his title to said lot against a number of defendants, but the defendant in this action, Emma L. Swan, was not made a party defendant in said action. However, on February 11, 1926, Emma L. Swan filed a complaint in intervention in said action. The plaintiff filed his answer to said complaint in intervention in which he set forth that he was the owner of said lot. This action came on for trial upon said complaint in intervention and the answer thereto. The trial was terminated by the signing and filing by the trial judge of an order dismissing the case. Thereafter the clerk of the court entered the same as a judgment in the proper book kept for that purpose.

Assuming that this document is a final determination of said action, can it be held to be a judgment determining the rights of either of said parties to the real property in controversy? It does not by its terms purport to determine the ownership of said lot. In express terms it ordered the dismissal of said action. In the body of the document are certain recitals in which the court apparently gave its reason for ordering the action dismissed, that is, that neither party had proven that he was the owner of said lot. If we give effect to the recitals in the order, the plaintiff herein is estopped from claiming title to said lot through said tax deed, and the defendant is estopped from claiming title to said lot through any means. If, therefore, it is res adjudicata as to these matters of recital, both of the parties thereto (and as they are the same, both of the parties hereto) are estopped from asserting any right or title to said lot. The introduction of this order or judgment cannot avail the defendant, for the instant we give effect to it as an estoppel of the parties thereto, it must be held to estop both the plaintiff and the defendant from claiming to be the owner of said lot. In our opinion the order cannot be given any such effect. As we construe its terms, it is at most merely a judgment of dismissal and as such does not estop either party from asserting in this action whatever title he or she may have to the lot in question. Pyle v. Piercy, 122 Cal. 383, 55 P. 141, 142. In 15 California Jurisprudence, § 185, p. 131, the rule is given by a quotation from Pyle v. Piercy as follows: "When there has been no adjudication of the cause upon its merits, it will only be in exceptional cases that this court will hold that a judgment of dismissal is the equivalent of a judgment of res adjudicata upon the facts." Defendant's plea of estoppel is not therefore sustained.

[2] As to the tax deed under which the plaintiff claims title to said lot, defendant points out that it was sold for 2 cents less than the legal amount of taxes, penalties, and costs due at the time of said sale. In a sale where the difference between the true amount due and the amount for which the property was sold amounted to only two cents, will this discrepancy vitiate the sale? Defendant relies upon Hotchkiss v. Hansberger, 15 Cal. App. 603, 115 P. 957; Simmons v. McCarthy, 118 Cal. 622, 50 P. 761, 763; and Warden v. Broome, 9 Cal. App. 172, 174, 98 P. 252. In the last of these three cases, the facts show that the property was sold for fifty cents more than the amount due. For that reason the court held that the sale was invalid. In Hotchkiss v. Hansberger, supra, the property was sold for $1.40 in excess of the amount due. The opinion of Simmons v. McCarthy, supra, while containing language from which it might be inferred that a sale for three cents in excess of the true amount due for taxes, penalties, and costs would not be sustained, cannot be regarded as authority on that question for the reason that that part of the opinion which was a departmental opinion was concurred in by only two members of the court. Chief Justice Beatty rendered a separate concurring opinion "upon the ground that the affidavit did not show a proper service of the notice to redeem."

In all of these cases, the sale was made for an excessive amount. As noted above, the property here involved was sold for less than the amount due, and not for an excessive amount. We have been unable to find any authority in this state bearing upon the question as to whether a sale for taxes in an amount less than the amount due is invalid. In Doland v. Mooney, 79 Cal. 137, 21 P. 436, 437, there was a discrepancy of 50 cents between the certificate and the tax deed. In discussing the validity of the sale, the court said: "We cannot say that because the certificate and deed differ in such recitals the sale

was for a sum in excess of the tax and legal costs. If an excessive amount was demanded, and the property sold therefor, it would invalidate the sale, and that fact may be shown." Here is a clear intimation by this court that it is only in cases where the property was sold for an excessive amount that the sale would be invalidated. We find few cases in the reports where the property involved was sold for less than the amount due for taxes, penalties, and costs. In Minnesota such a case came before the Supreme Court of that state, in which it was shown that the amount for which the property was sold was 75 cents less than the true amount due. In a well-reasoned opinion the court applied the de minimis rule and sustained the sale. London & Northwest American Mtg. Co. v. Gibson, 77 Minn. 394, 80 N. W. 205, 208, 777. The Supreme Court of Iowa sustained a tax sale when the amount for which the property was sold was less than the amount due. Kessey v. Connell, 68 Iowa, 430, 27 N. W. 365. The Supreme Court of Kansas has applied the same rule. Ireland v. George, 41 Kan. 751, 755, 21 P. 776. The courts of some of the other states hold a contrary doctrine, notably the supreme judicial court of Massachusetts, which applies the rule of strictissimi juris to all tax sales whether the amount for which the property was sold was less than the amount due as well as when it exceeded that amount. Shurtleff v. Potter, 206 Mass. 286, 92 N. E. 331. In that case the difference in the two amounts was 50 cents. Of the two rules followed respectively in these different jurisdictions, we think the former appeals to us to be more reasonable and more in accordance with equitable principles. Where the sale is for less than the amount due, the owner of the property suffers no damage whatever by reason of such sale. This was the basis of the decision of the Minnesota Supreme Court in the case just cited from that court. In that case that court said: "The plaintiff, as owner of the lot, was not in any way injured by the sale, for it was sold for an amount less than the law required." Under these authorities the fact that the property herein involved was sold for slightly less than the amount of taxes, penalties, and costs due at the date of the sale, would not vitiate the tax deed issued in pursuance of such sale. Said tax deed is, therefore, valid.

It is unnecessary for us to determine whether the plaintiff, in addition to his rights under said tax deed, has also acquired title to said lot by adverse possession. At most, whatever right the plaintiff has acquired to said lot by being in possession thereof would simply strengthen his title acquired through the tax deed. As he has a valid title to said lot under the tax deed, any additional muniments of title would be of no value to him.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.

140 Cal.App. 336

ROGERS v. BURNHAM.

Civ. 1107.

District Court of Appeal, Fourth District, California.

Aug. 4, 1934.

1. Account stated ⇐4

In account stated, there must be admission by debtor at time of striking balance that definite amount, or amount which can be definitely determined, was due as debt.

2. Account stated ⇐19(3)

Evidence that $10,000 check was given to nurse by patient and that extra services were performed for patient did not make out prima facie case of account stated, where there was evidence that all of patient's bills, including charges for extra services, were being paid each month.

3. Account stated ⇐19(3)

Evidence concerning transaction at which $10,000 check was given to nurse by patient *held* insufficient to establish account stated because it did not show settlement of any account, admission of debt, or agreement to pay existing debt, but justified inference that check was given by way of gift.

4. Account stated ⇐4

Expressions which merely imply gratuitous intentions are not sufficient to constitute admission of debt and agreement to pay, which are requisite to an account stated.

5. Evidence ⇐588

While court cannot arbitrarily disregard unimpeached testimony of single witness, inconsistencies in such testimony and inherent improbabilities appearing from surrounding circumstances may affect amount of credit to be given to such testimony.

6. Evidence ⇐588

In action on $10,000 check given by patient to nurse, inconsistencies in testimony

of witness as to who wrote date on check, and as to how many checks were given nurse, together with appearance of check, which did not correspond to witness' story as to how it was written, justified court in not accepting testimony at its face value.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Margaret Rogers against Donald C. Burnham, as executor of the estate of Julia Ann Smith, deceased. Judgment for the defendant, and the plaintiff appeals.

Affirmed.

See, also (Cal. App.) 29 P.(2d) 806.

Bertrand L. Comparet, of San Diego, for appellant.

Stearns, Luce & Forward and Fred Kunzel, all of San Diego, for respondent.

BARNARD, Presiding Justice.

In May, 1927, Julia Ann Smith went to live at a nursing home operated by the plaintiff. She was then about 80 years old, had no living relatives, and was convalescing from a broken hip. By agreement she was to pay the plaintiff $100 per month for board, room, and ordinary daytime nursing care. It was also understood that, in addition, she was to pay for any massages and night nursing which might be required. She remained at the plaintiff's home until the middle of October, 1930, the monthly compensation being paid each month by check, and during that time fourteen additional payments were made to the plaintiff, totaling $139.56. Early in August, 1930, she fell and again injured her hip, after which time she remained either in bed or in a wheel chair. During that month the plaintiff requested an increase in compensation and, by agreement, the monthly compensation was raised to $135, which amount was thereafter paid. Beginning in August, 1930, a Mrs. Burton, a niece of the plaintiff, was employed as a night nurse for some five or six weeks and was paid by six separate checks which total $154. The first of these checks, one for $15, was given on August 28, 1930. On the same day a check for $135 was given to the plaintiff, and also another check, for $10,000, which is the basis of this action.

On September 1, 1930, Miss Smith's bank account was transferred into a joint tenancy account with one Caroline Wood, who thereafter wrote and signed all checks for Miss Smith because she was unable to write. On October 15, 1930, Miss Smith was removed from the plaintiff's home, and on October 31, 1930, she was judicially declared to be incompetent and a guardian appointed. On November 5, 1930, the check for $10,000, dated August 28, 1930, was first presented to the bank and was returned to the plaintiff because of insufficient funds. It appears from the evidence that on August 28, 1930, Miss Smith had only $1,200 in her checking account in the bank. A claim against the estate of the incompetent, based on the check, which was presented on November 13, 1930, was rejected on November 14, 1930, and no further action was taken during the lifetime of Miss Smith. She died on July 19, 1931, and on January 25, 1932, a claim was filed against her estate in the sum of $10,000 "for agreed compensation for services rendered." The claim was rejected by the executor on January 29, 1932, and this action was filed on June 3, 1932. The court found in all respects in favor of the defendant and the plaintiff has appealed.

The only point raised is that the evidence is not sufficient to support two findings which read as follows:

"That it is not true that within two years last past, or at any time, at the special request and instance of Julia Ann Smith, deceased, the plaintiff performed certain special services for said Julia Ann Smith; that it is not true that said services consisted of taking care of Julia Ann Smith during serious illness and spending much time with said Julia Ann Smith, both day and night, during said serious illness; that it is not true that said extra services were not contemplated in the contract or agreement of employment theretofore entered into between the plaintiff and said Julia Ann Smith; that it is not true that immediately after the termination of said special services and after her recovery from said serious illness, and on or about the 28th day of August, 1930, the said Julia Ann Smith promised and agreed to pay the plaintiff herein as payment for said special services rendered the sum of Ten Thousand Dollars ($10,000), or any other sum; that it is not true that the said sum of Ten Thousand Dollars ($10,000), or any other sum, is now due, owing and unpaid to the plaintiff."

"That it is not true that there was ever an account stated between said Julia Ann Smith, deceased, and the plaintiff herein."

In support of this contention the appellant argues that the $10,000 check and the testimony of Mrs. Burton as to what occurred at the time it was executed are each sufficient to make out a prima facie case of an account stated; that no evidence was introduced by the respondent sufficient to rebut the prima facie showing; that the only evidence as to

what occurred at the time the check was signed, that given by Mrs. Burton, proves an account stated; and that since this evidence was not inherently incredible, the court was not justified in rejecting or disbelieving the same.

The general requisites of an account stated are set forth in Bennett v. Potter, 180 Cal. 736, 183 P. 156, 160, as follows: "The theory upon which the action on an account stated is allowed is that transactions have occurred between the parties from which the relation of debtor and creditor has arisen, that thereafter one or both have rendered or made statements or declarations specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a certain sum is due from him on such account, together with an express or implied promise to pay the same."

[1] There must be an admission by the debtor at the time of striking the balance that a definite amount, or an amount which can be definitely determined, was due as a debt. Beltaire v. Rosenberg, 129 Cal. 164, 61 P. 916; Outwaters v. Brownlee, 22 Cal. App. 535, 135 P. 300.

[2] In addition to the check itself, the appellant relies upon the testimony of Mrs. Burton, to the effect that some extra services were performed for Miss Smith, as establishing such a relationship of debtor and creditor. It is also claimed that the testimony of this witness shows the required definite admission of the debtor that a definite amount was due as a debt, with an agreement to pay that sum. With reference to the extra services claimed to have been rendered, Mrs. Burton testified that she was in the appellant's home at frequent intervals from October, 1929, until Miss Smith left in October, 1930; that Miss Smith was receiving from the appellant board, room, and nursing care; that Miss Smith's condition was such as to require extra attention on more than one occasion although not constantly; that the services ordinarily rendered by the appellant, which were rendered without extra charge, were the services needed during the daytime; that the appellant gave massage treatments without extra charge a time or two but not as a regular thing; and that during the time she was there the appellant "did small things" for Miss Smith other than the services customarily given. When asked as to what she had herself observed, this witness testified that she had seen the appellant rendering some extra services to Miss Smith; that at different times massages were given without extra charge but not always; and that an extra charge was customarily made for night nursing. When asked whether or not the appellant "rendered any nursing services at night to Miss Smith," she replied, "Yes." It will be noted that while this testimony was to the effect that some extra services were rendered by the appellant to Miss Smith, there is no evidence as to the amount of such services, as to their frequency or as to exactly what was done. On the other hand, Caroline Wood testified as follows:

"The agreement was for One Hundred Dollars a-month, and when she had special massages she paid her a little bit extra, but the general agreement was for One Hundred Dollars a-month."

"A. During the whole time Miss Smith was there, except the last two months when she had her last illness and was in bed she paid One Hundred and Thirty-Five Dollars, except now and then a little bit extra for massages."

This evidence is to the effect that the extra services therein mentioned were paid for. The respondent introduced into evidence fourteen checks given from Miss Smith to the appellant during the period in question, in addition to her regular monthly payments, which total $139.56. There is also evidence that after Miss Smith's second fall in August, 1930, the appellant asked for and was thereafter paid an increased compensation of $35 per month. In addition, Mrs. Burton was employed as a night nurse during most of the remaining time that Miss Smith remained in appellant's home.

The showing that an indebtedness existed on August 28, 1930, was far from satisfactory and it cannot be said that there is no evidence to the contrary. The agreed compensation was paid regularly and extra payments were made on several occasions. The indefinite evidence to the effect that "some" extra services were rendered was met by proof that "some" such services had been paid for. The evidence justifies the inference that all bills were being paid each month, and it cannot be held, under the circumstances, that no further proof on the part of the appellant was necessary to establish an indebtedness.

[3, 4] The only evidence as to what was said at the time the check was signed on August 28, 1930, was given by Mrs. Burton and, in our opinion, this testimony fails to show the settlement of any account at that time, disputed or otherwise, and fails to show either an admission of a debt in that amount or an agreement to pay the same as an indebtedness. Mrs. Burton testified that "Miss Smith asked Mrs. Rogers for the check she

had previously made out to her for $5,000," and also testified as follows:

"On this particular morning, Mrs. Rogers and Miss Smith were talking over business affairs which happened to be the monthly check that Miss Smith made out to Mrs. Rogers each month, and when that was satisfactorily finished with the both parties concerned, why, Miss Smith asked Mrs. Rogers if she had a check that she had made out to her April the 3rd, 1929.

"Q. What did Mrs. Rogers say in reply to that? A. Mrs. Rogers said, 'Yes,' and went immediately and got the check and produced it in a white envelope to Miss Smith.

"Q. Let me go back a moment—you say Miss Smith asked Mrs. Rogers if she had a check she had made out in 1929, who had made out the Check? A. Miss Smith.

"Q. And the check was produced you say? A. Yes, in that white envelope.

"Q. Then what was said and done? A. Then Miss Smith asked Mrs. Rogers if she had a blank check and Mrs. Rogers said, 'yes.' And Miss Smith said that she wanted her to make out a check; then Mrs. Rogers asked her who she should make it out to and Miss Smith said, 'To yourself, Margaret Rogers.' Mrs. Rogers asked what the amount was and Miss Smith said, 'Ten Thousand dollars.' After writing the numbers on the check, Mrs. Rogers held the check in front of Miss Smith so she could see it and Miss Smith said it was for ten thousand, not for a thousand as Mrs. Rogers had first written, then—

"Q. How much had been written? A. A thousand.

"Q. And what did Miss Smith say? A. She said, 'Ten Thousand Dollars.' Then Mrs. Rogers proceeded to add another naught to the check. And after writing the amount, Mrs. Rogers then asked Miss Smith—or previous to this, Mrs. Rogers had remonstrated about the amount, and asked Miss Smith if she was sure that was the right amount and Miss Smith had said 'Yes.'

"Q. What was it that Mrs. Rogers said as to the amount? A. Well, she had remonstrated about the amount.

"Q. What do you mean by 'she remonstrated about it,' what did she say? A. She asked Miss Smith if she was sure had she realized what the amount really was, Miss Smith said, yes, that is what she wanted her to have as compensation for what she had done, because she had not only been nurse to her, but also a friend and companion to her. And after Mrs. Rogers had written out the amount in writing, she handed the check to Miss Smith, and Miss Smith signed it.

"Q. That was in your presence? A. Yes.

"Q. And after signing it, what did Miss Smith do with it? A. She then had a white slip and a pin with which she pinned that white slip to the check.

"Q. And after she pinned that check and that white slip of paper together, what did she do with the white slip of paper and check? A. She handed them to Mrs. Rogers."

It would appear from this evidence that no bill was presented, no amount was named as being due for extra services, and the existence of a debt was not discussed. The matter came up after their business "was satisfactorily finished" and when the appellant was asked to write the check she did not know who was to be the payee or what was to be the amount thereof. When told these facts she remonstrated as to the amount and asked Miss Smith if she was sure the amount named was correct and if she was sure she realized what the amount really was. Miss Smith did not refer to the matter as a debt, but stated it was the amount "she wanted her to have," and this not as compensation for extra services but because she had been a friend and companion to her. This is far from an admission of an agreement to pay an existing debt in a fixed amount. At the same time Miss Smith took up an old check for $5,000 which she had given to the appellant some sixteen months before, which she asked for and evidently expected the appellant to still have in her possession. There is evidence that Miss Smith carefully examined her bank statements each month and therefore knew that she had only $1,200 in the bank. These facts, with the language used by the deceased on this occasion, indicate, and justify the inference, that the check in question was given to the appellant by way of a gift and not as an admission and agreement concerning an existing indebtedness. Expressions which merely imply gratuitous intentions are not sufficient to constitute the admission of debt and agreement to pay which are requisite to an account stated. Outwaters v. Brownlee, supra.

[5, 6] It is further contended that the court erred in arbitrarily rejecting the testimony of Mrs. Burton. In addition to what has already been said with respect to the effect of her testimony, a number of considerations appear which may well have justified the trial court in not accepting the same at its face value. While the court may not arbitrarily disregard the unimpeached testimony of a single witness (Hynes v. White, 47 Cal. App. 549,

190 P. 836), it is also true that inconsistencies in such testimony and inherent improbabilities appearing from the surrounding circumstances may affect the amount of credit to be given thereto. Whitaker v. Whitaker (Cal. App.) 30 P.(2d) 538. This witness testified that at the time in question she heard Miss Smith say that she wanted Mrs. Rogers to have the check as compensation for what she had done. At another time, she testified that nothing was said during that conversation concerning any services rendered by Mrs. Rogers. Upon being prompted by the attorney for the appellant, she then stated that nothing had been said about services other than what she had already testified to. She testified that all of the $10,000 check except the signature was written by Mrs. Rogers with her own fountain pen. The original check is before us and not only is it uncertain as to whether the date thereon was written by Miss Smith or by Mrs. Rogers, but it appears that the date was written with ink of the same color as that appearing in the signature while the ink used on the rest of the check was of a different color. At one time she testified that the only check she saw Miss Smith sign on this occasion was the one for $10,000, while at another time she testified that she saw Miss Smith sign the regular monthly check at the same time. She testified that she did not see Miss Smith deliver any check to Mrs. Rogers other than the $10,000 check, while at another time she testified that she saw her hand the regular monthly check to Mrs. Rogers. She first testified that the check which she herself received on this occasion was for massage treatments, then that it was for night nursing and that she was then working there as a night nurse, and again, when asked how late she had worked the night before the check was delivered, that she had not worked any that night, as she was then working somewhere else in the daytime.

Among the general circumstances which throw some doubt upon her testimony may be mentioned the following: In the space provided for the name of the payee on the check in question, some writing had been started, but not completed, in the same ink as that used in the date and signature. In writing the name "Margaret Rogers" on this line, the "M" has been written over what was started in the other ink. At the top of the check certain printed words have been crossed out and written words substituted, both colors of ink being there used. If all of the writing on the check, except the signature, is that of the appellant, as claimed, and if the check was all written at one time, it was at least unusual to change ink so many times. In any event, the appearance of the check does not correspond with Mrs. Burton's story as to how it was written, and the number of changes on its face justifies caution in examining any explanation thereof. That the appellant would show the check to Miss Smith after writing the amount in figures, but before writing the amount in words on the next line, while possible, is rather unusual. It is strange that such a check should be used merely to recognize an indebtedness when the maker knew she had only $1,200 in the bank. The fact that the appellant had received a prior check for $5,000 and that she had held the same without cashing for nearly a year and a half is in no way explained. It also appears that Miss Smith expected her to have that check in her possession and asked for its return. The fact that the new check was likewise held for more than two months and presented only after Miss Smith had been judicially declared incompetent is not without its significance. Not only is the amount of the check out of all proportion to any possible extra services which may have been rendered but the evidence indicates that a bill for services had been paid regularly each month, including some compensation for extra services.

Not only are we unable to say that the trial court arbitrarily rejected the testimony of this witness for the appellant, but we think all of the evidence, taken together, is sufficient to sustain the court's finding on the question of fact presented.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

140 Cal.App. 261

BRYAN et al. v. PASADENA HOLDING CO.

Civ. 7909.

District Court of Appeal, Second District, Division 1, California.

July 31, 1934.

Rehearing Denied Aug. 24, 1934.

Landlord and tenant ⇐35

Where store, rented to carry on dry cleaning, was used by tenant for nearly three years as receiving depot before attempt to get license to do dry cleaning, tenant *held* not entitled to cancellation of lease on ground that denial of license rendered use of premises unlawful for purposes contemplated by lease, in absence of proof that ordinance at time lease was entered into prohibited conduct of dry cleaning on premises.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by G. C. Bryan and William Zastone, doing business under the fictitious name of the Ramona Dye Works, against the Pasadena Holding Company for declaratory relief and for cancellation of lease. From a judgment for plaintiffs, the defendant appeals.

Reversed.

Porter & Sutton, of Los Angeles, for appellant.

Clark & Morgan, of Alhambra, for respondents.

YORK, Justice.

This is an action for declaratory relief under section 1060 of the Code of Civil Procedure, and to have a lease construed and canceled, on the theory that denial of plaintiffs' application for a license to do dry cleaning had rendered the use of the premises unlawful for the purposes contemplated by the lease. From a judgment canceling the lease defendant corporation takes this appeal.

Under the terms of the lease, dated November 15, 1927, the premises situated at 690 East Colorado street, Pasadena, Cal., were "to be used for the purpose of conducting and carrying on the business of dry cleaning, pressing, repairing and dyeing of wearing apparel, rugs, carpets and furnishings of all kinds."

It is alleged in the complaint that the plaintiffs carried on a business at said premises of receiving and delivering clothing and wearing apparel and that, on or about August 1, 1930, the plaintiffs desiring to do a dry cleaning and pressing business, applied to the city of Pasadena for a license to conduct such business, but that there was an ordinance in effect prohibiting the doing of said business in the zone in which the premises covered by the lease were located, and that, therefore, the license was refused by the said city.

Appellant maintains that there was insufficient evidence adduced at the trial to sustain the following findings of fact, which form the main, if not the only, support for the judgment:

(1) "It is true that plaintiffs were prohibited by law from doing a dry cleaning business at said premises."

(2) "It is true that the zoning ordinances and the fire ordinances of the city of Pasadena prohibit the use of said premises for dry cleaning business as contemplated and understood by the plaintiffs and defendant at the time they entered into said lease."

(3) "That said lease was entered into by plaintiffs and defendant under a mutual mistake of law and fact."

Appellant claims that subdivision (a) of section 4 of Ordinance No. 2613 of the City of Pasadena expressly permits "cleaning and dye works" in the location covered by the lease. Quoting from the bill of exceptions, the ordinance above referred to provides as follows: "Section 4. Zones B, or Commercial Districts: (a) Except as provided in sections 8 and 13 hereof, no building, structure, improvement or industry shall be erected, constructed, established, altered or enlarged in a zone B which is designed, arranged or intended to be occupied or used for any purpose other than a use permitted in zones C, D and E, or as a store or shop for the conduct of a wholesale or retail commercial business, garage, gasoline and oil station, automobile repair shop, machine shop, place of amusement, office, studio, conservatory, dancing academy, paint shop, cleaning and dye works, newspaper print shop, laundry (except steam laundry), photograph gallery, postoffice or an establishment for light manufacture, repair or storage and sale of materials not prohibited by law or ordinance, and which is not or may not become dangerous or offensive by reason of the emission of odors, dust, gas, smoke or excessive noise." Other than said section 4, no ordinance or part of any ordinance was introduced in evidence at the trial of the case.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Evidence was introduced showing that the storeroom involved in the lease was located in a two-story arcade building, and that other stores adjoined plaintiffs' store with offices on the second floor; that a cleaning machine suitable for the work alleged to have been contemplated under the lease would require at least twenty-five gallons of gasoline with which to operate; that on or about August 1, 1930, the plaintiffs made oral application for permit to do cleaning; that this application was made first at the license bureau in the city of Pasadena, and that plaintiff Bryan was referred by that department to the building department; that at the latter place he talked to a man who said cleaning could not be done in the district where the store was located, and that he would have to get out of the district in order to do dry cleaning; and that plaintiff Bryan went immediately to the office of the defendant corporation and told the young lady in charge that he was giving thirty days' notice that he was leaving, because he had tried to get a permit and was refused, and had found it impossible to put in a cleaning establishment.

We agree with appellant that, so far as the evidence shows, there is nothing in Ordinance No. 2613 which prohibited dry cleaning in the building leased at the time the lease was executed. While the language of the lease admits of a construction that dry cleaning in a limited form was contemplated by the parties to the lease, and that such was the intent of the parties is completely established by the manner in which the business was conducted for a period of nearly three years, there is insufficient evidence to support the finding of the court that a complete dry cleaning business was contemplated at the time of the execution of the lease. The store was used as a receiving depot for nearly three years after the lease was executed, and it would seem reasonable to suppose that the plaintiffs would have sought with greater diligence to procure their permit than is shown by the record before giving notice of their intention to move and to cancel the lease, if they seriously contemplated making a change in the type of business carried on upon the leased premises. Nowhere in the record do we find any prohibition against using the premises for the business which has been carried on by plaintiffs from the time the lease was executed.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

In re SMITH'S ESTATE.

FIRST CHURCH OF CHRIST, SCIENTIST, IN BOSTON, MASS., et al. v. GILBERT et al.

Civ. 9582.

District Court of Appeal, Second District, Division 1, California.

Aug. 30, 1934.

Rehearing Denied Sept. 25, 1934.

Hearing Denied by Supreme Court Oct. 29, 1934.

1. Wills ⇐289

Burden is on proponents offering will for probate as lost will to prove that will existed at time of decedent's death or was destroyed fraudulently or by public calamity during lifetime of decedent without her knowledge (Probate Code, § 350).

2. Wills ⇐290

Where evidence shows will cannot be found and that, when last seen or known to exist, it was in decedent's possession, conclusion of law is that writing was destroyed by decedent and that he acted with intention of effecting revocation.

3. Wills ⇐306

Evidence *held* to show that alleged lost will was destroyed by decedent before her death with intention to effect revocation.

4. Wills ⇐81

Testatrix' death within period necessary to elapse after execution of will in order that bequests for charitable purposes may become effective does not affect validity of document nor of provision therein revoking prior will, though charitable bequest was contained in both wills (Probate Code, §§ 40, 41, 43).

Appeal from Superior Court, City and County of Los Angeles; Henry M. Willis, Judge.

In the matter of the estate of Zaidee V. Smith, deceased. Proceeding by First Church of Christ, Scientist, in Boston, Massachusetts, and others, proponents, against Moses V. Gilbert, and others, contestants. From an adverse judgment, contestants appeal.

Reversed and remanded, with directions.

LeRoy N. French and Franklin J. Cole, both of Los Angeles, for appellants.

Arthur W. Eckman, Morton L. Barker, Ella Rae Briggs, and Ralph G. Lindstrom, all of Los Angeles, for respondents.

Noel C. Edwards, of Los Angeles, for executor.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

HAHN, Justice pro tem.

The next of kin of Zaidee V. Smith, deceased, appeal from that part of a judgment wherein it was decreed that a certain will executed August 16, 1929, but not produced, be admitted to probate as a part of the last will and testament of Zaidee V. Smith, executed March 17, 1932. Appellants in their brief state the questions involved in this appeal as follows:

"May a will be proven and admitted to probate as a lost will which is not proven to have been in existence at the time of the death of the testatrix?

"When a will, purporting to dispose of all of testatrix's estate, duly executed and entitled to be admitted to probate, contains the following clause: 'hereby revoking all former wills made by me, do make and declare this my last will and testament', may the Court disregard this language and admit to probate, in conjunction with said will, a former will, which, when last seen by any witness, was in testatrix's possession nearly three years prior to her death and could not, after testatrix's death, be found?"

The facts, material to the issues involved, as disclosed by the record may be summarized as follows: Zaidee V. Smith, a widow, residing in Los Angeles county, died August 8, 1932. An olographic will, dated March 17, 1932, with two undated codicils attached thereto in the handwriting of decedent, was offered for probate as the last will and testament of deceased by Marshall Stimson, a friend of deceased and named in said will as executor. For the purposes of brevity, this olographic will will be referred to as the 1932 will. Thereafter, the First Church of Christ, Scientist, in Boston, Mass., filed a petition in the same proceeding, which in part reads as follows:

"That said deceased left a will dated the 17th day of March, 1932 entirely written, dated and signed by said deceased as testatrix with two certain codicils thereto appended and thereon written as petitioner is informed and believes and therefore alleges the fact to be in the handwriting of said deceased and signed by said deceased. * * *

"That said deceased left in existence at the time of the death of said deceased, another unrevoked will which hereinafter for brevity is referred to as the '1929 will'; that said 1929 will was duly executed and published by said deceased and duly witnessed on the 16th day of August, 1929; that said 1929 will is part and parcel of said 1932 will and the 1929 will and said 1932 will together constitute the last will and testament of said deceased; that there is hereto attached and made a part hereof and filed herewith and marked as Exhibit 'A,' a full true and correct copy of the substance of said 1929 will; that diligent search has been made for the original of said 1929 will but the same cannot be found and by reason of the loss of said original instrument your petitioner is unable to file such original instrument in this court but presents herewith the attached Exhibit 'A' as the full true and correct statement of the substance thereof. * * *

"That said 1929 will is in writing signed by said testatrix and attested by said subscribing witnesses. * * *

"That said testatrix died as aforesaid on the 8th day of August, 1932, within six months after the writing and signing of said 1932 will and by reason thereof the said charitable bequest to your petitioner including its activities in said Pleasant View Home and said Christian Science Sanatorium in San Francisco contained in said 1932 will would be and are under said 1932 will standing alone invalid and ineffectual to the extent that said charitable bequest exceeds one-third of the estate of the testatrix, under the provisions of section 41 of the Probate Code of California; but by reason thereof and of the intent and purpose of said testatrix in said 1932 will and also in said 1929 will expressed, and by reason of the dependence of the testatrix upon the validity and legal effectiveness of each and all of the provisions of said 1932 will before said revocation clause in said 1932 will should become effective, the said 1929 will remains and is in full force and effect and the conditional revocation thereof by said 1932 will was and is ineffectual as a matter of law. * * *

"Wherefore your petitioner prays that a time and place be appointed for the hearing of this petition, simultaneously with the hearing of the petition aforesaid of said Marshall Stimson for the probate of said 1932 will, and for the proving of said 1929 will and said 1932 will as one last will and testament of said deceased and that all persons interested be notified and directed to appear at the time and place as appointed; that upon said hearing the court make its decree:

"First: that said will of August 16, 1929 and said will of March 17, 1932 be admitted to probate together as constituting one last will and testament of said decedent as of the date of said 1929 will, to-wit: August 16, 1929.

"Second: That such other and further orders and decrees be made by the court as may be fit and proper in the premises."

No question is raised on this appeal as to the due execution or validity of the will of 1932, or either of the codicils added thereto. The only portions of this will material to our discussion are contained in paragraphs I and IIII, which read as follows:

"I. I, Zaidee V. Smith of Los Angeles, California being of sound and disposing mind, not acting under undue influence, hereby revoking all former wills made by me, do make and declare this my last will and testament."

"IIII. When all bequests that I shall later designate are paid, the entire residue and remainder of my estate shall be paid over conveyed, transferred and delivered to the persons then composing the Christian Science Board of Directors of the First Church of Christ Scientist in Boston, Mass. and their successors in office in trust for the purpose of more effectively promoting and extending the religion of Christian Science as taught by Mary Baker Eddy, the proceeds from the sale of my diamonds and other valuable personal effects are to go to the Home at Pleasant View. My collection of Christian Science Journals dating from the 5th edition to present day are to be sold and the proceeds given to the Christian Science Sanatorium in San Francisco. All Sentinels from the first edition to be sold and given to the San Francisco Christian Science Sanatorium. All Christian Science literature old and new to be sold and given to S. F. Sanatorium."

Following the signature of the testatrix, appears the following paragraphs in her own handwriting:

"Codicil to above will.

"My house and lot 892 Kensington Road, furniture of house and everything on the premises I bequeath to Marion D. Hart and Rosina Chitwood jointly.

"Zaidee V. Smith."

"2nd Codicil to above will: I wish my cousin Moses Gilbert to have my orange ranch in Moreno Valley about 33 acres allso 100 shares of my Edison stock to.

"Zaidee V. Smith."

As to the execution of the alleged lost will of 1929, it appears from the testimony of Fannie F. Smithton and Stanley Jewell, friends of deceased, and who were subscribing witnesses to a will executed by deceased in July, 1929, that deceased stated to Fannie F. Smithton on August 15, 1929, that she desired to rewrite her July will, and on said date dictated to Fannie F. Smithton a new will, which was on the same day typed by her; that on the following day the will was signed by deceased in the presence of Fannie F. Smithton and Stanley Jewell, subscribing witnesses thereto; that the will consisted of two typewritten pages to which was attached a blue cover such as is commonly used as a backing for legal documents, on the outside of which was typed, "Last Will of Zaidee V. Smith"; that upon the execution of the document, deceased put it in her handbag. There is no evidence in the record that this will was ever again seen by any one, nor was a copy of said will produced at the hearing. Over the objection of counsel for appellants, Fannie F. Smithton and Stanley Jewell, the subscribing witnesses to the 1929 will, were permitted to testify that the will devised all of the estate of the testatrix to the First Church of Christ, Scientist, in Boston, Mass.

The evidence bearing upon the question of the existence or nonexistence of the will of 1929 on August 8, 1932, the date of decedent's death, or stated otherwise, whether the will was lost, or destroyed and revoked, is meager. As already stated, there is no evidence that the will was ever seen after the day of its execution, which was almost three years prior to the death of deceased. The evidence without conflict shows that a most thorough search was made among the effects of deceased, but no will other than the 1932 will was found. Two blue legal document covers were found among the papers of deceased on each of which was typed, "Last will and testament of Zaidee V. Smith." These cover sheets clearly show that each had been attached by staples to other sheets of paper, which sheets in one instance had been torn off, and in the other, removed by the removal of the staples.

After the making of the 1929 will, deceased repeatedly expressed to several of her friends that it was her desire and intention to change her will so as to provide for persons not named in her will. To at least two of her friends she stated that she intended "to rewrite her will." In February, 1932, she told a cousin she had had a will but had destroyed it. To her friend Stanley Jewell, one of the subscribing witnesses to her 1929 will, in April or May, 1932, she stated that she "had rewritten her will." Jewell understood her statement to mean she had rewritten her 1929 will, to which he had been a subscribing witness.

On the morning of August 8, 1932, which was the day of her passing, she then being clear of mind and intelligent and coherent in her speech, she stated to a friend, who was with her, that she desired to add a codicil to her will and requested that her will be brought to her. At her direction the key to the closet where she kept her valuable papers was taken from her handbag and a sealed envelope, on the outside of which was written, "Last will and testament of Zaidee V. Smith," was secured from the closet and handed to her. Opening the envelope with a scissors, she took out the 1932 will, which for some time she read and pondered over. Then saying she wished to make an addition or codicil to her will, she asked for pen and ink and wrote on the last page of the will the paragraph designated "2nd codicil to last will" and signed her name.

In view of our conclusion that the judgment must be reversed because of erroneous findings on two vital issues, we will quote from the court's findings of fact and conclusions of law, only such portions as are pertinent to the discussion of the points involved. Among other things, the court found:

"That said 1929 will was not destroyed during the lifetime of Zaidee V. Smith and was in existence, unrevoked, at the time of death of said decedent. * * *

"That the revocation clause in said 1932 will contained was as to said 1929 will, related to and dependent upon the legal effectiveness and operation of said 1932 will; that it was the desire, intent and testamentary purpose of decedent to die fully and completely testate; that to such extent as the said 1932 will might for any reason whatsoever fail to dispose of any portion of the estate of decedent as therein provided, it was the desire, intent and testamentary purpose of decedent that said 1929 will remain in full force and effect as part and parcel of her last will and testament to dispose of her said estate, so that the entire estate of said decedent should be disposed of as testate property as by said 1929 will and said 1932 will provided.

"That said 1929 will and Article 'IIII' of said 1932 will were and are identic in their dispositive provisions and disposed of all of the estate of decedent (except only the property devised and bequeathed by the first and second codicils to said 1932 will), including the proceeds of sale of diamonds, valuable personal effects, Christian Science Journals, Sentinels, and other Christian Science literature, to The Mother Church; that the administrative sales agents, to-wit: Belle Baker, Clara W. Mitchell and Marian Hart as provided under said 1929 will were dispensed with and eliminated by said 1932 will, and the sales work to them given was by said 1932 will left for discharge by The Mother Church as and when it should deem wise; that said proceeds of sale of personal property were by said 1929 will and said 1932 will given and disposed of directly to said The Mother Church to be used by it as by its Board of Directors determined for said Christian Science Home at Pleasant View and said Christian Science Sanatorium at San Francisco and were not to go or be disposed of directly to the respective corporate entities which operate said Pleasant View Home and said Sanatorium at San Francisco;

"That said 1929 will and said 1932 will and the codicils thereto are all part and parcel of and as a whole constitute the last will and testament of Zaidee V. Smith, said decedent;

"That said last will and testament of decedent consisting of said 1929 will and said 1932 will (except the devises and bequests by said codicils provided) is completely dispositive of the estate of decedent to The Mother Church, as a charitable, benevolent body corporate, and said will and testament was executed at such times as to make the same valid and fully dispositive of the estate of decedent within the terms of article 2 Sections 40 to 43, both inclusive, of the Probate Code."

The following conclusions of law declared by the court are pertinent to the points under discussion:

"1. That said 1929 will and said 1932 will and codicils thereto are entitled to admission to probate together, as a whole, as the last will and testament of Zaidee V. Smith, said decedent. * * *

"4. That all objections and grounds of opposition to the probate of said 1929 will and to the codicils to said 1932 will should be overruled and denied.

"5. Judgment and order of admission of said 1929 will and said 1932 will and codicils thereto, to probate, said order to contain the provisions of said 1929 will as hereinabove set out, to be entered accordingly.

"6. That said The Mother Church is the sole devisee and legatee of the entire estate of Zaidee V. Smith, deceased, save and except only the portions thereof devised and be-

queathed by codicils to said holographic portion of said last will and testament of Zaidee V. Smith, deceased."

[1] In urging a reversal of the judgment, appellants contend that all of the quoted findings are without support in the evidence, and that the court erred in its conclusions of law. Specifically, they assert:

First. That the burden was upon respondent who offered the 1929 will for probate as a lost will to prove, by a preponderance of the evidence, the essential requisites provided by section 350 of the Probate Code, namely:

a. That the will was in existence at the time of the death of deceased, or

b. That the will was destroyed fraudulently or by public calamity in the lifetime of the testatrix, without her knowledge.

Second. That respondent not only failed to sustain the burden placed upon it by said section 350, but the presumption of law and the evidence without conflict sustain the conclusion that the will in question was not lost, but was destroyed by the testatrix in her lifetime.

Third. That the will of 1929, if the evidence showing the execution of such a will was properly admitted, was revoked by the testatrix in her lifetime.

[2, 3] Appellants' contentions on all of these points must be sustained. The evidence shows without conflict that the will of 1929 was last seen in the possession of the testatrix three years prior to her death, and that although a most thorough search was made immediately after decedent's death, no such document was found.

It is the settled rule in this jurisdiction that, where the evidence shows that the instrument cannot be found, and that when last seen or known to exist, it was in the custody or possession of decedent, the conclusion of law is that the writing was destroyed by the decedent, and that he acted with the intention of effecting a revocation thereof. In re Estate of Johnston, 188 Cal. 336, 203 P. 628; In re Estate of Sweetman, 185 Cal. 27, 195 P. 913.

It would be difficult to find a situation that would more justly warrant the invoking of this rule of presumption than in the case at bar. In addition, there is the undisputed evidence that in February, 1932, deceased made the statement to a cousin that she had had a will but destroyed it, and in April following informed an intimate friend, who had been a witness to the 1929 will, that she had rewritten her will.

The evidence without conflict shows that for some months prior to her death, deceased discussed with friends the advisability of making bequests to persons not named in her 1929 will, and also evidence that she made statements that she was going to make such changes. There is also other evidence to justify the inference that she had made a new testamentary disposition of her property after 1929, and that she had physically destroyed all wills made by her previous to the will of March, 1932. It appears that prior to 1932, she had made several wills. The fact that some of these wills were shown to have been destroyed by her, and not one of the old wills found after her death, justifies the inference that she entertained the belief that when she made a new will, she should destroy the superseded will.

In addition to the evidence bearing upon the question of the actual physical destruction of this will, we have the most solemn declaration by the testatrix in her 1932 will that she revoked all former wills, and that this document was her last will and testament. This declaration is so direct and clear that no elaboration or discussion can add force to, or change its meaning.

[4] Respondent attempts to avoid the effect of this declaration by the testatrix in her 1932 will by arguing that it was made in the belief that the devise of the entire residuum of her estate to respondent would be effective. Inasmuch, however, as her death within six months of the execution of the will rendered this devise in its entirety void by reason of sections 40, 41 and 43 of the Probate Code of California, and because three years prior to her death deceased had made a will giving all her estate to respondent, respondent urges that this declaration should be rendered null and void, and the prior will reinstated as a part of the 1932 will, thus avoiding the result of the combined act of Providence and the legislative enactments of the sections of the Probate Code above cited.

There is no merit in this contention. The will at the time it was executed met all the requirements of the law, making it a valid and legal testamentary act of the testatrix. This being so, the death of the testatrix within the period of time prescribed by our statute as necessary to elapse after the execution of a will in order that a bequest for charitable purposes may become effective, does not and cannot affect the validity of the document as the last will and testament of the testatrix, or of any other provisions con-

tained in the will, which otherwise are a valid exercise of testamentary disposition.

Respondent does not dispute this proposition, so far as the document as a will is concerned, but does vigorously contend that, because the devise to it is rendered ineffective by reason of the restrictions contained in section 40 of the Probate Code, and the express wish of the testatrix so far as this devise is concerned in the 1932 will is thus defeated, another provision of the will, which is a perfectly valid declaration of her testamentary right, should be declared invalid so as to make possible the re-establishment of a previously drawn will, which makes respondent the sole beneficiary of the estate of deceased.

The argument advanced in support of this contention is neither persuasive in its reasoning, nor supported by legal authority. There is nothing in either of the wills that justifies a finding that deceased intended that both the documents of 1929 and 1932 should constitute her last will and testament. Indeed, the language of the 1932 will not only specifically declares otherwise, but its very terms are inconsistent with the provisions of the 1929 will. Full legal effect cannot be given to the valid provisions of both wills. Nor does the willingness of respondent to accept the residuum of the estate as decreed by the judgment, instead of the entire estate as provided in the 1929 will, obviate the difficulty encountered in attempting to reconcile the conflicting provisions of both documents.

If the considerations urged in support of the judgment were given judicial sanction, the right of testamentary disposition would be seriously undermined; for if, because any particular bequest in a will otherwise valid is rendered ineffective for any one of a number of reasons which need not here be pointed out, the solemn declaration of a testator that the document is his last will and testament and that all of his former wills have been revoked is to be ignored and declared ineffective, so that a prior disregarded will, which has been as effectively revoked as such an act can be accomplished, is resurrected and made the basis for disposing of his estate, then surely the declared right of testamentary disposition would be a mere fiction and not a substantial right.

Among other contentions urged by respondent in support of the judgment is that the testamentary purpose of the testatrix was never changed, and, therefore, the will of 1929 expressing this purpose should be held to be her last testamentary act so as to make possible the fulfillment of her testamentary purpose.

The evidence does not support the assertion that the testatrix had an "unchanged testamentary purpose." Paragraph III of the 1932 will makes two specific bequests to corporations which were not included in the will of 1929. In what is designated as the first codicil, which the court finds was written in March, 1932, a devise of a house and lot, together with the furnishings, is made to Marion D. Hart and Rosina Chitwood. In the codicil No. 2, written under the very shadow of the hand of death, she devises her orange ranch and bequeaths her Edison Company stock to a cousin. These very substantial devises and bequests were not contained in the 1929 will.

Other points are discussed by counsel in their briefs, as well as extended citations of authorities on the points we have considered, as well as those not included in our discussion. In view of the conclusions we have arrived at, we do not deem it necessary to discuss the other points raised, or the many cases and authorities cited in the briefs. Suffice it to say that we find no case among those cited that holds to the contrary of the conclusions which we have stated.

Inasmuch as our conclusions are in effect a determination of the law applicable to the facts as to which there is no dispute, it would seem that no useful purpose would be served by ordering a new trial of the case. It is therefore ordered that the judgment be reversed and the case remanded, with the direction that the trial court make its findings and conclusions of law as hereinabove indicated, and enter judgment in accordance with the conclusions herein stated.

We concur: CONREY, P. J.; HOUSER, J.

140 Cal.App. 382

CITY OF LAGUNA BEACH v. AMERICAN LEGION POST NO. 222 OF LAGUNA BEACH et al. (four cases).

Civ. 1477–1480.

District Court of Appeal, Fourth District, California.

Aug. 9, 1934.

Eminent domain ⇐246(3)

Property owners *held* not entitled to dismissal of condemnation proceedings for failure of city to pay award within one year from date of interlocutory decree due to city's inability to sell at par bonds of improvement district which were not general obligations of city, since 30-day limitation in Code conflicted with statute requiring city to pay damages for condemned property as soon as there was sufficient money in treasury and hence was not controlling, and since one-year limitation in Code referred to general obligation bonds of city and not to those of improvement district (Code Civ. Proc. §§ 1251, 1255a; Gen. Laws 1931, Act 3276a, §§ 26, 36, 37, 51).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Proceeding in eminent domain by the City of Laguna Beach, a municipal corporation, against the American Legion Post No. 222 of Laguna Beach, a corporation, John Seipel and others. From judgments dismissing the proceeding entered after the plaintiff failed to pay an interlocutory judgment fixing the amount of damages to be paid to the second named defendants, the plaintiff appeals.

Judgments reversed.

Milburn G. Harvey, of Santa Ana, for appellant.

William M. Dorney, of Los Angeles (Charles D. Swanner, of Santa Ana, of counsel), for respondents.

BARNARD, Presiding Justice.

These four appeals arise out of an eminent domain proceeding begun by the city of Laguna Beach in connection with an improvement project known as Acquisition and Improvement District No. 4 of the City of Laguna. The proceeding is one under the "Acquisition and Improvement Act of 1925" as amended (Deering's Gen. Laws, 1931, Act 3276 a, p. 1594). The four appeals were consolidated and have been submitted upon one set of briefs and upon stipulated facts.

A complaint was filed on November 3, 1930, and, by answer, the respondents put in issue the value and severance damages to their respective pieces of property. An interlocutory judgment fixing the amount of damages to be paid to the respondents, respectively, was entered and recorded on January 19, 1932. After due proceedings, the city council of the appellant city ordered bonds issued in the necessary amount to pay the awards and fixed a date for receiving bids for said bonds. On two occasions the city council gave notice inviting bids on said bonds, but no bids were ever received. Although repeated efforts were made by the appellant to sell said bonds and although the appellant was at all times willing, and was at all times attempting, to sell the same for the purpose of raising money to pay the awards in question, the appellant was unable to sell the same or to secure any bid therefor up to the time judgment of dismissal was entered. By reason of the inability of the appellant to sell said bonds there has never at any time been any money in the hands of the appellant's treasurer with which to pay the amounts of the respective awards.

Between February 15, 1933, and March 10, 1933, the various respondents moved to dismiss the action and for their costs and disbursements, including attorney's fees. These motions were made under the provisions of section 1255a of the Code of Civil Procedure and based upon section 1251 of that Code, it being the theory and contention of the respondents that the failure of the appellant to pay the amounts assessed within one year from the date of the interlocutory judgment constituted an implied abandonment of the proceeding. These motions were granted and judgments of dismissal were entered including orders for costs and attorney's fees, from which these appeals were taken.

The main question presented is whether sections 1255a and 1251 of the Code of Civil Procedure are controlling under these circumstances. It is respondents' contention that these Code sections are applicable, while the appellant contends that the Acquisition and Improvement Act of 1925 contains a complete scheme for the carrying through of a condemnation action and contains provisions so inconsistent with the Code sections named as to make the same inapplicable. Section 26 of this act makes the general provisions of the Code of Civil Procedure applicable to such proceedings "except in the particulars otherwise provided for in this act." Section

51 provides that any provision contained in any other act which is in conflict with any provision of this act shall be void and of no effect in any proceeding commenced under this act. Section 37 provides in part as follows: "As soon as there is sufficient money in the hands of the treasurer, in the special fund to defray the expenses of the acquisition (together with the amount, if any, received from the issuance and sale of bonds to obtain immediate possession and use and deposited for that purpose), to pay the amounts including costs awarded to the defendants by the interlocutory judgment in the action in condemnation, the said amounts including costs shall be paid to the parties entitled thereto, or into court for their benefit."

Other sections provide for the issuance and sale of bonds, the proceeds to be used in paying the amounts of the awards. Section 36 provides that such bonds may not be sold for less than par, a provision somewhat inconsistent with a time limitation. Not only are these provisions inconsistent in general with a time limit, but it is fully apparent therefrom that payment of such an award cannot be made within thirty days of the entry of judgment. These provisions are in conflict with the first sentence of section 1251 of the Code of Civil Procedure providing that the amount assessed in the award must be paid within thirty days. The exception that follows in that section, to the effect that the award must be paid within one year where bonds are to be sold, applies only to bonds of the state or of the public corporation which brought the action and has no application here, since the bonds to be issued and sold were those of the improvement district and not general obligation bonds of the city. City of Los Angeles v. Agardy (Cal. Sup.) 33 P.(2d) 834. It follows that the provisions of sections 1251 and 1255a of the Code of Civil Procedure, being inconsistent with the terms of the act itself, are neither applicable nor controlling.

We conclude, therefore, that the fact that payment of the award was not made within one year of the date of the interlocutory decree was not, in itself, sufficient to constitute an implied abandonment of the proceeding or to justify a dismissal of the action. It does not necessarily follow that the respondents would be without remedy in the event payment of the awards should be unreasonably delayed. But we are here concerned only with the applicability of particular Code sections.

The allowance of attorney's fees in connection with the dismissal of this proceeding is also attacked. Under the view we take of the main question raised, this matter requires no consideration.

For the reasons given the respective judgments are each reversed.

We concur: MARKS, J.; JENNINGS, J.

140 Cal.App. 234

LOVELACE v. FREE et al.

Civ. 1284.

District Court of Appeal, Fourth District, California.

July 31, 1934.

Hearing Denied by Supreme Court Sept. 27, 1934.

1. Specific performance ⇐73

Contract to devise real property and to continue in force unmodified a joint policy of life insurance on lives of plaintiff and defendant in consideration for care and support to be furnished defendant by plaintiff during defendant's lifetime was not specifically enforceable, since it was contract for personal services, full performance of which was dependent upon will of person agreeing to furnish such services.

2. Injunction ⇐59(1)

Where contract to devise real property and to continue in force unmodified a joint policy of life insurance on lives of plaintiff and defendant in consideration for care and support to be furnished defendant by plaintiff during defendant's lifetime was not specifically enforceable, injunction to restrain threatened breach of contract *held* not authorized by statute (Code Civ. Proc. § 526; Civ. Code, § 3423, subd. 5).

3. Specific performance ⇐128(1)

In action upon contract whereby defendant agreed to devise real property to plaintiff in consideration for care and support to be furnished defendant by plaintiff during defendant's lifetime, plaintiff *held* not entitled to full value of real property as damages upon defendant's alleged breach of contract, since controversy was inter vivos, and plaintiff's rights under agreement would expire with her prior death.

4. Pleading ⇐203

Demurrer to complaint on general ground of insufficiency of facts must be overruled if it can be discovered from allegations of pleading that cause of action for relief,

either legal or equitable, is therein contained.

5. Action ⇐38(5)

In action for damages caused by defendant's refusal to allow plaintiff to perform her part of contract wherein defendant agreed to devise real property to plaintiff in consideration for care and support to be furnished defendant by plaintiff during defendant's lifetime, mere statement that value of plaintiff's services actually rendered was $20,000 *held* not to set out separate cause of action for alleged value nor reasonable value of services actually rendered.

6. Work and labor ⇐22

In action for damages caused by defendant's refusal to allow plaintiff to perform her part of contract wherein defendant agreed to devise real property to plaintiff in consideration for care and support to be furnished defendant by plaintiff during defendant's lifetime, allegation of count of indebtedness for value of services, board, and lodging *held* fatally defective for failure to allege nonpayment.

7. Payment ⇐57

Complaint which alleges obligation to pay money must contain averment that money has not been paid.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Eula B. Lovelace against Arthur M. Free and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Leland Crawford, of Santa Barbara, and Walter W. Middlecoff, of Los Angeles, for appellant.

Lawrence W. Young, of Fresno, for respondents.

JENNINGS, Justice.

The plaintiff in this action, by her original complaint, sought the aid of equity to enforce an alleged agreement of the defendant Arthur M. Free to devise to her certain real property and to continue in force unmodified a certain joint policy of life insurance issued on the lives of plaintiff and said defendant.

The facts alleged by the original complaint are substantially as follows: On July 29, 1925, the plaintiff and said defendant Arthur M. Free entered into an agreement whereby it was provided and agreed that during the joint lives of said persons the plaintiff would permit Free to occupy her home as his home and that she would render to him services in furnishing him with a home, board, personal care, nursing, driving him in her automobile, caring for his clothing, and rendering such other service of a similar nature as he might desire or should require, and, in consideration of plaintiff's promise to perform such agreement on her part, the said defendant Arthur M. Free agreed that he would treat plaintiff as a life employee, and that he would transfer and convey to her all property which he then owned or might thereafter acquire, and in accordance with his agreement on April 2, 1926, he did execute and deliver to plaintiff a written instrument whereby he disposed of all of his property in favor of plaintiff, and thereafter in the month of November, 1931, in conjunction with plaintiff, he procured a policy of life insurance in the amount of $20,000, and agreed that said policy of life insurance should belong to said parties for their joint support during their joint lives, and should thereafter become the property of the survivor, "and such agreement is still in force, as plaintiff is informed and believes, except as modified, without the consent of plaintiff by some provision in said policy in favor of said defendants Maude Hawke and Florence Stockton Free." It is also alleged in said complaint that it was agreed that the defendant Arthur M. Free would manage and preserve the principal sum of all property which he owned or should thereafter acquire, and that from April 2, 1926, the plaintiff should have the same and an equal right, title, and ownership in all his property as was held by said Arthur M. Free.

The complaint further alleged that, in performance of her part of the agreement, the plaintiff permitted Free to move into and to occupy her residence as his home; that from April 2, 1926, she furnished him with board, personal care, nursing, automobile transportation, care of his clothing, and such other service as is generally provided in a home until November 22, 1932, when, without her consent, he left her home and refused thereafter to accept further performance of the agreement by her and himself refused to perform his part of the agreement.

The complaint also alleged that the defendant Arthur M. Free in performance of his agreement had executed and delivered to plaintiff a will in her favor devising and bequeathing to her all of his property, and had agreed that he would not revoke or modify said will, but that she had been informed and believed, and therefore alleged, that he had

attempted to revoke the will in a manner unknown to her.

A further allegation contained in the complaint set out that the defendant Free had accepted performance by plaintiff of all terms of the agreement for more than six years; that it was a part of said agreement that said defendant would, during the joint lives of plaintiff and said defendant give to plaintiff the benefit of his society, comfort, and companionship; that the agreement was just and reasonable as to both parties thereto; and that each party had received an adequate consideration for the performance of the covenants and agreements which were to be performed by such party.

The final allegation of the complaint was to the effect that plaintiff had been informed and believed that, unless restrained, the defendant Arthur M. Free and the other defendants would cancel or change the policy of insurance in such manner as to defeat the rights of plaintiff thereunder, and would transfer, incumber, or otherwise dispose of the real property owned by the defendant Free and thereby prevent plaintiff from completely obtaining the rights therein to which she was entitled by virtue of the above-mentioned agreement; that "plaintiff has no plain, speedy or adequate remedy in the ordinary course of law; and said defendant A. M. Free will be unable to respond in damages except out of said property now owned by him, and plaintiff as above described."

The prayer of the complaint was for the issuance of (1) a temporary injunction pending trial of the action restraining the defendants from changing or modifying the insurance policy and from revoking or modifying the will; (2) a permanent injunction restraining the defendants from incumbering or disposing of the real property owned by the defendant Arthur M. Free, without plaintiff's consent or the consent of the court, and that the court either by injunction or by receiver preserve the real property for those interested therein, and particularly preserve plaintiff's rights therein to which she was entitled by virtue of the agreement between her and Free, and, if necessary, the court should divide and partition the said real property.

To this complaint the plaintiff filed three amendments. One of such amendments alleged that the value of the real property owned by the defendant Arthur M. Free, as described in the complaint, was and is the sum of $60,000. Another of such amendments alleged that it was made in compliance with section 447 of the Code of Civil Procedure, and stated that the plaintiff would rely in part upon written instruments, and that two of such instruments were the life insurance policy and the will of Arthur M. Free, both of which instruments were mentioned in the complaint. The third amendment alleged that, at the time when the agreement between plaintiff and defendant Free was made, the plaintiff was 35 years of age and had an expectancy of 32 years and the defendant Free was 47 years of age and had an expectancy of 23 years, and that each party to the agreement was in a normal state of health; that at said time defendant Free was a competent dentist and was in receipt of an annual income of more than $5,000; that plaintiff had practically no income, but was the owner of a home, and that she had been trained in housekeeping, in practical nursing, and as a dentist's assistant. This amendment also contained the following allegation: "That if Arthur M. Free had performed the terms of said contract on his part and permitted plaintiff to perform the same on her part for the balance of the agreed term thereof, plaintiff would have received therefrom support and maintenance for the balance of her life, which would have been of the value of $60,000, and by reason of the acts of said Arthur M. Free, she has been deprived of said support and maintenance to her damage in the sum of $60,000.00; and the value of her services, rents, board and other matters given by plaintiff in performance which plaintiff actually rendered to said Arthur M. Free as far as he permitted her to perform were of the value of $20,000.00; and the total damages suffered by plaintiff by reason of said acts of said defendant Arthur M. Free were and are the sum of $60,000.00. Wherefore, plaintiff in addition to the relief prayed for in her original complaint herein prays judgment against defendant Arthur M. Free for the sum of $60,000.00."

To the complaint the defendants Maude Hawke and Florence Stockton Free filed a general demurrer. The defendant Arthur M. Free filed a demurrer, both general and special, to the complaint and to the amendments thereto. The general demurrer of defendant Arthur M. Free on the ground of failure of the complaint and amendments to state a cause of action was sustained, and the special demurrer of said defendant was sustained as to certain specified paragraphs of the complaint. The general demurrer of the two other defendants was likewise sustained. The plaintiff was granted 10 days within which further to amend her complaint. This privilege of further amendment plaintiff did not accept, and, upon the expiration of the

time, limited judgment was entered in favor of the above-mentioned defendants. From this judgment the plaintiff has prosecuted the present appeal.

[1, 2] The problem which is here presented is therefore the sufficiency of the complaint together with the various amendments thereto. In considering this problem, certain fundamental principles are applicable. In the first place, it is clear that appellant would not have been entitled to specific performance of the agreement set out in the complaint. The pleading disclosed that the agreement was one whereby appellant engaged to render personal services to respondent Arthur M. Free. Application of the familiar equitable rule that contracts for personal services where full performance is dependent upon the will of the person agreeing to furnish such services are not specifically enforceable would effectually prohibit the equitable relief of specific performance in this action. Roy v. Pos, 183 Cal. 359, 191 P. 542. It is likewise equally clear that the remedy of injunction to restrain a threatened breach of the contract alleged in the complaint would not be authorized. O'Brien v. O'Brien, 197 Cal. 577, 588, 241 P. 861. Section 526 of the Code of Civil Procedure provides that an injunction cannot be granted to prevent the breach of a contract whose performance is not specifically enforceable. Subdivision 5 of section 3423 of the Civil Code is to the same effect.

[3] It is also apparent that appellant would not be entitled to a judgment against respondent Arthur M. Free, in the amount of $60,000 as prayed for in the amendment filed to the complaint; such amount being the alleged value of the real property owned by said respondent at the time the agreement which formed the basis of the action was made. This is evident, since we are here dealing with a controversy inter vivos. Appellant may not survive respondent Arthur M. Free. If she does not, whatever rights she might have under the agreement described in the complaint would expire with her. O'Brien v. O'Brien, supra.

[4] It is, however, the final contention of appellant that her complaint, together with the amendments filed thereto, sufficiently alleged a cause of action for damages in the amount of $20,000 suffered by her in the furnishing of board, lodging, and services to the respondent Arthur M. Free during the period of approximately six years when he resided in her home and accepted such service. In advancing this contention, appellant relies upon the established rule that, since there is but one form of action in California, a demurrer to a complaint on the general ground of insufficiency of facts must be overruled if it can be discovered from the allegations of the pleading that a cause of action for relief, either legal or equitable, is therein contained. Pascoe v. Morrison (Cal. Sup.) 25 P. (2d) 9.

[5-7] The only allegation which appears in any of the various pleadings filed by appellant which refers to the value of the lodging, board, and services furnished by appellant to Arthur M. Free is contained in the first amendment to the complaint, and is in the following language: "And the value of the services, rents, board and other matters given by plaintiff in performance which plaintiff actually rendered to said Arthur M. Free as far as he permitted her to perform were of the value of $20,000.00." It is significant that this language occurs in a paragraph wherein it is alleged that, if respondent Arthur M. Free had permitted appellant to perform her part of the contract, and if he had performed his agreement, she would have received therefrom support and maintenance for the balance of her life which would have been of the value of $60,000, and that the total damages suffered by her by reason of the action of said Arthur M. Free were and are the sum of $60,000. It is also significant that the prayer appended to the amendment in which the above-quoted language appears is for a judgment against respondent Arthur M. Free in the amount of $60,000. It is clear, therefore, that no separate cause of action for the alleged value of the services including board and lodging is set out in the complaint and the various amendments filed thereto. It is also obvious that there is no sufficient allegation of a cause of action for the reasonable value of the services, board, and lodging contained in the pleadings. Finally, if it may be assumed that the above-quoted language sufficiently complies with the rules of pleading to entitle it to be considered as a proper allegation of a common count of indebtedness for the value of the services, board, and lodging, it is fatally defective in that the fact of nonpayment is nowhere alleged. For all that appears on the face of the pleading, the respondent Arthur M. Free may have fully paid for the board, lodging, and services furnished to him during the time he resided in appellant's home. It is an established rule of pleading that a complaint which alleges an obligation to pay money must contain an averment that the money has not been paid. Richards v. Trav-

elers' Ins. Co., 80 Cal. 505, 22 P. 939; Melone v. Ruffino, 129 Cal. 514, 519, 62 P. 93, 79 Am. St. Rep. 127; Jacuzzi v. Jacuzzi, 38 Cal. App. 533, 534, 176 P. 872; Smith v. Chin Chew, 81 Cal. App. 704, 254 P. 599.

The judgment from which this appeal has been taken is therefore affirmed.

I concur: BARNARD, P. J.

MARKS, J., being absent, does not participate herein.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. PENDERGRASS et al.

Civ. 5157.

District Court of Appeal, Third District, California.

Aug. 29, 1934.

Rehearing Denied Sept. 28, 1934.

1. Appeal and error ⇐760(1)

Appeal from judgment against defendants on their opening statement will be considered on merits, though their opening brief does not specifically refer to reporter's transcript for portions of record relied on for reversal, where it sets forth substance of record and refers to pages of clerk's transcript where facts included in opening statement are set forth in answer, and their concluding brief specifically indicates portion of transcript where complete report of opening statement may be found (District Court of Appeal Rules, rule 8, subd. 3).

2. Chattel mortgages ⇐255

No action lies on note secured by chattel mortgage; only form of action provided for by statute being foreclosure of mortgage (Code Civ. Proc. § 726).

3. Appeal and error ⇐673(1)

Plaintiff's contention on appeal from judgment against defendants that note sued on was not secured by chattel mortgage, not part of answer, and appellants' reply thereto, constitute no part of record.

4. Trial ⇐109

Trial court erred in disregarding allegation of defendants' opening statement, on which judgment was entered against them, that note sued on was secured by chattel mortgage not introduced in evidence.

5. Appeal and error ⇐837(1)

Only defendants' opening statement, not referring to pleadings, can be considered on their appeal from judgment against them on such statement.

6. Evidence ⇐434(7)

Defendants' opening statement, alleging that plaintiff's representatives made certain promises without intending to perform them and that defendants believed and relied on them and were induced thereby to execute notes and mortgages, *held* to present prima facie case, warranting admission of oral testimony as to fraud inducing execution of note sued on and mortgages (Civ. Code, § 1572, subd. 4).

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by the Bank of America National Trust & Savings Association against T. S. Pendergrass and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Bush & Cleary, of Modesto, for appellants.

Louis Ferrari, T. J. Bricca, and C. H. White, all of San Francisco, and T. B. Scott, of Modesto, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was instituted by the plaintiff to recover judgment on a promissory note in the sum of $4,750. Trial was had before a jury. The note was payable upon demand, and the complaint was a simple action based upon the promissory note. The defendants in their answer interposed two defenses, to wit: That the note was obtained by fraud, and also was secured by a chattel mortgage. The plaintiff introduced the note in evidence, and also the testimony of a witness to the effect that the note had not been paid. Following this, counsel for the defendants made an opening statement, at the conclusion of which the court directed judgment in favor of the plaintiff. From this judgment the defendants appeal.

[1] The respondent objects to the consideration of the defendants' appeal on the ground that the appellants have not sufficiently complied with subdivision 3 of rule VIII of the rules governing appeals taken to this court, the point being urged that the briefs of appellants do not sufficiently comply with the rules just referred to in indicating the portions of the record upon which appellants rely for reversal.

The opening brief of appellants, while it sets forth the substance of the record, does not make specific reference to the reporter's transcript, but does refer to the pages of the clerk's transcript where the facts included in the opening statement are set forth in the answer filed by the appellants. The concluding brief of the appellants does specifically indicate the portion of the transcript where a complete report of the opening statement may be found. No difficulty having been experienced by the court in ascertaining the grounds upon which this appeal is based, and also in view of the fact that no trial was had upon the merits of this cause, and judgment having been entered against the defendants upon their opening statement, we conclude that the respondent's objection to a consideration of this appeal upon its merits should be disregarded.

The opening statement, while not referring to the pleadings, constituted an oral presentation to the court and jury of the defenses set up in the answer. While too lengthy to be set forth herein, we glean from the opening statement the following:

In 1928, the defendants took over a ranch near Oakdale in Stanislaus county for the purpose of growing lettuce seed thereon. The ranch was then subject to a trust deed securing a note in favor of the Bank of Italy subsequently becoming the Bank of America, in the sum of $20,000. From the time of taking over the ranch in 1928, appellants continued the operation thereof in the growing of lettuce seed and marketing the same in the southern portion of the state, particularly in the Imperial Valley. Financial transactions appear to have been had between the plaintiff and the defendants until January, 1932, at which time the $20,000 note, secured by a trust deed, remained unpaid, and another note in the sum of $14,997.40, unsecured, was held by the plaintiff, signed by the defendants. At this time negotiations were entered into between the defendants and the plaintiff, by and through its representatives, relative to the defendants continuing their operation of the ranch during the year 1932. At the time of the beginning of these negotiations it appears that the appellants had on hand personal property consisting of ranch equipment of the value of approximately $25,000, and also unsold lettuce seed in storage of the approximate value of $6,000.

The opening statement then sets forth that the plaintiff, by its representatives, promised the defendants that if they would execute a new note for $4,750, to be credited upon the $14,997.40 note to which we have referred, and would give a chattel and crop mortgage, which mortgages should secure the notes referred to, the plaintiff would not interfere with the operation of the ranch by the defendants during the year 1932, but would allow them to operate the ranch and make sales of lettuce seeds to prospective purchasers, contracting for the sale and delivery of the seeds in advance, turning the same over to the appellants. In consideration of this promise the defendants were to execute, and did execute, the note and mortgages which would cover all the property owned by the defendants, and which, up to that time, appears to have been unincumbered.

The opening statement then goes on to recite that the defendants made preparations to operate the ranch, to secure contracts for the seed to be raised, and further that the promises made by the plaintiff, through its representatives, were made without any intention on their part to keep and perform the same, and were fraudulently made for the purpose of securing the notes and chattel and crop mortgages mentioned in the opening statement. The opening statement of the appellants, in relation to the indebtedness of the mortgages, is in the following words and figures (after providing that the $6,000 worth of lettuce seed should be turned over to the appellants as security for the indebtedness), to wit: "That a new note was to be executed for the balance of the indebtedness above the $20,000.00 originally secured by the trust deed, and that the chattel mortgage was to secure not only this indebtedness above the $20,000.00, but was to cover the whole thing, $20,000.00 plus the balance of the indebtedness which at that time was about $14,750.00." And further: "That this chattel and crop mortgage be executed by Mr. Pendergrass; that a new note in the sum of $4,753.00 be executed by Mr. Pendergrass, to be credited on a note that they already had of $14,753.00, that is, the balance due on it was $14,753.00; that those notes were to be secured by the chattel mortgage, by the pledge of the warehouse receipt of 6500 pounds of lettuce seed on hand, and by the assurance that the sales of the 1932 crop of seed would pass through the bank, and the moneys from the sales of the 1932 crop should all go to the bank in payment," etc.

The opening statement further shows that the mortgages referred to were executed by the defendants, and that the plaintiff failed to keep its promises, and within a short time after the execution of the mortgages proceed-

ed to seize all the property covered thereby.

[2-4] The answer as well as the opening statement alleges that the note sued upon in this action was and is secured by a chattel mortgage. Under the provisions of section 726 of the Code of Civil Procedure, if the allegations referred to set forth the true status, then and in that case the plaintiff's cause of action should have been abated. That section provides for only one form of action, specifying the procedure, to wit, the foreclosure of the mortgage, which was not followed in this case. The respondent seeks to avoid the force of this contention on the part of the appellants by referring to the mortgage itself, and contending that the note sued upon is not secured, basing its argument upon the fact that the answer of the defendants alleges that the note is secured by mortgage of a certain date, and recorded at a certain place in the official records of Stanislaus county. However, such a reference does not make the mortgage a part of the answer, and it was not made a part of the answer in this case; consequently, the contention of the respondent and the reply of the appellants in relation thereto constitute no part of the record of which this court can take notice. It does establish, however, the error of the court in disregarding this portion of the defendants' opening statement, because whether the note sued upon was or was not in fact secured by a chattel mortgage or a crop mortgage could only be determined by the introduction of the mortgage in evidence, which was not done. Both the appellants and the respondent lay down the premise that upon the consideration of this appeal, everything set forth in the opening statement must be considered as true. Therefore, it must be held upon this appeal that the note sued upon in this action was and is secured by a chattel mortgage.

As the cause must go back for further trial, it is necessary to pass upon the question of the introduction of oral testimony relative to the validity of the note sued upon and the chattel and crop mortgages referred to herein. In so doing it is only necessary to determine whether the opening statement presents a prima facie case. Subdivision 4 of section 1572 of the Civil Code defines "actual fraud" as "a promise made without any intention of performing it."

In the case of California Credit & Collection Corporation (a corporation) v. Carpenter, 77 Cal. App. 18, 246 P. 126, 128, this court had occasion to pass upon the very question at issue herein. In that case the facts show that two notes, each for the sum of $250, had been obtained by fraudulent representations. It was there held that while a mere promise is not a representation, a promise made with the intention of not performing it constitutes a fraud, for which a contract may be rescinded or avoided. The representations in that case were outside of the promissory notes, and constituted no part thereof. In passing upon the question, this court used the following language, referring to the defendant: "In other words, he simply asks for defensive relief, in support of which he has set up fraud, or, in other terms, has set up fraud as a basis of a defense to defeat 'an action brought to enforce an apparent obligation or liability.' Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 498, 33 P. 550, 553. This is one of the three methods for relief or defense afforded defendants in cases of this character (Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 33 P. 550, supra; Field v. Austin, 131 Cal. 379, 382, 63 P. 692; J. B. Colt Co. v. Freitas, 76 Cal. App. 278, 244 P. 916), and where, as here, such defensive relief is sought, and no affirmative relief is asked, 'it is not necessary for' the defendant 'to have exercised an existing right to rescind.' Simon Newman Co. v. Lassing, 141 Cal. 174, 74 P. 761; 12 Cal. Jur. 786; J. B. Colt Co. v. Freitas, supra. Our views upon these questions are also fully covered in our opinion in the case of California Credit & Collection Corp. v. Goodin [76 Cal. App. 785], 246 P. 121, which was filed in this court March 8, 1926." In both of these cases it was held that the fraudulent representations made at the time of the execution of the notes constituted a sufficient defense to the actions based thereon, and that the proof of the fraudulent representations went directly to the validity of the instruments themselves. The proof in this case consisted in large part of the oral testimony of witnesses as to the representations and promises made at the time of the execution of the notes.

In 19 California Jurisprudence, p. 1008, § 159, the text reads: "Whether the instrument be negotiable or non-negotiable as between the original parties and parties taking notice of existing equities, fraud may be pleaded as a defense. Where fraud is set up, of course, it cannot prevail unless the facts are sufficient to establish the defense." This statement of the law is supported by the citation of numerous authorities in the footnotes. See, also, the case of Williams v. Hasshagen, 166 Cal. 386, 137 P. 9, where fraud in the procurement of a promissory

note was held established by the oral testimony introduced in that case.

The same ruling was had in the case of Grinnell v. Hill, 1 Cal. App. 492, 82 P. 445. A promissory note was involved in that action, and the defense that it had been obtained by fraudulent promises was held established.

In 8 C. J. p. 780, that the defense of fraud may be interposed, is supported by the following statement: "While an unconsummated intent to fraudulently convert a note is no defense to an action thereon, yet as between the original parties to a bill or a note, or as against a holder who is not a bona fide holder in due course, fraud, in the consideration or in the procurement of the bill or the note is ordinarily a defense." The citations supporting this statement of the law are too numerous to be set forth herein.

This court, in the case of Bouey v. Porterfield, 96 Cal. App. 674, 274 P. 766, 767, in an action brought to rescind a contract on the grounds of fraud, held as follows: "Mere failure to perform a promise made in good faith does not constitute actionable fraud. However, a promise made without any intention of performing it is actionable fraud" (citing the authorities to which we have hereinbefore referred).

In 12 California Jurisprudence, p. 735, in considering a promise as actionable fraud, the law is thus stated: "Again, where, by reason of a promise, one has been induced to change his condition and relations, so that it is impossible to place him in status quo, a failure to fulfil the promise works a fraud and entitles him to equitable relief, if such relief will work no injustice on innocent third parties. Although, as we have already seen, a mere promise does not amount to a false representation, nevertheless if the promise be accompanied with statements of existing facts which show the ability of the promisor to perform his promise, and without which the promise would not be accepted or acted upon, such statements are denominated representations, and, if falsely made, are grounds for avoiding the contract, though the thing promised to be done lies wholly in the future." See, also, Matteson v. Wagoner, 147 Cal. 743, 82 P. 436; Martin v. Lawrence, 156 Cal. 191, 103 P. 913.

It appears from the answer in the case at bar that damages are not sought for, but only cancellation of the note and mortgages, just as was upheld by this court in the cases of California Credit Corporation v. Carpenter, and California Credit Corporation v. Goodin, supra.

[5] We agree with counsel for the respondent that by reason of the fact that the opening statement of the appellants makes no reference to the pleadings, only the opening statement can be considered by this court in the determination of this appeal; but, as above stated, all the facts and reasons which necessitate a reversal appear in the opening statement, which must be considered as true and sufficiently proven.

[6] We have carefully examined the cases of Pierce v. Avakian, 167 Cal. 330, 139 P. 799, McArthur v. Johnson, 216 Cal. 581, 15 P.(2d) 151, and Lindemann v. Coryell, 59 Cal. App. 788, 212 P. 47, and other cases relied upon by the respondent, where it is held that oral testimony cannot be admitted to change the terms of a promissory note. These cases all exclude the subject of fraud in the procuring of a promissory note as constituting a defense to the action. The opinion in most of the cases specifically states that no question of fraud or mistake is presented for consideration. In the case at bar, as we read the opening statement, no attempt is made to change or controvert the written instruments, but only the question of fraud in their procurement, which goes directly to the right to maintain an action thereon. This distinction appears to have been entirely overlooked. The opening statement in this case sets forth, substantially, that certain promises were made by the representatives of the respondent, without any intention of performance; that the defendants believed the promises to be true, relied thereon, and were induced thereby to change their status by executing the notes and mortgages referred to and creating a lien upon their property which did not theretofore exist.

The foregoing summary, presented more in detail in the opening statement, we think presented a prima facie case under subdivision 4 of section 1572 of the Civil Code, and the oral testimony as to questions of fraud inducing the execution of a note and mortgages may be introduced in evidence.

For the reasons given, it must be held that the order for a directed verdict was erroneous, and the judgment must be, and the same is hereby, reversed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

140 Cal.App. 412

CONSOLIDATED PIPE CO. v. GUNN.

Civ. 1313.

District Court of Appeal, Fourth District, California.

Aug. 15, 1934.

1. Sales ⇐273(1)

Where casing shoe was purchased for use in drilling water well without waiver of any warranty implied by law, warranty of reasonable fitness for purpose was implied (Civ. Code, § 1735, subd. (1).

2. Sales ⇐439

In action for purchase price of material used in drilling water well, defendant who counterclaimed for damages caused by collapse of casing shoe when well was drilled to depth of 385 feet had burden of proving breach of warranty of fitness (Civ. Code, § 1735, subd. (1).

3. Sales ⇐439

Proof that casing shoe sold with implied warranty that it was fit for purpose of drilling water well was damaged by unknown causes under normal working conditions did not establish breach of warranty so as to shift to seller burden of proving that collapse of shoe was not due to defective material or workmanship, where evidence showed that casing shoe could be damaged in drilling without being defective, since seller did not guarantee that casing shoe would accomplish drilling of well (Civ. Code, § 1735, subd. (1).

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by the Consolidated Pipe Company against John Gunn, in which the defendant filed a cross-complaint. From an adverse judgment, the defendant appeals.

Affirmed.

Jas. W. Campbell and G. L. Aynesworth, both of Fresno, for appellant.

Alfred Siemon and T. R. Claflin, both of Bakersfield, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action for the purpose of foreclosing a lien on defendant's land for the price of certain material and supplies purchased by defendant and used in drilling a water well on said land. The defendant filed a combined answer and cross-complaint to the complaint. In the answer it was admitted that plaintiff had furnished the material and supplies, and that the price charged therefor was the amount alleged in the complaint, but denied an indebtedness to plaintiff of any amount for the reason set forth in the cross-complaint. The last-mentioned pleading alleged that the defendant purchased certain well-drilling supplies, including casing shoes, from plaintiff, and proceeded to drill a well on his land, using the quality and type of casing shoe which the plaintiff had advised to be used and which defendant had purchased from plaintiff; that, when the well had reached a depth of 150 feet, the casing became jammed, and defendant was unable to proceed further, whereupon, acting on plaintiff's advice, he procured a smaller sized casing, and, after the well had been drilled to an additional depth, the casing shoe collapsed and it became necessary to remove the casing; that thereupon another casing shoe was procured from plaintiff and fastened to the casing and drilling was resumed; that, when the well had been drilled to a somewhat greater depth, the second shoe collapsed through no fault of defendant and could not be withdrawn or repaired, so that it became necessary to abandon further drilling of the well, which had been completely damaged and ruined by reason of the collapse of the casing shoe. The final paragraph of the pleading alleged that the defendant had been damaged in the amount of $2,000 by the collapse of the shoe and the consequent injury to the well. The cross-complaint concluded with a prayer that plaintiff take nothing by his complaint and that defendant have judgment against plaintiff for the amount mentioned.

When the case was called for trial, plaintiff's counsel stated that it would not rely upon the claim of lien and would merely seek the recovery of a personal judgment against defendant for the price of the supplies furnished as alleged in the complaint.

Upon the conclusion judgment was rendered in plaintiff's favor for the amount demanded in the complaint reduced by the sum of $95.75, which the court allowed by way of credit for the expense incurred by defendant in removing the casing from the well after the collapse of the first casing shoe. The plaintiff made no objection to the allowance of the above-mentioned amount as a credit against the sum which was demanded by the complaint. From the judgment thus rendered, the defendant has prosecuted the present appeal.

[1] In support of his appeal, the appellant first contends that the second casing shoe

was sold under an implied warranty that it was reasonably fit for the purpose for which it was procured. It appears to be conceded that there was a written waiver of warranty as to the first casing shoe supplied by respondent. The second shoe was, however, sold on open account without any waiver of warranty. Since this was the situation developed by the evidence, it is urged that a warranty that the article was reasonably fit for the purpose for which it was required was implied in accordance with the provisions of subdivision (1) of section 1735 of the Civil Code.

The trial court found that the second casing shoe was purchased by appellant without a waiver of any warranty implied by law. It is our understanding that respondent does not here deny that, by virtue of the provisions of the above-mentioned statute, a warranty of reasonable fitness was implied. We shall therefore assume that appellant's first contention is correct and that he was entitled to rely on an implied warranty of fitness.

The second contention advanced by appellant is that the trial court drew the erroneous conclusion that respondent was entitled to recover after it had found that the second casing shoe was injured or damaged and that the cause of such injury or damage was unknown. It is urged that the effect of the court's conclusion that respondent was entitled to recover under the state of facts developed by the evidence was to impose an unwarranted burden upon appellant. This contention obviously requires some consideration of the evidence which was produced during the trial.

The record shows that respondent first proved that the supplies for the recovery of whose price the action was brought had been furnished to appellant on his order and rested its case. Appellant thereupon presented evidence which consisted of the testimony of the well driller who controlled the drilling operations in which the casing shoe collapsed. This witness testified that at the time the shoe collapsed the formation in which the drilling was being done was a soft blue clay; that the drilling was accomplished by means of a mud scow consisting of a piece of pipe about 15 feet in length having a valve and a cutting blade at the bottom; that the mud scow was located inside the casing and was raised and lowered; that, as the scow was dropped into the well, it cut away a part of the formation which then passed through the valve in the bottom of the scow into a bucket which, when filled, was raised to the surface; that at the time the casing shoe collapsed the casing was exactly at the same depth as the scow; that the diameter of the casing was 10 inches and that of the scow was 9½ inches; that the casing shoe was fastened to the bottom of the casing; and that it was about ¾ of an inch larger than the casing. The witness also testified that a pressure of three tons weight was applied to the top of the casing to cause it to follow the mud scow. The witness further testified that he did not know what happened when the drilling had proceeded to a depth of 385 feet; that an attempt was made to drill deeper, but that it was impossible to force the drilling tools through the casing shoe, which indicated that the shoe "had got out of shape some way." The witness was asked if he knew what causes a casing shoe to collapse, to which he replied by stating that several different things might cause such a result. He was requested to be more specific, and gave as one possible cause the forcing of a casing through a hard substance "with not a big enough hole." The witness stated that the shoe which had collapsed or had become so misshapen that it no longer permitted the passage of drilling tools was a steel shoe known as a "Henderson Special"; that he could not recognize any defect in it by inspection, and that he could not attribute the difficulty that was encountered to any defect in the shoe; that he did not know how the collapse occurred; that it did not occur from any defect in the casing. The witness also testified that it was possible that the collapse occurred by reason of the fact that a harder formation than that through which the drilling had been proceeding was encountered and that the external force which was being applied to the top of the casing might have caused the edge of the casing shoe to crumple when it was brought in contact with such harder formation. He further stated that the well was straight and was perpendicularly drilled.

On rebuttal respondent produced a witness who testified that he had known of casing shoes collapsing, and gave as possible reasons for such collapse, other than defectiveness of the material of which the shoe is made, the pinching of the shoe between boulders or in a hard clay formation where the hole was not sufficiently large.

By way of explanation, it may be remarked that a casing shoe is a sort of cutting ring having the lower edge sharpened for the purpose of cutting the material with which it comes in contact as it is forced down into the ground. It is attached to the lower end of

the casing and is constructed of material which is considerably heavier than the casing. The particular shoe which formed the basis of the present controversy was constructed of plow steel. It was 12 inches in diameter, 3 inches in height, and ⅝ of an inch in thickness.

In support of the contention that the trial court incorrectly concluded that respondent was entitled to recover the price of the supplies, it is urged that, when appellant had shown that the casing shoe had collapsed under normal working conditions, the burden then shifted to respondent to show that the collapse was due to some cause other than defective material or improper workmanship.

[2, 3] It is our conclusion that appellant's contention is not sustainable on the peculiar facts developed by the evidence in this case. It must, we think, be conceded that the cause of the collapse or failure of the casing shoe was not shown. The court's finding that the cause of collapse was unknown is amply supported by the evidence. The foundation of appellant's cross-complaint was that a warranty of fitness was implied by law and that there was a breach of such warranty which resulted in the abandonment of the well and which was therefore the cause of the damage suffered by appellant in the expense incurred by him for drilling the well. It is obvious that the burden rested upon appellant to establish to the satisfaction of the trial court that there was a breach of the implied warranty of fitness. As we understand appellant's contention, it is conceded that it was incumbent upon appellant to make a showing that there was a breach of warranty, but it is urged that appellant sufficiently sustained the burden by showing that there was a failure of the casing shoe under normal drilling conditions, and that thereupon the burden shifted to respondent to show that the cause of the collapse was something other than inferiority in the quality of material or faulty workmanship in the manufacture of the article which caused it to be unfitted to perform the work for which it was procured. If appellant's contention in this regard may be sustained in this particular case, it simply means that the law implied, not a warranty of reasonable capacity, but a guaranty that the article would prove capable of doing the work; in other words, the result would be that respondent became an insurer. While it is true that, under the circumstances here appearing, it was impossible as a practical matter for appellant to make any further showing of incapacity than he did, it is likewise true that it was impossible for respondent to show that appellant was negligent in operating the casing shoe or that the failure occurred because of the shoe coming in contact with some harder material 385 feet below the surface of the earth. We think that, when an article of the character here described is purchased for the purpose of facilitating the drilling of a well to a distance several hundred feet below the surface of the earth, the seller does not guarantee that it will not fail in the accomplishment of the task without regard to the character of formation that may be encountered as the drilling progresses. The very nature of the work in which the article is used is such that there is very considerable risk that the article, although the material of which it is made is in no respect defective and it is properly fashioned, may nevertheless become so misshapen, due to its being pinched between boulders or by reason of coming in contact with an exceedingly hard formation, that the drilling tools can no longer pass through it. The aforementioned testimony of appellant's well driller shows that the above-mentioned occurrences are by no means unusual risks encountered in drilling operations.

It is therefore our conclusion that the evidence amply sustained the trial court's findings and that the legal conclusion that respondent is entitled to recover from appellant the price of the supplies was properly drawn from the court's findings of fact.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

140 Cal.App. 451

PEOPLE v. TULLY.

Cr. 2536.

District Court of Appeal, Second District, Division 1, California.

Aug. 17, 1934.

1. Criminal law ⇐1160

While appellate court cannot weigh evidence in determining appeal from order denying new trial asked for on ground of newly discovered evidence, it may consider effect of introduction of new evidence on probability of jury changing its verdict.

2. Criminal law ⇐1160

Refusal to grant new trial in attempted rape prosecution on ground of newly discovered evidence concerning statements made by complaining witness as to how she acquired her bruised face *held* error, although new evidence might be considered cumulative, where intent was proved only by testimony of complaining witness, and there was reasonable probability that new evidence would change result.

3. Rape ⇐48(1)

In attempted rape prosecution, in which intent was proved only by testimony of complaining witness, accused was entitled to present to jury statements made by complaining witness as to how she acquired her bruised face.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Alton Thomas Tully was found guilty of attempted rape. From the judgment of conviction and order denying his motion for a new trial, he appeals.

Judgment and order reversed, and new trial ordered.

Theodore Rosenthal and Arthur C. Webb, both of Los Angeles (James MacIntosh, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

YORK, Justice.

By information the defendant was accused of the crime of attempted rape. By verdict of the jury he was found guilty as charged. From the judgment of conviction and from the order denying his motion for a new trial, he prosecutes this appeal.

[1-3] This court cannot weigh the evidence, except that, in examining affidavits presented in support of a motion for a new trial, it may consider the possible effect of the introduction of such evidence as is shown in the affidavits, for the purpose of determining whether or not there is a probability of a different or other verdict being rendered by the jury, if such evidence were before it. Although these affidavits might be considered as cumulative, nevertheless, after an examination of the entire record, we are of the opinion that, under the facts and circumstances introduced in evidence in this case, especially by reason of the fact that the intent is proven only by the testimony of the complaining witness, it was error on the part of the trial court to refuse to grant the motion for new trial. Defendant was entitled to present to the jury evidence as to what the complaining witness had said to the parties making the affidavits regarding the way in which she acquired her bruised face. There is a reasonable probability that the newly discovered evidence would have changed the result, and this is especially true, when it is noted that the prosecuting attorney got before the jury in an irregular way evidence as to trouble the defendant had had with reference to other women, although there was no contention that he had ever been convicted of any offense against any woman, as intimated by the prosecuting attorney.

The judgment and order are reversed, and a new trial is ordered.

We concur: CONREY, P. J.; HOUSER, J.

140 Cal.App. 407

HAMMEL RADIATOR CORPORATION v. CALIFORNIA SEC. LOAN CORPORATION.

Civ. 8577.

District Court of Appeal, Second District, Division 2, California.

Aug. 15, 1934.

Fixtures ⇐20

Where removal of gas radiators would substantially damage or injure security of prior incumbrancer of building, rights of conditional seller of radiators must be relegated to those of prior incumbrancer who had no knowledge of conditional sales contract.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Action by Hammel Radiator Corporation against California Security Loan Corporation. From an adverse judgment, plaintiff appeals.

Affirmed.

Janeway, Beach & Hankey, of Los Angeles, for appellant.

Cruickshank, Brooke & Evans, of Pasadena, for respondent.

SCOTT, Justice pro tem.

Plaintiff installed gas radiators in three apartment houses built by one Pereira. Money to build the houses was loaned by defendant and was secured by trust deeds on the properties. The radiators were purchased on conditional sales contracts at a time subsequent to the recording of the trust deeds and the notices of completion on the respective buildings. During August of 1930, being within sixteen months of the time the radiators were installed, Pereira gave defendant grant deeds to the properties. October 1, 1930, the balance of the purchase price being past due and unpaid, plaintiff demanded possession of the radiators, and upon being refused brought this action for conversion. From judgment for defendant, plaintiff appeals.

The trial court found: "That when said radiators were installed they were attached by plaintiff to the rough plumbing in the building by means of slip joint threaded unions and elbows; that the said radiators when installed by plaintiff were so affixed to the realty but stood on the floor where they were installed and were not in any other manner attached to the buildings; that the radiators installed by the plaintiff in the said building are indispensable for the use and operation of the said building as an apartment house, and that the removal of the radiators from the building would substantially damage the security of the deed of trust of the defendant." The court also found that defendant did not know of the contract of plaintiff with Pereira nor of plaintiff's rights thereunder until the date of its demand, October 1, 1930, although the testimony did show that defendant knew Pereira had not paid up this account with plaintiff.

In Dauch v. Ginsburg, 214 Cal. 540, 6 P. (2d) 952, 954, the court said: "Although no case seems to have been decided directly in point in this state, the rule is well settled elsewhere that usually the subsequent conditional vendor will prevail over a prior incumbrancer, for the reason that the prior incumbrancer has not been misled and has advanced nothing on the faith of such annexation. 26 Cor. Jur. 684, § 49. * * * However, to that rule there is a well-recognized exception, and that is that it has no application where a severance of the fixtures will substantially injure or diminish the security of the prior incumbrancer. 26 Cor. Jur. 686, § 52, and cases cited therein." The facts in that case were similar to the instant case, except that the plumbing and heating fixtures were more extensive. Since in this case, as in the case cited, "the removal of the fixtures will substantially damage or injure the security of the prior incumbrancer, the conditional vendor's rights must be relegated to those of the former."

Appellant urges that the portion of the findings in this case above set forth are not supported by the evidence. The record, however, affords them ample support.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 456

PEOPLE v. YOUNG.

Cr. 171.

District Court of Appeal, Fourth District, California.

Aug. 17, 1934.

1. Criminal law ⇨1159(5)

Jury's finding, supported by sufficient evidence, that defendant was sane when he committed offense charged, will not be disturbed on appeal.

2. Criminal law ⇨773(3)

Instruction that defense of insanity must be examined carefully lest ingenious counterfeit of insanity furnish immunity to guilt, though it must be weighed fully, fairly, and justly, *held* not erroneous.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

G. M. Young was convicted of issuing a check on a bank without sufficient funds to

meet it and a prior conviction of felony, and he appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

GRIFFIN, Justice pro tem.

Defendant was charged, by an information filed by the district attorney, with the crime of issuing a check on a bank without sufficient funds to meet same, and with two prior convictions of felony. A plea of not guilty by reason of insanity was entered as to the first charge. Defendant denied the first of the two prior convictions charged but admitted the second.

Three physicians were appointed by the court to examine the defendant as to his sanity. A trial by jury was had and a verdict was returned finding the defendant sane at the time of the commission of the offense charged.

The first accusation of a prior conviction of felony was dismissed and the court rendered judgment from which the defendant appeals.

Defendant urges two grounds for reversal of the judgment: First, that the evidence is not sufficient to sustain the finding of the jury that he was sane at the time of the commission of the offense; and, second, that the court erred to the prejudice of the defendant in its instructions.

[1] In considering the first point raised, and reviewing the evidence in its entirety, we find that the testimony of all three of the physicians who were appointed by the court to examine the defendant, was to the general effect that he was sane at the time he committed the offense. Testimony of other witnesses who observed his actions prior to and after the commission of the acts charged tended to conflict with the testimony of the medical examiners. This created a conflict which the jury resolved against the defendant. When sufficient evidence is before the jury to support its finding, such finding will not be disturbed on appeal. People v. Johnson, 115 Cal. App. 704, 2 P.(2d) 216.

[2] Defendant complains of the following instruction given by the trial court: "You are instructed that the defense of insanity is one which may be, and sometimes is, resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fully, fairly and justly, and, when satisfactorily established must commend itself to the sense of humanity and justice of the jury, they must examine it with care lest an ingenious counterfeit of this mental infirmity shall furnish immunity to guilt."

The foregoing instruction was given and approved in People v. Pico, 62 Cal. 50. We find the giving of this instruction was not erroneous, although it is probably the more generous rule to avoid cautioning the jury as to any particular legal defense especially where the evidence supporting it is reasonable.

The judgment of the trial court should be, and is, affirmed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

140 Cal.App. 361

Ex parte BLACK et al.

Cr. 1821.

District Court of Appeal, First District, Division 2, California.

Aug. 8, 1934.

Hearing Denied by Supreme Court Sept. 6, 1934.

1. Bail ⇦53

On petition for habeas corpus for reduction of bail, court must assume that petitioners are guilty and that trial court determined from facts before it that bail fixed was reasonably necessary, and bail should not be reduced except on showing of abuse of discretion of trial court in fixing bail.

2. Bail ⇦53

Petition for habeas corpus for reduction of bail was denied where no showing was made of abuse of discretion of trial court in fixing bail.

Application of Elaine Black and others for a writ of habeas corpus to obtain a reduction of bail.

Writ denied.

Philip M. Zwerin, of San Francisco, for petitioners.

PER CURIAM.

[1, 2] The petition for a writ of habeas corpus to obtain a reduction of bail is denied. There are numerous considerations entering into the determination of the amount of bail to be required by the trial court in any case. In re Tsuji Horiuchi, 105 Cal. App. 714, 288 P. 708; Ex parte Ruef, 7 Cal. App. 750, 96 P. 24; In re Williams, 82 Cal. 183, 23 P. 118. Under the authorities cited, this court must assume in this proceeding that the petitioners are guilty and must further assume that the trial court determined from the facts before it that the bail fixed was reasonably necessary. Furthermore, it is well settled that this court should not reduce the bail unless it clearly appears that the trial court has abused its discretion. There has been no showing made of an abuse of discretion herein.

140 Cal.App. 528

SCHERER et al. v. SOUTHERN PACIFIC CO.

TAYLOR et al. v. SAME.

Civ. 8046, 8047.

District Court of Appeal, Second District, Division 1, California.

Aug. 30, 1934.

Hearing Denied by Supreme Court Oct. 29, 1934.

1. Railroads ⇐327(8)

Motorist struck by train at crossing, who failed to look for on-coming train after leaving point 50 feet from crossing where she first looked, *held* barred from recovery, since contributorily negligent as matter of law.

2. Railroads ⇐327(4)

Railroad tracks are a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains.

3. Negligence ⇐93(1)

To constitute "joint enterprise" so as to impute to passenger in automobile negligence of driver, there must be community of interest in objects or purposes of undertaking, and equal right to direct and govern movements and conduct of each other with respect thereto.

[Ed. Note.—For other definitions of "Joint Enterprise," see Words & Phrases.]

4. Negligence ⇐93(1)

Passenger in automobile struck by train at crossing who agreed to go with driver to and from employment together *held* not engaged in "joint enterprise" with driver so as to be barred from recovery for injuries by driver's contributory negligence, where it did not appear that passenger had any interest in automobile, or that she contributed any sum toward its maintenance or had any right to direct driver.

5. Railroads ⇐350(7)

In actions by motorists struck by train at crossing, conflicting testimony whether bell was rung and whistle blown *held* for jury.

6. Railroads ⇐350(24)

Guest in automobile struck by train, failing to keep lookout after leaving point 50 feet from crossing, *held* not contributorily negligent as matter of law, since her duty was not same as required of driver.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Consolidated actions by Lillian Scherer and another, and Mabel Taylor and another, against the Southern Pacific Company. From judgments for defendant on directed verdicts, plaintiffs appeal.

Affirmed in part and reversed in part.

Pace & Purdue, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

HAHN, Justice pro tem.

Plaintiffs in each of the above-entitled actions, which by order of court were consolidated for trial, appeal upon the same record from a judgment entered in each case for defendant, upon directed verdicts returned by the jury.

Both actions were for alleged injuries suffered by plaintiffs in a collision between an automobile in which they were riding and a passenger train operated by defendant. The complaint charges negligence on the part of defendant in, first, failing "to install and keep any audible or visible warning device at, near or over said grade crossing" where the collision occurred, and, second, in "the carelessness and negligence of the defendant and of its servants and employees in the operation of said train."

Appellants in their briefs state the questions involved in this appeal as follows:

"Thus two issues are presented for determination upon this appeal—first, is there substantial evidence upon plaintiffs' part that the defendant was negligent, and, second, does the evidence upon plaintiffs' part respectively show contributory negligence as a matter of law?"

The evidence, upon which the court instructed the jury to return its verdicts for defendant, may be summarized as follows:

[1, 2] Plaintiffs Lillian Scherer and Mabel Taylor, both employed at the same establishment at Camarillo, Ventura county, and living several miles from Camarillo, entered into an agreement to go to and from their employment together, part of the time in Mrs. Scherer's automobile and part of the time in Mrs. Taylor's car. On the morning of July 3, 1929, both women started for Camarillo in Mrs. Scherer's car. Driving in a westerly direction along Fifth street, which was a highway running near and parallel to the railway track of defendant company, Mrs. Scherer, who was driving, brought her car to a stop at the intersection of Rice road, which highway crosses Fifth street and defendant's railway track at right angles. Starting slowly, Mrs. Scherer turned her car to the right and proceeded northerly on Rice road toward the railway track at a speed of about 4 miles per hour. Running parallel with and at a distance of about 55 feet south of the railway track extending westerly from Rice road is a row of eucalyptus trees. After passing these trees, and when about 50 feet south of the track, both Mrs. Scherer and Mrs. Taylor looked to the left, that is, in a westerly direction, to see if any train was approaching. Both women were familiar with the track, having used this crossing frequently. Mrs. Scherer testified that she knew a train was due at this point about this time, and that, when she looked up the track to the west, she looked for the train she expected would be along about that time. Both women testified that they saw no train coming. Driving along toward the track at a speed of about 4 miles per hour, neither of the women again looked to the west for an approaching train until they were on the track and the train was upon them. Approaching the track from Fifth street there is an up grade to the track of from 2 to 4 feet. There were "little hollows in the pavement" and "holes in the track—around the tracks." The road was "real rough." Mrs. Scherer testified that after passing the row of trees, when she looked up the track to the west, she could see a distance of at least one-half mile; that there was nothing to obstruct her view of the track after she passed the trees during her progress up to the track; that there was the usual cross-arm R. R. warning sign at the crossing, but no signal device of any kind; that she could have stopped her car within the space of one foot at any time after she turned into Rice road and proceeded toward the track.

Under the facts, as thus disclosed by the record, there would seem to be no escape from the conclusion that plaintiff Mrs. Scherer was as a matter of law guilty of contributory negligence, and therefore not entitled to recover for her injuries, notwithstanding any negligence on the part of defendant railroad company, if such there was. The question as to the rule applicable to such a situation has been established in this state by a long line of decisions. The opinion in the case of Herbert v. Southern Pacific Co., 121 Cal. 227, 230, 53 P. 651, states the rule briefly as follows: "The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and to listen for approaching trains." In the case of Green v. Los Angeles, etc., Ry. Co., 143 Cal. 31, 76 P. 719, 720, 101 Am. St. Rep. 68, the court had before it circumstances very similar to those here involved. In holding that the driver of the automobile that came into collision with defendant's train was guilty of contributory negligence, as a matter of law, and therefore not entitled to recovery for her injuries from the defendant railway company irrespective of the question of negligence on its part, the court in discussing the question uses the following language: "Upon this point the case of Holmes v. Southern Pacific Coast Ry. Co., 97 Cal. 167, 31 P. 834, 835, is conclusive authority. There it was said: 'A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such person, so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such a situation, is negligence per se.' This statement of the doctrine of negligence per se, made 10 years ago, was based upon several decisions of this and other courts, cited in the opinion of Justice De

Haven, and the rule has been applied in a number of more recent cases decided here. See Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651; Bailey v. Market-Street C. Ry. Co., 110 Cal. 329, 42 P. 914; Lee v. Market-Street C. Ry. Co., 135 Cal. 295, 67 P. 765; Green v. Southern California Ry. Co., 138 Cal. 1, 70 P. 926; Warren v. Southern California Ry. Co., 138 Cal. 1, 70 P. 926, and cases cited."

Many other cases might be cited and authorities quoted which give support to this rule and justify its application to the facts here involved in the Scherer case. The admitted fact that Mrs. Scherer, as she drove slowly toward the track, did not look again to see if any train was coming after leaving the point 50 feet away where she first looked is clearly not that exercise of vigilance which, under the circumstances, the law requires of one about to cross a railroad track. That, had she looked again during her progress toward the track, she would have seen the approaching train at a time when she could easily have avoided the collision, cannot successfully be controverted.

[3, 4] As to the Taylor case, there is involved the question of her status, either as a guest, as claimed by appellants, or as one engaged in a joint enterprise, as urged by respondent.

The elements necessary to constitute a joint enterprise, so as to impute to a plaintiff injured while riding in an automobile the negligence of the driver, are stated in Meyers v. Southern Pacific Co., 63 Cal. App. 164, 170, 218 P. 284, 287, as follows: "In circumstances such as are here outlined, joint enterprise is not indicated by the fact that the guest and the driver each sought the same destination and by means of the same conveyance. There must be more than such common desire and common method of transportation. There must be: 'A community of interest in the objects or the purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management.'" Cunningham v. Thief River Falls, 84 Minn. 27, 86 N. W. 763, 765; Renowden v. Pacific Electric Ry. Co., 73 Cal. App. 383, 238 P. 785; Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529; St. Louis & S. F. R. Co. v. Bell, 58 Okl. 84, 159 P. 336, L. R. A. 1917A, 543; Atwood v. Utah L. & R. Co., 44 Utah, 366, 140 P. 137; Cotton v. Wilmar, etc., Ry. Co., 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935.

While the evidence shows without conflict that Mrs. Taylor and Mrs. Scherer had a common interest in the purpose of the journey to Camarillo, there is no evidence in the record that directly or by inference justifies a finding that Mrs. Taylor had any interest in the car, or that she contributed any sum toward the expense of its maintenance, or indeed that she had any right to direct Mrs. Scherer as to the course she would take when they started out that morning, or as to Mrs. Scherer's manner of driving. The evidence here falls short of that required to sustain a finding of "joint enterprise."

[5] Respondent urges and argues at some length that there is no substantial evidence to support a finding of negligence on the part of defendant's agents, who were in charge of the train. We cannot give assent to this contention. Both plaintiffs, who, according to the evidence, were in a position where they could have heard the ringing of the bell or the sound of the whistle, had either warning been given as required by law, in time to have avoided the train, testified that they did not hear either the bell or the whistle. Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709. Ray Owen, a witness for plaintiffs, who was at the time of the collision at work in his field about 300 yards distant from the crossing, testified he heard no bell and "only two short whistles and a crash practically at the same time." This testimony, in conflict with the testimony of defendant's witnesses that the bell was continuously rung and the whistle blown several times over a distance of at least one mile before the train reached the crossing, created an issue of fact for the jury.

[6] Respondent attempts to support the judgment on the further ground that, irrespective of the theory of imputed negligence, based on the "joint enterprise" contention, Mrs. Taylor was herself guilty of contributory negligence as a matter of law under the evidence, because she, like Mrs. Scherer, failed to maintain a vigilant outlook for the train. The duty imposed upon a guest riding with another is not the same as that required of the driver. The rules governing the conduct and duties of driver and guest have been so fully discussed and so frequently declared by the courts of this state that, in our opinion, the requirements of this opinion will be fully met by the citation of a few of the cases: Drouillard v. Southern Pacific Co., 36 Cal. App. 447, 172 P. 405; Marchetti v. Southern Pacific Co., supra; Meyers v. Southern Pacific Co., supra; Switzler v. Atchison, etc., Ry. Co., 104 Cal. App. 138, 285 P. 918;

Aungst v. Central California Traction Co., 115 Cal. App. 113, 1 P.(2d) 56.

That the question of a guest's contributory negligence, when the evidence does not justify the court in declaring as a matter of law that such negligence was established, is a question that should be submitted to the jury needs no argument or citation of authorities.

In view of the conclusions arrived at on the points discussed, we deem it unnecessary to consider the question of the alleged negligence of the defendant railway company in not maintaining some signal device or other method of warning of the approach of trains.

For the reasons indicated, the judgment in the case of Lillian Scherer and N. R. Scherer v. Southern Pacific Co., is affirmed, and the judgment in the case of Mabel Taylor and Bryan Taylor v. Southern Pacific Co. is reversed.

Inasmuch as both cases were tried together and appeals in both cases taken on the same transcript, it would seem proper that appellant Taylor should recover one-half of the costs incurred by appellants in the appeal, and respondent recover as against appellants Scherer one-half of its costs incurred in the appeal.

We concur: HOUSER, Acting P. J.; YORK, J.

140 Cal.App. 536

Ex parte JACKSON.

Cr. 2596.

District Court of Appeal, Second District, Division 2, California.

Aug. 30, 1934.

Municipal corporations ⇐639(1)

Under ordinance making certain acts offenses if committed on a public street, on private premises, or to annoyance of other persons, complaint charging that forbidden acts were committed at specified number of named street to the annoyance of other persons *held* not defective for want of sufficient description of the premises.

Application by James G. Jackson for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

Alexander L. Oster, of Los Angeles, for petitioner.

Buron Fitts and Tracy Chatfield Becker, both of Los Angeles, for respondent.

CRAIG, Acting Presiding Justice.

After charge by complaint in the police court of the city of Glendale, a plea of guilty and sentence for violation of an ordinance making certain acts offenses if committed on a public street, on private premises, or to the annoyance of other persons, it is sought by habeas corpus to release the defendant upon the ground that the complaint did not state facts sufficient to constitute a public offense; the claim being that the description of the premises is defective.

The forbidden acts were alleged to have been committed at No. 617 East Garfield street, to the annoyance of other persons. We are convinced that the complaint stated a cause of action.

The writ is discharged, and petitioner remanded.

We concur: DESMOND, J.; WILLIS, Justice pro tem.

140 Cal.App. 200

SHEEHAN et ux. v. DIVISION OF MOTOR VEHICLES OF STATE OF CALIFORNIA.

Civ. 1339.

District Court of Appeal, Fourth District, California.

July 26, 1934.

Rehearing Denied Aug. 20, 1934.

Hearing Denied by Supreme Court Sept. 24, 1934.

1. Licenses ⇐38

Power to license includes power to prescribe reasonable conditions precedent and power of revocation.

2. Licenses ⇐7(1)

Requirement that licensee should not interfere with equal rights of other licensees is reasonable condition upon which to base issuance and continuance of license.

3. Automobiles ⇐28
Constitutional law ⇐287

Statute permitting cancellation of license when licensee is unable to pay judg-

ment arising from negligent operation of automobile *held* not invalid as unreasonably discriminating against driver of automobile and owner who authorized its use and who were unable to pay such judgment because of insolvency of insurer (St. 1929, p. 560, § 73 (g); Const. Cal. art. 1, § 1; Const. U. S. Amend. 14).

Application by Harry Sheehan and Justine Sheehan, husband and wife, for a writ of mandate to require the Division of Motor Vehicles of the State of California to set aside certain orders revoking certain certificates of registration of motor vehicles and certain licenses to operate motor vehicles.

Demurrer sustained, and alternative writ of mandate discharged.

Rehearing denied; MARKS, J., dissenting.

W. C. Dorris and R. W. Henderson, both of Bakersfield, for petitioners.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondents.

BARNARD, Presiding Justice.

This is an application for a writ of mandate in which the petitioners seek to compel the respondents to set aside certain orders revoking certain registrations of motor vehicles and certain licenses to operate motor vehicles previously issued to the petitioners, and to compel the respondents to recognize as valid and subsisting these operators' licenses and certificates of registration previously held by the petitioners. The matter is before us upon a demurrer to the petition.

The petition alleges, among other things, that the petitioners are husband and wife; that a judgment was entered against them in the superior court of Kern county based upon a complaint which alleged that the plaintiff therein suffered personal injuries on June 18, 1931, through the negligent operation of an automobile by Harry Sheehan, one of the petitioners herein, and one of the defendants in that action; that recovery was sought and had in that action against Justine Sheehan, the other petitioner here, solely on the ground that she was the owner of the automobile in question; that the petitioners have been and now are unable to satisfy said judgment in whole or in part and that said judgment remains wholly unsatisfied; that on June 18, 1931, these plaintiffs had a policy of insurance issued by the Pacific Coast Insurance Association, an insurance company authorized to do business in this state, covering liability for personal injuries arising out of the operation of the automobile in question in the sum of $5,000; that all premiums were paid and this insurance was in full force and effect on that date; that upon notice this insurance company admitted its liability and obligation to pay any judgment that might be recovered in said action and agreed to and undertook and commenced to defend the action; that thereafter and prior to the trial of the action this insurance company became insolvent and is now in process of liquidation by the insurance commissioner of this state; that the petitioners were compelled to defend said action at their own cost and expense and that they have received nothing whatever on account of said policy of insurance although their claim against the liquidator of said insurance company has been presented and allowed; and that the respondents have revoked and canceled the operator's license and registration certificates previously issued to these plaintiffs.

The contention here made is that section 73 (g) of the California Vehicle Act, as existing on June 18, 1931 (St. 1923, p. 534, § 73 (g), as amended by St. 1929, p. 560), violates section 1 of article 1 of the Constitution of California, in that it is discriminatory and violates Amendment 14 of the Federal Constitution, in that it deprives these plaintiffs of due process of law. It is contended that this section is unconstitutional unless so interpreted as not to permit the Division of Motor Vehicles to cancel a license when the inability of the license holder to pay a judgment arises from the insolvency of his insurer. It may first be observed that this latter contention, regardless of any force it might have under a statute requiring compulsory insurance as a condition for the issuance of a license to operate a motor vehicle, has no application here. The statute here in question provides for a revocation of the license upon the failure to pay a judgment within fifteen days after the same becomes final and it is immaterial whether such failure results from a failure to carry insurance, from the insolvency of an insurance carrier or from the insolvency of the licensee. While good reasons might be advanced before a legislative body for the suggested exception, we are here concerned only with the power of the legislature to enact the law in question.

The only cases cited are In re Lindley, 108 Cal. App. 258, 291 P. 638, and Watson v. Division of Motor Vehicles, 212 Cal. 279, 298 P. 481. The section was held unconstitutional in the first of these cases, while the majority opinion in the other case is to the contrary. It was pointed out in a concurring opinion, and is here argued by the petition-

ers, that what was said in the majority opinion concerning the constitutionality of this act is obiter dictum. Assuming that this case is not controlling as a precedent, we are in accord with the reasoning and conclusion expressed therein to the effect that this statute is neither unreasonable nor discriminatory.

[1, 2] The power to license carries with it the power to prescribe reasonable conditions precedent, and must and does include the power of revocation. That the licensee shall not interfere with the equal rights of other licensees is certainly a reasonable requirement and condition upon which to base the issuance and continuance of such a license. The one at fault in an automobile accident has interfered with the right of another in his use of the highway. In all cases the degree of such interference may be said to be greater where the damage done is not repaired, while in many cases, because of the financial condition of the victim, the failure to repair the damage done may result in a continuing interference, entirely depriving the injured party of that use of the highway to which he is entitled. To provide that the privilege represented by the license will be granted only upon the condition that any damage done through the exercise of the privilege will be made good, would not be an unreasonable regulation. A provision making the continuance of the privilege dependent upon a similar condition seems equally reasonable. As was said in In re Opinion of the Justices, 251 Mass. 617, 147 N. E. 680: "It may be thought by the Legislature that such a judgment debtor, who did not do what the law required of him, as declared by the judgment, to repair damage already done by him, was not a fit person to be intrusted again with the responsibility of operating a motor vehicle on the public ways." Such a provision is not unduly harsh and cannot be said to lack a proper foundation in common experience, in view of well-known conditions growing out of the inherently dangerous nature of the instrumentality used, coupled with the enormous increase in the number of such automobiles appearing on the highways in the hands of operators of every kind of experience and ability. In addition, the act in question may have a marked tendency to prevent negligent driving and a not inconsiderable effect in eliminating drivers who may be a menace to those properly using the roads.

It is argued that the section in question is discriminatory and that it favors the rich over the poor. However, the fact that one man may be more able to pay than another is merely incidental, as is the fact that in some cases the person benefited may be a poor man. Fundamentally, the distinction made is not one based upon the ability to pay, but is one based upon the proper use of a privilege. Not only is the provision effective only when the privilege granted has been abused, with a consequent interference with the rights of others, but in some cases the failure to pay for damage done may constitute a continuing interference with the right of another to use the highway.

[3] In our opinion, the provision here attacked tends to secure the safety of the public and the equal rights of all in the use of the highways and is neither discriminatory nor an unreasonable regulation. "There is no inequality or discrimination in a constitutional sense from the standpoint of the judgment debtor. Those who do not pay their debts arising from their fault in the operation of a motor vehicle on the public way may be classified by the Legislature as not worthy of a license to operate again." In re Opinion of the Justices, 251 Mass. 617, 147 N. E. 680, 681. In the statute here in question an equal opportunity is offered to all, the conditions prescribed apply to all and the distinction made not only is based upon the way in which the privilege is used, but relates to and conserves the equal rights of all in the use of the highways.

In the case of Watson v. Division of Motor Vehicles, supra, no opinion was expressed as to the constitutionality of that portion of section 73 (g) of the California Vehicle Act which provides for the revocation of the license of an owner of an automobile when a final judgment for damages remains unpaid and when the damages in question resulted from the operation of the motor vehicle by his agent or by some other person with his express or implied consent. That question is directly presented here since judgment was rendered against the plaintiff wife solely by reason of her ownership of the automobile in question and not by reason of any negligence on her part in operating the same. We are unable to find any reasons for applying a different rule in the case of owners of automobiles thus involved in accidents which cause injuries or damage to others. Most of the reasons applying to the operator of a motor vehicle apply also to an owner who permits his vehicle to be operated under conditions which make him liable to another, and we think these reasons lead to the same conclusion.

A particular accident resulting in an unpaid judgment against the owner would not

have happened had not the owner of the car furnished the operator with the dangerous instrumentality and permitted him to use the same on the highways and the owner thus assumes, in part at least, a responsibility for any interference with the rights of others that may occur. This responsibility is recognized and definitely imposed under our civil law and, in this particular case, the same has resulted in a judgment against the owner and his responsibility and liability have taken the form of a debt covering or representing the damage he has been instrumental in causing. If such an owner refuses or neglects to repair the damage already caused in part by the manner in which he has used the license previously issued to him, it cannot be said that a reasonable ground does not exist for revoking that license and refusing to issue another until he has righted the wrong thus done to others who had an equal right to the use of the highway.

The statute in question is uniform and general in its application and interferes with no one until he misuses the license previously granted and then fails to repair the wrong for which he is responsible. Under such circumstances, we think the provision for the revocation of the license of one coming within the provisions of the act is reasonable and within the constitutional powers of the Legislature.

The demurrer is sustained, and the alternative writ of mandate is discharged.

I concur: JENNINGS, J.

MARKS, J., being absent, does not participate in this opinion.

140 Cal.App. 494

MARTIN v. COSTA.

Civ. 5120.

District Court of Appeal, Third District, California.

Aug. 29, 1934.

1. Husband and wife ⊂⊃209(2)

Where complaint did not seek consequential damages, it was not necessary to join husband in action by wife for injuries sustained in affray (Code Civ. Proc. §§ 370, 427).

2. Husband and wife ⊂⊃216, 209

Where wife's injuries were caused by negligent or willful acts of husband, husband and wife could not recover damages since recovery would be community property.

3. Husband and wife ⊂⊃216

Wife could not recover for injuries sustained in affray in which husband was aggressor, since her injuries would be attributable in part to husband's fault and recovery would permit husband to participate in compensation deemed to be community fund.

4. Assault and battery ⊂⊃13

Where owner told trespasser to remain away from his home and not create disturbance there, and trespasser returned with two companions and approached owner and cursed him, owner could use necessary force to eject trespasser and was not aggressor, though striking first blow.

5. Assault and battery ⊂⊃14

Where wife saw husband being attacked by three men, her intervention in affray and seizing of one of assailants to prevent him from striking husband did not constitute her aggressor so as to justify assailants in striking or choking her.

6. Assault and battery ⊂⊃40

$500 for injuries sustained by married woman knocked down and choked when she went to assist husband in affray in which he was not aggressor *held* not excessive.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Mrs. L. P. Martin against A. P. Costa. Judgment for plaintiff, and defendant appeals.

Affirmed.

Edward Bickmore, of Merced, and Thomas F. Lopez, of Fresno, for appellant.

H. K. Landram and F. A. Silviera, both of Merced, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $500 which was rendered against him for personal injuries inflicted upon the plaintiff in an affray.

It is contended the findings and judgment are not supported by the evidence, that the defendant used no more force in the affray than was required in necessary self-defense, and that, because the plaintiff's husband was the aggressor in the affray, she is barred

from a recovery of judgment, the proceeds of which are community property, in which the husband may not participate on account of his wrong.

There is a serious conflict of evidence. It is difficult to determine the facts of this case, since all of the witnesses who actively engaged in the affray are Portuguese who understand and speak the English language very imperfectly. No interpreter was employed at the trial.

The plaintiff and her husband live on a farm near Gustine. They are engaged in the dairy business. Joe Almeida was temporarily living with them and was working for his board and lodging. It appears that Almeida had purchased from the defendant a pair of automobile tires which he had not paid for. At 6 o'clock p. m. on April 1, 1933, the defendant appeared at the home of plaintiff and asked for Almeida, who was then helping Mr. Martin milk the cows. Almeida met him in the front yard, and a controversy ensued which resulted in a conflict. During the affray Mr. Martin was called by his children. He told Costa to leave the premises; that he did not want any disturbance at his home. Costa replied that he would go, but that he would return again that night and that he either wanted Almeida to pay for the tires, or he would take them away. At 8 o'clock that evening, the defendant, accompanied by his brother, who went by the name of Alfonse Bastos, and his nephew, Louis Costa, returned in an automobile to the home of the plaintiff. Bastos went to the door and demanded an interview with Almeida. Mr. Martin went out to the machine, which was stationed near the kitchen window. The defendant and his son were not in the machine, but were standing near by. Bastos said to Mr. Martin that he was told of the fight which occurred there at 6 o'clock between Costa and Almeida, and added, "You take a part for Joe Almeida, I want to take a part for my brother." Mr. Martin told him that he did not see the fight which had occurred previously and that he did not want any trouble there at his home; that Almeida had gone away with a truck. Bastos replied that "if he was home he would get it now." Martin insisted he did not want any disturbance there on his premises. He testified, "I sent him away, he won't go." Mrs. Martin testified in that regard: "He (Martin) said several times for him to go away, he didn't want any bother, any trouble, and he (Costa) just walked three or four steps toward the car * * * and came back and swear." Vulgar and opprobrious language was used towards Martin. The evidence does not specifically show that Costa approached Martin in a threatening manner, but the circumstances warrant the inference that he did come back threatening him with bodily harm. From his language and his attitude it may be reasonably inferred that he did threaten to attack Martin. The fact that the three men came together after they had been warned not to return, and that Bastos assumed the part of an aggressor and told Martin he had come there to take the part of his brother, warranted him in believing he was to be assaulted. Mrs. Martin testified: "My husband struck him (Bastos) by the car with the hand, * * * (the other) two come * * * running back there, and they jumped on my husband, all three of them on him, and Mr. Costa socking my husband on the back like hammer and nails and just grab him there." Mrs. Martin then jumped out of the window and ran to her husband's assistance. She seized the bib of Costa's overalls to prevent him from assaulting her husband. She testified in that regard: "I was trying to hold him there and pretty soon he strike me on my left breast and I fell on my back and he fell on top of me, * * * and he got up and he just choked me as hard as he could." Mr. Martin corroborates the attack of Costa in the following language:

"Q. Did Mr. Costa strike you? A. Yes, he strike me in the head.

"Q. Struck you in the head? A. Yes.

"Q. What, if anything, did his son do? A. His son was pulling me off (of Bastos).

"Q. His son was pulling you? A. Pulling my legs."

It also appears that after Mrs. Martin arrived on the scene, Costa cursed her and repeatedly inferred that she had been intimate with Joe Almeida. The affray soon terminated without further casualty, and the defendant and his associates left.

Mrs. Martin claimed that she had been injured in the chest and on her breasts, arms, and throat as a result of the conflict, that she was unable to breathe without pain and difficulty, and that she could not perform her household duties for several days, but that her sister-in-law came to prepare the meals for them during that interval. Two days later she visited a physician, who testified that he made an examination of her throat, neck, and arms and found black and blue marks on her throat and left arm. He did not examine the breast, but said she complained of tenderness over the bladder and chest. He found black and blue marks on

both thighs. He examined the breast later and found no bruises.

The suit for damages for personal injuries sustained by the plaintiff was subsequently brought in her name alone. No damages for medical care or loss of services were asked or proved. A demurrer on the ground that the complaint fails to state facts sufficient to constitute a cause of action was overruled. The defendant answered the complaint, denying all the material allegations thereof, and affirmatively alleging that the affray was brought on by the acts and conduct of plaintiff's husband, and that she was barred from recovering damages because the proceeds of the judgment constitutes community funds from which the husband may not profit, since he was the aggressor in the affray.

The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff on all the material issues. Judgment for $500 was rendered in favor of the plaintiff. From that judgment the defendant has appealed.

[1-3] The complaint in the present suit states a good cause of action for personal injuries sustained by the plaintiff. Consequential damages were not alleged or sought. It was therefore not necessary for the husband of plaintiff to have been joined in the action. Code Civ. Proc. § 370. The demurrer was not filed on the ground of misjoinder of parties plaintiff. It is true that a husband and wife may be properly joined in a suit for personal injuries sustained by the wife, and that, where consequential damages are sought in behalf of the husband for loss of services of the wife or for medical expenses or other costs incurred by him on account of her injuries, both spouses may be joined without separately stating the cause resulting in such consequential damages. Code Civ. Proc. § 427; Meek v. Pacific Electric Ry. Co., 175 Cal. 53, 164 P. 1117. It is also true that, when the injuries which are sustained by a wife were caused by the negligent or willful acts of her husband, they may not recover damages, for the reason that the compensation therefor, under the laws of California, is deemed to be community property in which the husband shares and over which he has control. Basler v. Sacramento Gas & Elec. Co., 158 Cal. 514, 111 P. 530, Ann. Cas. 1912A, 642; Giorgetti v. Wollaston, 83 Cal. App. 358, 257 P. 109. It follows that, if the husband of plaintiff in this action was the aggressor in the affray and that his conduct caused or substantially contributed to the injuries which she sustained, the plaintiff will be barred from recovery, not only because her husband would thereby participate in the compensation which is deemed to be community funds, but also because her injuries would then be attributable in part to his fault.

[4-6] We are of the opinion the findings and judgment are adequately supported by the evidence. While it may be true that L. P. Martin actually struck the first blow in the final affray in which the plaintiff was injured, that fact does not necessarily mean that he was the aggressor or the cause of the conflict. The trial judge was in a much better position to determine from the conduct of the witnesses on the stand and from a construction of their testimony who was to blame for the assault. The defendant and his companions were trespassers on the property of Martin. Costa had been previously told to remain away from the home of plaintiff. He threatened to return, and willfully did so in company with his brother and son. He cursed and insulted the plaintiff. He was again warned by Martin to go away and to make no disturbance at his home. He went towards his automobile, but returned to Martin, cursing him. Martin was entitled to use any necessary force to eject him from the premises as a trespasser and to prevent a disturbance thereon. We are not prepared to say that the trial judge was not warranted in assuming from the evidence adduced that Martin was not the aggressor, and that he might reasonably have assumed the defendant was returning to attack him at the time he struck the first blow. Under such circumstances, the mere striking of the first blow does not constitute one the aggressor. These were questions for the determination of the trial judge. The intervention of the plaintiff in the affray did not make her the aggressor. She had a lawful right to go to the aid of her husband, whom she says was being attacked by the defendant and his two companions. She did not strike the defendant. She merely seized him by the bib of his overalls and tried to prevent him from attacking her husband. This conduct on her part would not justify him in striking or choking her. The amount of the judgment is not excessive.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

140 Cal.App. 453

VUICH v. SMITH.

Civ. 8499.

District Court of Appeal, Second District, Division 2, California.

Aug. 17, 1934.

1. Trover and conversion ⇐1

"Conversion" is any act of ownership or exercise of dominion over personal property of another in defiance of his rights, for which "trover" is name usually applied to action for damages.

[Ed. Note.—For other definitions of "Conversion" and "Trover," see Words & Phrases.]

2. Trover and conversion ⇐2

Leasehold interest is not subject of action for trover or conversion.

3. Landlord and tenant ⇐132(2)

In lessee's action against lessor for conversion of furniture and leasehold, finding that lessor was liable for value of leasehold as damages and yet was bound by lease *held* contradictory.

4. Appeal and error ⇐1071(1)

Where one part of court's contradictory findings on material matters would support judgment, and another part would necessarily upset it, judgment must be reversed.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by M. J. Vuich against Jack P. Smith. From a judgment for plaintiff, defendant appeals.

Reversed.

Franklin J. Cole, of Los Angeles, A. E. Crane, of Topeka, Kan., and Richard Kittrelle, of Los Angeles, for appellant.

George I. Devor, of Los Angeles (Walter S. Hilborn, of New York City, of counsel), for respondent.

SCOTT, Justice pro tem.

Respondent leased an apartment building from appellant for a ten-year term commencing in 1920, and gave appellant a chattel mortgage on the furniture to secure payment of rent. On October 9, 1925, with respondent's consent, on October 9, 1925, and refused management of the apartment house, rendered accounts to respondent, but refused to turn over the building and furniture until the latter paid him the amount he claimed was due on account of rent and repairs. Respondent on January 18, 1929, brought an "action for conversion of property" and recovered judgment for $5,000 against appellant. The complaint set out the leasehold interest, valued at $2,000, and the furniture, valued at $10,000, alleged that appellant converted them to his own use without respondents' consent, on October 9, 1925, and refused to return them on demand, June 1, 1928, claiming trust and confidence on his part and fraud and deceit on the part of appellant.

At the conclusion of the trial the court found in effect: (1) That on October 9, 1925, respondent owned and possessed the leasehold interest and furniture; (2) that they were worth $5,000; (3) that appellant, with intent to convert them, offered to take them over and manage them for respondent's benefit; (4) that respondent trusted him and (5) allowed him to take them over; (6) that respondent had no means of knowing that appellant claimed the premises except as his agent or trustee until June 15, 1928; and (7) on that date demanded their return, which appellant refused; (8) that appellant converted the leasehold and personal property on October 9, 1925; (9) that the lease was never canceled; and (10) that respondent owed appellant no rent—together with three other paragraphs not material to this appeal.

[1, 2] The findings of the trial court are uncertain and contradictory in matters which are material to the determination of the case, and for that reason the judgment must be reversed. Respondent was awarded damages for the "conversion" by appellant, not only of the furniture but also of the leasehold interest, and at the same time the court made finding IX: "No evidence being offered or presented that the defendant falsely and fraudulently claimed that the leasehold interest, described in finding 'I' hereof, between himself and the plaintiff had been canceled by mutual consent of the parties thereto on or about the 9th day of October, 1925, the court finds that said lease was not canceled on said date or at any time or at all." Plaintiff's action for conversion or trover was brought to recover damages for the alleged wrongful acts of defendant in connection with the furniture and the lease. Conversion is any act of ownership or exercise of dominion over the personal property of another in defiance of his rights, and trover is the name usually applied to the action for damages for conversion. 24 Cal. Jur. 1021; Dodge v. Meyer, 61 Cal. 405; 65 Cor.

Jur. 12. A leasehold interest is not the subject of an action for trover or conversion (Goldschmidt v. Maier, 7 Cal. Unrep. 162, 73 P. 984; Whayne v. Seamans, 95 Okl. 168, 217 P. 859, 864; 65 Cor. Jur. 18), and plaintiff's action to recover damages for "conversion" of his leasehold interest was erroneously conceived.

[3, 4] Following this, however, the court found in effect that appellant was liable in damages for such "conversion," and yet was bound by the terms of this same lease. Appellant therefore had but two alternatives: To return possession of the property to the lessee or keep it as trustee for the latter. The findings of the trial court would impose on appellant all of the burdens of the original lease and at the same time compel him to pay over to respondent a sum which the court determined to be the total value on October 9, 1925, of (1) the furniture which was appellant's only security for his rent under the lease and (2) the leasehold interest. In other words, respondent was to continue to enjoy his rights under the lease notwithstanding his collection of damages for appellant's "conversion" of the same. These findings are uncertain and inconsistent, and, "where there are contradictory findings about matters material to the merits of the case, and the determination of which, one way or the other, is essential to the correctness of the judgment, there the judgment cannot stand. If one part of the contradictory findings would support the judgment, and another part would necessarily upset it, then the judgment must be reversed." Learned v. Castle, 78 Cal. 454, 460, 18 P. 872, 21 P. 11, 13.

Under the lease, which the court found was still in force, appellant had certain rights as mortgagee of the furniture which was security for rentals yet to accrue on the lease, and for which respondent as lessee was still liable. The nature and extent of those rights should be considered by the trial court.

It appears probable that an action for an accounting would be appropriate to determine the interests of the parties here (Goldschmidt v. Maier, supra), and that they should be permitted to amend their pleadings if so advised.

Judgment reversed.

We concur: STEPHENS, P. J.; DESMOND, J.

140 Cal.App. 482

HARTFORD ACCIDENT & INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

PACIFIC EMPLOYERS' INS. CO. et al. v. SAME.

Civ. 9629, 9630.

District Court of Appeal, Second District. Division 2, California.

Aug. 27, 1934.

1. Master and servant ⇐405(4)

Evidence *held* insufficient to show that shipping clerk for packing company whose duties exposed him to inclement weather, smoke, ammonia gas, and extremes of heat and cold had contracted tuberculosis due to his employment, requiring annulment of compensation award (St. 1917, p. 831, as amended).

2. Master and servant ⇐371

"Injury arising out of and in course of employment" means injury by reason of employment, and not by reason of some inherent natural defect which culminates during time of employment (St. 1917, p. 831, as amended).

[Ed. Note.—For other definitions of "Arising Out of Employment" and "Course of Employment," see Words & Phrases.]

3. Master and servant ⇐403

There is no presumption that, because injury occurs in course of employment, it arises out of employment, burden being upon applicant for compensation to show that injury arose out of as well as in course of employment (St. 1917, p. 831, as amended).

4. Evidence ⇐528(1)

Whether pulmonary tuberculosis was contracted by employee because of his employment was matter for expert testimony, rule that expert evidence is conclusive on subject not within common knowledge of laymen being applicable to compensation proceeding (St. 1917, p. 831, as amended).

5. Master and servant ⇐405(1)

Findings of fact by Industrial Commission must be based on legally competent evidence and not on mere surmise, conjecture, or satisfaction of referee or commission with correctness of their views (St. 1917, p. 831, as amended).

Proceeding under the Workmen's Compensation Act by Gerald F. Houlihan, employee, against the Tovrea Packing Company and the National Packing Company, Leonard O. Chudacoff, receiver in equity, employers, and

the Hartford Accident & Indemnity Company and the Pacific Employers' Insurance Company, insurers. To review a decision of the Industrial Accident Commission awarding compensation for temporary total disability due to tuberculosis, the employers and the insurers bring certiorari.

Award annulled.

F. Britton McConnell and J. M. Clements, both of Los Angeles, for petitioners.

Everett A. Corten, of San Francisco, for respondent commission.

SCOTT, Justice pro tem.

Certiorari to review decision of the Industrial Accident Commission awarding compensation to respondent Houlihan. The applicant was employed as shipping clerk in a packing plant operated in turn by National Packing Company, Leonard Chudacoff, as receiver, and Tovrea Packing Company, who were insured at first by Pacific Employers' Insurance Company and later by Hartford Accident & Indemnity Company. Industrial Accident Commission on November 20, 1933, made its findings, and awarded applicant compensation for temporary total disability due to tuberculosis, which compensation was to continue indefinitely. The compensation and medical expense were apportioned between the insurance carriers, 21/23 to Pacific Company and 2/23 to Hartford Company, on the basis of the time they had carried the insurance for the employers.

[1] The evidence is clearly insufficient to justify or support an award of compensation to such employee under the Workmen's Compensation Act (St. 1917, p. 831, as amended). The testimony showed that employee Houlihan began working for the company in October of 1929 and continued until July, 1933, his title being that of shipping clerk, and included work in the office, cooler, smoke room, and outside, which exposed him to extremes of heat and cold, smoke, ammonia gas, and inclement weather. When he started such work, he was healthy. Two years afterward he was examined for insurance, and there is no evidence that tuberculosis was discovered. After some further time, he started to lose weight, appetite and endurance, and later had "pleurisy trouble" and "colds." He first knew he had tuberculosis on June 20, 1933, and was obliged to stop work early in July. There in no question that the employee was suffering from pulmonary tuberculosis which rendered him temporarily totally disabled. The evidence does not show that it was due to his employment.

The report of the assistant medical director for the commission was as follows: "According to the record, this applicant was subjected to more than the usual hazard experienced by one in his type of employment. It is possible that continual exposures described would have predisposed to the lighting up of an inactive pulmonary tuberculosis. Naturally, such an opinion is merely surmise and conjecture. However, one can state positively that the duties of his employment as described would not be beneficial to him if he were susceptible to a tuberculosis lesion."

Petitioners' physicians examined Houlihan and reported in part as follows, as to the cause of the tuberculosis:

Dr. Campbell: "The question as to the cause in this particular case is blamed on the hazard of his occupation where he spends an average of 8 or 9 hours daily but the balance of the time is free to do whatever he cares to. Why penalize the place where he was employed 8 or 9 hours a day and attach no importance to his home life, environment and habits during the balance of the day? A general answer to the question is that any condition that lowers the tone of the general system renders the tissues susceptible to the changes produced by the tubercle bacillus. The latter is of course the direct cause, a susceptibility to its influence may be acquired by heredity, syphilis, alcoholism, occupations such as the inhalation of foul air and irritating particles, residence in damp or over crowded apartments, catarrhal inflammation of the respiratory tract or debility from any infectious disease," etc.

Dr. Smith: "That this man is tuberculous is proved and he is now undergoing the proper treatment for his condition. That this condition is related to his employment in industry is extremely questionable, in my opinion. Tuberculosis is an infectious disease. This claimant does not set forth in any way any claim or any evidence to substantiate any claim that he was infected with tubercle bacilli while in his employment, and I know of nothing in such employment that would cause such infection. Just where he picked up the infection of tubercle bacilli is undoubtedly unknown to him and likewise to me; therefore I am of the opinion that his infection causing tuberculosis cannot be traced to his employment in industry. Whether or not his occupation contributed to his present condition in so far as it may be claimed

that employment in a 'cooler' may have brought about activity of a smoldering tuberculous infection, must be considered. I know of no evidence to support such claim, and know of no reason why the mere presence of an individual in a room of this character should be more prone to develop tuberculosis. He makes no claim of any injury to his body but apparently is entirely dependent on the fact that he was working in a 'cooler' in a packing house. At best a patient doing such work spends much less time at his occupation than he does outside his occupation, which hours are spent in rest and amusements which could just as readily be a factor in the development of tuberculosis as his work. I am therefore of the opinion that there is no relationship between the occupation in industry of this claimant and the tuberculosis from which he now suffers."

[2, 3] A former employee, Baersch, who had done work similar to Houlihan, testified that he (Baersch) had lost weight while so employed, but did not state to what extent. Another witness called by respondent, an employee Trego, who had done the same kind of work as Houlihan "off and on about eight years," testified that his health had always been all right; that he had contracted colds in the different temperatures, but had never been in the hospital for sickness. The commission found that Houlihan "sustained injury arising out of and occurring in the course of said employment, consisting of an aggravation into a disabling condition of a preexisting nondisabling tuberculosis." An injury, in order to be compensable under the terms of the Compensation Act, must have been sustained by the employee "arising out of and in the course of the employment," and must have been "proximately caused by the employment." Storm v. Industrial Accident Commission, 191 Cal. 4, 214 P. 874. It is not suggested in this case that any accident had occurred which had caused or contributed to applicant's condition. "While the word 'accident' has been eliminated from section 6 of 'The Workmen's Compensation Act' * * * the phrase 'arising out of, and in the course of the employment' has been interpreted to mean that the injury must result by reason of the employment in which the employee is engaged, and not by reason of some inherent natural defect which simply culminates during the time of employment. * * * 'There is no presumption, as contended by respondents, that because an injury occurs in the course of the employment it arises out of or because of that employment.'" Newton v. Industrial Accident Commission, 204 Cal. 185, 267 P. 542, 543, 60 A. L. R. 1279. "The burden is upon the applicant for compensation to show that the injury arose out of as well as in the course of the employment." Eastman Co. v. Industrial Accident Commission, 186 Cal. 587, 593, 200 P. 17, 19.

[4, 5] In this case we have an employee suffering from pulmonary tuberculosis, a disease which for years has been studied, diagnosed, and treated by those members of the medical profession whose research and experience have qualified them for that service and to whose judgment as experts on the subject of the disease their fellow practitioners defer. "The rule," as stated in Simpson Const. Co. v. Industrial Accident Commission, 74 Cal. App. 239, 243, 240 P. 58, 59, "appears to be that whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the court nor the jury can disregard such evidence of experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses. The same rule would, of course, apply to a proceeding before the Industrial Accident Commission." Testimony of probative value sufficient to support applicant's claim is entirely lacking. No expert witness has expressed an opinion that it is even reasonably probable that the condition of applicant was due to his employment, and an award may not be predicated upon a possibility which is "merely surmise and conjecture." It is not sufficient that the referee or commission be satisfied as laymen of the correctness of their view, but the law requires that they shall reach their conclusion on the basis of legally competent evidence. A mere surmise or conjecture does not constitute a "foundation sufficient to support a finding of fact." Simpson Const. Co. v. Industrial Accident Commission, supra.

The award is annulled.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 246

PEOPLE v. MAGGIO et al.

SAME v. FIORE.

Cr. 267.

District Court of Appeal, Fourth District, California.

July 30, 1934.

Hearing Denied by Supreme Court Aug. 29, 1934.

1. Obstructing justice ⇐11

Information charging accused with resisting deputy game warden arresting him while committing misdemeanor *held* sufficient, though not alleging what misdemeanor accused was committing at time (Pen. Code, §§ 950–952, 955, 959, 960, 1004, 1012; Const. art. 6, § 4½).

2. Indictment and Information ⇐110(21)

Information, charging accused in language of statute with resisting deputy game warden arresting him while committing misdemeanor, which failed to charge that officer was engaged in or attempting to discharge duties of his office at time resistance was made, *held* sufficient (Pen. Code, §§ 950–952, 955, 959, 960, 1004, 1012; Const. art. 6, § 4½).

3. Obstructing justice ⇐11

Indictment charging accused with resisting deputy game warden attempting to arrest him *held* not insufficient for failure to designate officer as deputy fish and game commissioner (Pen. Code, §§ 950–952, 955, 959, 960, 1004, 1012; Const. art. 6, § 4½).

4. Obstructing justice ⇐16

Evidence that accused, after being informed by game warden that hunter was under arrest and that game warden would take care of him, took hunter away from warden by use of shotguns, sustained conviction for resisting officer.

5. Criminal law ⇐822(1)

All instructions given in case should be considered together as a whole.

6. Criminal law ⇐822(1)

Where each instruction is correct and all taken together plainly state law so that jury may understand what is meant, accused is not prejudiced.

7. Criminal law ⇐1186(4)

In prosecution for assault with deadly weapon, instruction that offense was committed by assault with deadly weapon or force likely to produce great bodily injury, and that deadly weapon was one likely to produce death or great bodily injury and included any firearm, and that jury were judges as to whether accused used deadly weapon, *held* not prejudicial to accused (Pen. Code, § 960; Const. art. 6, § 4½).

8. Criminal law ⇐823(2)

In prosecution for assault with deadly weapon, instruction that accused was guilty if he struck officer with shotgun with intent to assault him *held* not erroneous as instructing jury that shotgun was deadly weapon per se and that assault with shotgun was assault with deadly weapon irrespective of amount of force used, in view of other instructions (Pen. Code, § 960; Const. art. 6, § 4½).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Sam Maggio and Antonio Fiore and another were convicted of resisting an officer, and Sam Maggio was convicted of assault with a deadly weapon, and defendants appeal.

Affirmed.

A. C. Finney, of El Centro, and Edgar B. Hervey, of San Diego, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, Justice pro tem.

The defendant Sam Maggio was charged with the crime of assault with a deadly weapon, and all three defendants were separately charged with the crime of resisting an officer. Two informations with various counts were filed. All of the charges grew out of the arrest or attempted arrest of Sam Maggio by a game warden and, by consent, the two cases were consolidated for trial and have been consolidated and briefed together on this appeal. The defendant Sam Maggio was found guilty of assault with a deadly weapon and all three defendants were found guilty of resisting an officer. In pronouncing judgment a fine was imposed upon each defendant, and all three have appealed.

[1-3] The first point raised is that the respective informations, in so far as they attempted to charge each of the appellants with the crime of resisting an officer, were insufficient and failed to charge such an offense. These informations, respectively, alleged that the defendant named therein did on or about a certain date in the county of Imperial willfully, unlawfully, and feloniously resist, delay, and obstruct a public officer, to wit, J. W. Harbuck, in the discharge of, or attempt to discharge, his duties as such public officer. It was further alleged that the said

Harbuck was a deputy state game warden and a deputy federal game warden; that he was then and there duly appointed, qualified, and acting as such; and that he was then and there engaged as such public officer in arresting the defendant Sam Maggio, who was then and there willfully and unlawfully committing a misdemeanor in violation of the law. It is claimed that these informations are insufficient in that the officer referred to therein should have been called a deputy fish and game commissioner rather than a deputy state game warden; that it does not appear from the information that said officer was engaged in discharging or attempting to discharge the duties of his office at the time the resistance was made; and that the informations fail to set forth what misdemeanor was being committed at the time by the said Sam Maggio. Even under the stricter rules of pleading which formerly prevailed, the third of these contentions would have been held to be without merit. People v. Hunt, 120 Cal. 281, 52 P. 658. With respect to the second contention the essential fact is alleged not only in the language of the statute but with sufficient clarity to be readily understood by any one. As to the first of these contentions, no authority is cited for the proposition that the correct name for the position held by the officer in question is deputy fish and game commissioner. Such officers have long been known as game wardens. There was evidence that this officer was commonly so designated and no possible prejudice could have resulted to the appellants if, in fact, there was any error in the designation. The informations in question followed the language of the statute, which was sufficient in a case of this kind. No demurrer or motion to set aside the information was filed and these particular objections were thereby waived. Pen. Code, §§ 1004 and 1012. The informations conform to the provisions of sections 950, 951, 952, 955, and 959 of the Penal Code and, in view of the provisions of section 930 of the Penal Code and section 4½ of article 6 of the Constitution, no defects are pointed out which can be held sufficient to justify a reversal.

It is next urged that the evidence is insufficient to support the conviction of the appellants Fiore and Paul Maggio, in that it does not disclose any interference by them with the arrest or the attempted arrest of Sam Maggio. This requires a brief summary of the evidence relating to the situation out of which these cases arose.

On September 24, 1933, the three appellants, with two others, were hunting ducks in Imperial county. The game warden referred to, who was at that time unarmed, approached Sam Maggio, told him he was a game warden, showed him his badge, and asked to see his license. Sam told him he had left his license at home and, in response to another inquiry, told him that he had bought his license at the courthouse on September 2, which statement was disproved at the trial. Upon being asked his name, Sam said his name was "Anthony Pecoria" and spelled out the last name for the warden, who wrote it on a piece of cardboard. While they were talking the warden saw a man some distance away whom he later identified as Paul Maggio. This man fired two shots and a flock of ducks arose from a pond and passed near the point where Sam and the warden were standing. Sam raised his gun and fired, hitting one duck which fell to the ground. The warden placed his hand on Sam's shoulder and told him he was under arrest and asked him to give him the gun. Sam refused and the two started scuffling for possession of the gun and both fell to the ground. While the warden was lying on the ground on top of the gun, Sam started striking him on the head with his fists. When the warden started to move to protect himself, Sam grabbed the gun, jumped up, and, after calling the warden a vile name, said: "You want my gun, here it is. You like it?" Thereupon Sam struck the warden under the right eye and again behind the left ear with the double-barreled shotgun. The first blow slightly dazed the warden and after striking the second blow Sam left and went over into the brush. The warden went back to his car which was parked nearby and, after strapping on his holster in which was a pistol, drove a short distance to where another car, belonging to the appellant Fiore, was parked. In about five minutes all of these hunters, except Sam Maggio, came back to Fiore's car. The warden told them that they could go home but not to go in the direction in which Sam Maggio had vanished, and that the other man was under arrest. Fiore replied to the effect that he would go where he pleased, whereupon the warden told him: "You can go home but don't take that man with you. He is under arrest and I am going to bring him in. I will take care of him." Fiore then started his car and drove in the direction in which Sam had gone. After proceeding a few hundred feet he stopped his car and Paul Maggio got out and went into the brush. As the warden came up to the

car Paul returned with Sam. Fiore got out of the car and all three appellants talked among themselves in a foreign language, which the warden could not understand. All three appellants then pointed their shotguns directly at the warden and Paul started to walk around behind his back. At that the warden started backing up and Paul said: "Well, what about it?" The warden continued to back up and after saying, "He is still under arrest," went to his car and the appellants got in their car and left.

[4] While the appellants denied on the stand that they had pointed their guns at the warden just before Sam got into the car, they admitted that the warden had a badge on at the time, that they knew he was an officer, and that he told them not to pick up the other man as he would take care of him himself. The evidence justifies the inference that the appellants Paul Maggio and Fiore knew all about the scuffle between the warden and Sam Maggio and that the warden had attempted to place Sam under arrest. In any event, after being informed by the officer that Sam was under arrest and after being told not to take him away and that the officer intended to take him away, they not only took him with them but accomplished this purpose through the use of their shotguns in a most persuasive manner. It would be difficult to imagine a plainer case of interference with an officer in his attempt to perform his duties and the evidence is entirely sufficient to support the verdict of the jury in that regard. People v. Martensen, 76 Cal. App. 763, 245 P. 1101; People v. Pedde, 25 Cal. App. 34, 142 P. 894.

[5-8] The last point urged is that the court erred in its instructions to the jury and that the evidence is insufficient to sustain the verdict, as to Sam Maggio, on the charge of assault with a deadly weapon. It is conceded, however, that the evidence with respect to this charge was conflicting and the only argument presented is as to errors in the instructions. There was ample evidence to the effect that Sam Maggio struck the officer with a double-barreled shotgun used as a club, including the testimony of the doctor who examined the officer on the same day, who testified as to the nature of the wounds and that they had the appearance of having been caused by a blunt instrument. One instruction given by the court was as follows: "You are instructed that every person who commits an assault upon the person of another with a deadly weapon or instrument or by means of force likely to produce great bodily injury is guilty of the offense of assault with a deadly weapon."

While the appellants concede that this instruction was correct in itself, it is claimed to be erroneous when taken in connection with another instruction, reading as follows: "You are instructed that the definition of 'deadly weapon' as given by our laws include any weapon commonly known as a pistol, revolver or any other firearm."

It is argued that these two instructions had the effect of telling the jury that the manner of use or the amount of force employed with the weapon was immaterial. The court also gave the following instructions:

"A deadly weapon is one likely to produce death or great bodily injury."

"The jury are the judges as to whether the weapon used in the affray was or was not a deadly weapon."

"An assault is an unlawful attempt coupled with the present ability to commit a violent injury on the person of another."

It is well settled that all of the instructions given in a case should be considered together, as a whole. It is not practicable to put all of the law in one instruction, and where each instruction is correct and all taken together plainly state the law so that the jury may understand what is meant, a defendant is not prejudiced. People v. Quimby, 6 Cal. App. 482, 92 P. 493. Most of these instructions followed corresponding statutes and, taken together, sufficiently defined the terms so that the jury might decide whether the weapon here employed, used in the manner in which it was used, constituted a deadly weapon. This question was left to the jury, as was also the question as to whether an assault was in fact made by Sam Maggio upon the complaining witness. Another instruction given was as follows: "You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant Sam Maggio, on or about the 24th day of September, 1933, struck and hit the said J. W. Harbuck with a shotgun with the intent then and there to assault the said J. W. Harbuck, then your verdict should be guilty of Assault with a Deadly Weapon as charged in the information."

This instruction is attacked as telling the jury that a shotgun is a deadly weapon per se and that an assault with a shotgun is an assault with a deadly weapon irrespective of the amount of force used in the assault. In other instructions the necessary elements of the crime were fully defined and the jurors were specifically told that they

were the judges as to whether the weapon used was or was not a deadly weapon. It is not reasonable to think that the jury could have understood these instructions in any other light than that they were to determine whether the weapon here used was a deadly weapon under the circumstances and in the manner in which it was here used, as shown by the evidence. The instruction last quoted left to the jury the question as to whether Sam Maggio struck and hit the complaining witness with a shotgun and also left to the jury the question whether any such act was done with the intent then and there to assault the complaining witness. We think the instructions, taken together, were sufficient to inform the jury as to the law upon the subject and that no possible error therein could account for the result. A reading of the record fails to convince us that any miscarriage of justice has occurred.

The judgments and orders denying motions for a new trial are, and each of them is, affirmed.

I concur: JENNINGS, J.

MARKS, J., being absent, does not participate herein

GOLDEN GATE CANDY PRODUCTS CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 9532.

District Court of Appeal, First District, Division 2, California.

Aug. 30, 1934.

Rehearing Granted Sept. 29, 1934.

1. Attachment ⇐64
Garnishment ⇐58

Generally, money on person of one outside prison walls is not subject to attachment or garnishment on passing involuntarily to officer's custody when such person enters within walls as prisoner.

2. Attachment ⇐64
Garnishment ⇐58

Contents of prisoner's wallet, taken by arresting officer from one to whom prisoner handed it before leaving place of arrest, *held* not subject to attachment or garnishment while in custody of property clerk, to whom it was delivered at police station.

Certiorari proceeding by the Golden Gate Candy Products Company to review an order of the Superior Court of the State of California, in and for the City and County of San Francisco, and Edmund P. Mogan, as Judge thereof, granting a motion by Morris Maidl to vacate, set aside, and quash a writ of attachment, sued out by petitioner in the latter's action against movant and others.

Order affirmed.

Morris, Jaffa & Sunski, of San Francisco, for petitioner.

Byron C. Parker and A. J. Hennessy, both of San Francisco, for respondents.

STURTEVANT, Justice.

As submitted this is a proceeding in certiorari. Heretofore Morris Maidl was arrested on a charge of violating section 476a of the Penal Code, that is, issuing checks with intent to defraud. The arrest was made in his place of business. Before leaving the room he turned to an assistant and taking a wallet out of his hip pocket he handed it to her with directions to keep it for him. The arresting officer stated he could not do that and directed the assistant to hand the wallet back to the defendant. As she did so the officer took the wallet, and when the defendant was booked at the police station the wallet and its contents were delivered over to the property clerk. The wallet contained $1,373 in cash and $500 in checks. Thereafter an action was commenced in the superior court by this petitioner against Morris Maidl et al. The complaint in that action was framed in two counts. In the first count the plaintiff alleged a cause of action as for goods sold and delivered for the agreed price of $13,076.37. The second count was as for the reasonable value. After commencing the action the plaintiff took out a writ of attachment and caused it to be served on the property above mentioned as being in the custody of the property clerk. Later the defendant appeared in the civil action and made a motion to vacate, set aside, and quash the attachment. After a hearing had the trial court made an order granting the motion to review that order this proceeding was commenced.

[1] The petitioner contends that it was within its rights in causing the contents of the wallet to be garnished. The defendant ear-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 36 P.2d 834.

nestly contends that under the law the property was not subject to garnishment. In Emmanuel v. Sichofsky, 198 Cal. 713, at page 715, 247 P. 205, 48 A. L. R. 580, Mr. Chief Justice Waste states as follows: "From the authorities upon the subject it may be gathered as a general rule that, if money on the person of a prisoner when outside the prison walls is not subject to seizure, it is not subject to attachment or garnishment when it passes involuntarily from his possession to the custody of the officer appointed by law to take it into possession, when such person enters as a prisoner within the walls. Public policy requires the adoption and maintenance of this rule. Were it otherwise, it would lead to a grave abuse of criminal process. It would tempt creditors whose debtors keep their funds upon their persons, and thus beyond the reach of civil process, to make unfounded criminal charges against their debtors, and bring about their arrest and the transfer of their funds to the custody of the arresting officers, in order to make them reachable by the process of garnishment. It needs no citation of the cases to show that the general rule, as thus broadly stated, is supported by the preponderance of authority." See, also, 28 C. J. 76; 14 Am. & Eng. Ency. 827; 1 Freeman on Executions, § 130a; 12 R. C. L., p. 811; Williams v. Edelstein, 143 Wash. 198, 253 P. 596. It will be conceded that there are exceptions to the rule. The petitioner cites Coffee v. Haynes, 124 Cal. 561, 57 P. 482, 71 Am. St. Rep. 99. It is not helpful. In that case the defendant Haynes was charged with the crime of homicide. He claimed that his act was committed in defending himself from robbers. To verify his claim the officers took him to the place and in their presence he excavated cans containing money and jewelry. That property was taken to the court to be used as evidence in the trial of the charge of murder. It does not appear from the decided case that anything of value was taken from the prisoner when he was arrested. Petitioner also cites Emmanuel v. Sichofsky, 198 Cal. 713, 247 P. 205, 48 A. L. R. 580. The defendant in that case was charged with having committed grand larceny. He was convicted and appealed from the judgment. The judgment was affirmed. While the appeal was pending the defendant became a fugitive from justice. Some three years later he was recognized, taken into custody by the sheriff, and delivered at the state prison. When he was arrested the second time he had on his person $35,890, which sum was turned over to the warden of the state prison. Thereafter Emmanuel recovered a judgment against the defendant in the sum of $14,300. Execution issued on that judgment and was levied on the property so in the hands of the warden. Addressing itself to those facts the court held that the general rule stated above did not apply.

[2] The petitioner cites many cases from other jurisdictions. It will serve no useful purpose to attempt to analyze each one. As stated above, it will not be claimed that the rule is the same in all jurisdictions. However, it will not be claimed that Mr. Chief Justice Waste erred in stating the general rule in the language we have quoted above. The petitioner makes a point that property taken from the hand is not taken from the person and it cites and relies on Green v. Palmer, 15 Cal. 411, 418, 76 Am. Dec. 492. In that case no arrest was involved and we do not understand the defendant to question the doctrine of that case. Finally, the petitioner asserts that property connected with a criminal charge, or which represents the fruits of the crime charged, or which was obtained from the plaintiff in the attachment suit by a criminal or illegal act, is subject to garnishment in the hands of the arresting officer or authorities, even though taken from the person of a defendant upon his arrest upon a criminal charge. Without going into the subject in detail it may be conceded that there are some authorities sustaining the contention made by the petitioner. Reifsnyder v. Lee, 44 Iowa, 101, 24 Am. Rep. 733. Such exceptions stand on the particular facts of the particular case. The case last cited involved the theft of some cattle. The thief sold them to the plaintiff. The latter returned the cattle to the owner, caused the arrest of the thief, and then sued him and garnished the proceeds then in the hands of the arresting officer. The court held that the garnishment was valid. In the instant case the petitioner does not claim that the entire contents of the defendant's wallet were even the proceeds obtained from the sale of goods theretofore sold by the petitioner to the defendant. Neither does it make a showing that said goods were stolen, obtained under false pretenses, or through any other criminal act. Therefore we think that the instant case does not come within the doctrine of Reifsnyder v. Lee, supra.

Pointing to the fact that the wallet was in the hand of the defendant Maidl when it was taken by the arresting officer, and that property taken from the hand is not taken from the person (Green v. Palmer, supra), the petitioner contends that its case does not fall within the general rule. In making that ar-

gument we think it overlooks the fact that at the time of the taking Maidl had been arrested and that the taking was an involuntary act so far as Maidl was concerned. The uncontradicted evidence is that Maidl wanted to pass the wallet to his assistant but was prevented from doing so by the arresting officer. We think the case falls within the general rule hereinabove mentioned and not within any of the exceptions that have been called to our attention.

The order attacked is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

140 Cal.App. 444

PEOPLE v. COFFELT et al.

Cr. 1787.

District Court of Appeal, First District, Division 2, California.

Aug. 17, 1934.

Hearing Denied by Supreme Court Sept. 13, 1934.

1. False pretenses ⇐49(3)

Evidence *held* sufficient to sustain conviction of appealing defendant, as well as his codefendant, for grand theft on theory that latter's fraudulent representations as to assets and income of corporation, for stock of which complaining witness exchanged realty, were made pursuant to unlawful conspiracy between defendants.

2. False pretenses ⇐12

To warrant conviction of grand theft by false pretenses, it was unnecessary to show that complaining witness' property was obtained by defendants, but sufficient to show that she was induced by such pretenses to deliver property to another.

3. False pretenses ⇐49(5)

Evidence, in trial for grand theft by false pretenses, *held* sufficient to sustain jury's implied finding that complaining witness sold land to defendants for cash and corporation stock in reliance on defendants' false representations of material facts as to corporation's assets, income, etc.

4. Criminal law ⇐372(9)

Evidence of defendants' false radio and newspaper statements in foreign language, transactions after that complained of, and other dissimilar transactions, *held* admissible in trial for grand theft by false pretenses to show general plan or scheme and conspiracy to defraud public by false representations in sale of corporation stock, for which complaining witness exchanged land.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

V. L. Coffelt and G. R. Searl were convicted of grand theft, and defendant Coffelt appeals.

Affirmed.

Leo A. Sullivan and John G. Robertson, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendants, V. L. Coffelt and G. R. Searl, were jointly indicted, tried, and convicted on the charge of grand theft. Defendant Searl has not appealed, but defendant Coffelt has appealed from the judgment of conviction and the order denying his motion for a new trial.

The charge was tried upon the theory that a conspiracy existed between the defendants for the purpose of obtaining money and property from the public in exchange for stock of the Lusitania Corporation upon false and fraudulent representations and that the property of the complaining witness, Mrs. Clara M. Thornton, was unlawfully taken in pursuance of such conspiracy. The transcript is very voluminous, containing almost 2,000 pages, and it appears that over 150 exhibits were offered at the trial. We believe, however, that the essential facts for the purposes of this opinion may be briefly stated.

Mrs. Thornton owned a piece of land in Concord consisting of about three acres. She had authorized her agent Adams to sell this property. Adams was approached by defendants with a proposition for the purchase thereof. After certain negotiations, in which the purchase price of $3,000 was practically agreed upon as a basis for the deal, Mrs. Thornton finally exchanged her property for the sum of $500 and 125 shares of the preferred stock of the Lusitania Corporation. Mrs. Thornton previously knew nothing of said corporation and relied upon written and oral statements given and made to her through her agent. Among the oral representations made by defendant Searl to said agent and communicated by him to Mrs. Thornton were the

following: "That they had the Lusitania building in which they were * * *; that they also owned the Pittsburg Building and Loan Association and that they owned the Victory Mutual Life Insurance Company and that they had the office of the Pittsburg Building and Loan Company at Pittsburg as a part of their assets." That "the income from the Victory Mutual was approximately a thousand dollars a month." "That the Lusitania building had a very good class of tenants and they were paying good rental prices and the property was considered a very valuable piece of property." That the University of California was "one of their tenants occupying a group of offices there in that building." That the "Lusitania Company was taking in quite large amounts of money" and "that it was a good, profitable concern." These and other representations which were made for the purpose of inducing Mrs. Thornton to part with her property were shown to be false and fraudulent.

[1] As above stated, the oral representations in the Thornton transaction were made by defendant Searl. We do not believe that appellant seriously questions the sufficiency of the evidence to sustain the conviction of his codefendant Searl, but appellant does contend that there is no evidence connecting him with the crime charged. In our opinion this contention is without merit. There is abundant indirect evidence in the record to sustain the implied finding that an unlawful conspiracy existed between appellant and his codefendant, Searl, and that the representations made by defendant Searl in the Thornton transaction were made pursuant to and in furtherance of the objects of such conspiracy. It may be here noted that the jury was fully and fairly instructed on the subject of conspiracy and that no exception is taken upon this appeal to the giving of any of said instructions.

We will summarize briefly some of the evidence relied upon to establish the conspiracy between the defendants Searl and Coffelt. Coffelt acquired for a nominal sum the charter of an inactive assessment mutual life insurance association known as the Victory Mutual Life Insurance Association. In promoting this venture he conceived the idea of operating a building and loan association in conjunction therewith in order that the dues and assessments of the members of the life insurance association might be deducted from said members' deposits in the building and loan association. Coffelt met with Searl and after the lapse of some time they finally acquired through certain fictitious transactions the charter of a practically dormant building and loan association known as the Pittsburg Building & Loan Association. Their scheme contemplated the incorporation of a holding company to be known as the Lusitania Corporation and the sale of the stock thereof. Said corporation was organized by defendants in Nevada and after considerable effort involving false representations by defendants to the commissioner of corporations of this state, they ultimately obtained a permit to sell said stock. Defendants then launched upon an intensive sales campaign with defendant Coffelt acting as sales manager. This campaign was directed largely to selling the stock to the Portuguese people in Alameda county, and at the same time a concerted effort was made to obtain depositors in the building and loan association. The name Lusitania was adopted because of its strong appeal to the Portuguese people. In order to impress the prospects with the magnitude of the plan, defendants published pamphlets stating that the corporation was "organized to own, operate and manage financial institutions and their affiliated companies, building and loan association companies, insurance companies, banking companies and mortgage companies operated on the Pacific Coast and in the states of California, Oregon, Washington and Nevada." In the campaign Coffelt hired the salesmen and gave them their instructions. He arranged for extensive radio broadcasting and newspaper advertising to supplement the work of said salesmen. The radio and newspaper advertising was done in the Portuguese language, but the evidence showed that the material for this advertising was either written or approved by defendant Coffelt. Much of this material was false and was similar in its nature to the false representations made in the Thornton transaction. It appears that Coffelt as sales manager in talking to his salesmen stated as follows: "You fellows are not delivering. You have got to bring in the money. These Portuguese people have money, they have it under their mattresses and in cans. It is up to you fellows to bring it in. If people can't swim, let them sink. Bring in the money. I don't care how you get it, but bring it in." The campaign continued over several months before and after the Thornton transaction, and although a large amount of stock was sold and a large amount of deposits were obtained for the building and loan association, the whole structure finally collapsed and the Lusitania Corporation was found to be hopelessly insolvent. It would serve no useful purpose to set forth in detail the entire history of the working out of the scheme of these defend-

ants. They were in active control of the sales campaign and of the management of the Lusitania Corporation and the building and loan association. Suffice it to state that the record is replete with false and fraudulent representations made by them and their agents in said sales campaign and shows that they caused many fictitious or dummy transactions to be put through the books of the corporation and the association. This evidence amply sustains the implied finding of the existence of an unlawful conspiracy between said defendants and the implied finding of the taking of the property of Mrs. Thornton in pursuance thereof. While there is no evidence that appellant Coffelt personally made any of the fraudulent representations to Mrs. Thornton, it is significant to note that he was present when the purchase of her property was first discussed with her agent and that he arranged the fictitious transaction whereby it was made to appear that the stock which Mrs. Thornton received for her real property was being sold for cash as required by the permit from the corporation commissioner.

[2] Appellant further contends that nothing of value was received by him from the Thornton transaction. Perhaps the record fails to show that appellant personally profited directly by the Thornton deal. At the suggestion of appellant the stock certificate was made out in favor of one Rose, a salesman in the stock selling campaign. The Thorntons were requested to make out the deed to one Jack Frietas who had been acting as Portuguese interpreter for one of the salesmen. The deed was so made out and Frietas then signed certain papers concerning which he knew nothing but which were in fact an application for a loan from the Pittsburg Building and Loan Association, a promissory note in favor of said association for $5,400 and a deed of trust covering the Thornton property. There was much conflict in the statements subsequently made by the defendants regarding this transaction. In appellant's brief it is stated that out of the $5,400 loan, $500 went into escrow for the cash payment to the Thorntons, that $2,500 went to the Lusitania Corporation as the purchase price of the stock received by Mrs. Thornton by indorsement of the certificate issued to Rose, that $2,000 went to one Eyre who was in charge of the "building program for the Lusitania" to pay off certain overdrafts and that $400 was retained by the Pittsburg Building & Loan Association to cover costs in the transaction. It appears that Rose and Frietas merely acted as dummies in consummating this deal. The fact, if it be a fact, that appellant may not have received the property or the proceeds of the loan, directly or indirectly, is wholly immaterial. We must assume in discussing this contention that the property of Mrs. Thornton was obtained from her by the false pretenses of the defendants and under these circumstances it was not necessary to show that the property was obtained by the defendants themselves, but it was sufficient to show that, induced by such false pretenses, the complaining witness delivered the property to a third party. People v. Woods, 59 Cal. App. 740, 212 P. 41; 25 C. J. 606.

[3] Appellant further contends that there is no evidence to show that Mrs. Thornton was induced to sell her property in reliance upon any false representation of a material fact. Under this heading appellant deals only with the false representation regarding the ownership of the Lusitania building and claims that "it is inherently improbable that the Thornton transaction was predicated" upon said representation. Appellant's argument ignores the other numerous false representations regarding the assets, income and financial prosperity of the corporation. These were all representations of material facts and there was ample evidence to sustain the jury's implied finding that Mrs. Thornton parted with her property in reliance thereon.

[4] The remaining contentions of appellant all relate to the admission of evidence not directly connected with the Thornton transaction. Appellant refers to the testimony concerning false statements made over the radio and in the newspapers, which statements were made in the Portuguese language and were neither heard by nor communicated to Mrs. Thornton or her agent. He also refers to evidence of other transactions occurring after the Thornton transaction had been completed. He also claims that evidence was admitted regarding transactions which were not similar in character to the Thornton transaction. While appellant concedes that it is proper to admit evidence of similar offenses in certain cases, he contends that none of the elements justifying such procedure are present in the instant case. In our opinion there was no prejudicial error in admitting the testimony to which appellant has called our attention. The prosecution sought by indirect evidence to prove that the defendants had entered into an unlawful conspiracy for the purpose of defrauding the public by false pretenses in the sale of the stock in the Lusitania Corporation. In order to show the plan or scheme, to establish the guilty intent and to

prove that an unlawful conspiracy existed between said defendants, the evidence complained of was properly admitted. People v. Shurtleff, 113 Cal. App. 739, 299 P. 92; People v. Collier, 111 Cal. App. 215, 295 P. 898; People v. Cordish, 110 Cal. App. 486, 294 P. 456; People v. Robinson, 107 Cal. App. 211, 290 P. 470; People v. Sampsell, 104 Cal. App. 431, 286 P. 434; People v. Whiteside, 58 Cal. App. 33, 208 P. 132; 8 Cal. Jur. 69; 5 Cal. Jur. 521. While much of said testimony involved representations made in a foreign language to other persons and while other transactions were shown, some of which were similar and others not similar to the Thornton transaction, we believe that all of said testimony was admissible as tending to show a general plan or scheme to defraud the public by means of false representations and as tending to show that an unlawful conspiracy existed between the defendants for that purpose.

The judgment and order denying a new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

140 Cal.App. 295

MYERS v. CITY OF CALIPATRIA.

Civ. 1096.

District Court of Appeal, Fourth District, California.

Aug. 2, 1934.

1. Municipal corporations ⇐164

Board appointing statutory officer, whose salary is fixed by city ordinance, cannot reduce it by minute order.

2. Officers ⇐99

Officer, agreeing before his appointment to accept reduced salary and accepting it after earning it, is bound by such agreement.

3. Municipal corporations ⇐162(1)

City council's minute order, reciting appointment of city clerk as city attorney at salary fixed by ordinance, with reservation that city should be at no further expense for deputy city clerk, *held* not to contemplate payment of deputy clerks' salaries by such appointee or reduction in his salary as clerk.

4. Municipal corporations ⇐131

Whether office of city attorney of city of Calipatria should be filled was discretionary with city council (St. 1883, pp. 267, 277, §§ 852, 879, as amended).

5. Municipal corporations ⇐163

City clerk, accepting appointment as city attorney by council, with full knowledge of circumstances, must be presumed to have acquiesced in arrangement, shown by council's minute order, for payment of compensation fixed by ordinance, with reservation that city should be at no further expense for deputy city clerk, so as to preclude recovery from city of sums voluntarily paid deputy clerks by him.

6. Municipal corporations ⇐163

Illegality of city council's minute order, showing appointment of city clerk as city attorney at salary fixed by ordinance, with reservation that city should be at no further expense for deputy clerk, would not authorize his recovery from city of sums paid to deputy clerks by him, in absence of compulsion or coercion.

7. Payment ⇐84(1)

Party voluntarily paying demand, with knowledge of its illegality or in ignorance or misapprehension of law, cannot recover amount paid.

8. Payment ⇐87(2)

To render payment involuntary and hence recoverable, there must be actual or threatened exercise of power, actually or supposedly possessed by payee, over person or property of payor without other means of immediate relief than by advancing money.

9. Municipal corporations ⇐163

City clerk, accepting appointment as city attorney, with understanding, embodied in council's minute order, that city should be at no further expense for deputy clerk, *held* not entitled to recover from city amounts voluntarily paid deputy clerks by him.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by P. N. Myers against the city of Calipatria. From a judgment of dismissal, plaintiff appeals.

Affirmed.

P. N. Myers, in pro. per.

W. I. Wilson, of Brawley, for respondent.

MUNDO, Justice pro tem.

The plaintiff had been serving the city of Calipatria as its elected city clerk at a salary

fixed by ordinance in the sum of $100 per month. By the same ordinance the salary of its deputy city clerk was fixed at $80 per month, the salary of its city attorney at $75 per month, and the salary of the deputy tax collector at $75 per month.

On April 19, 1928, while the plaintiff was so serving as city clerk, the following minute order was made and entered by the city council of defendant city: "On motion of Councilman Montgomery, seconded by Councilman Gullet, and carried, P. N. Myers was appointed to the office of city attorney, to take effect May 1st, 1928, he to be paid the compensation fixed by ordinance, viz.: $75.00 per month, but with the reservation that the city shall be at no further expense for a deputy city clerk as long as said appointment shall remain in force." On the same day plaintiff was also appointed deputy tax collector. He served in all three capacities until October 5, 1929.

During the period from May 1, 1928, to October 5, 1929, plaintiff appointed certain deputy clerks whose total amount of earned salary was the sum of $1,025, which he alleges he paid out of his own money for the use and benefit of the city.

On July 14, 1931, almost two years after plaintiff had left the employ of the city, a claim for the money so paid was presented to and rejected by the city council. This action was then brought to recover the sum so paid. The defendant demurred to the second amended complaint generally and specially, which demurrer was by the court sustained without leave to amend, and judgment of dismissal was entered in favor of the defendant. Upon this appeal, taken by the plaintiff, the question involved is: Does the appointment of a city attorney by the city council of a city of the sixth class, subject to a reservation that the city shall be to no further expense for a deputy clerk as long as said appointment shall remain in force, authorize the city attorney, so appointed, to pay the salaries of deputy clerks, and, thereafter, collect the same from the city?

Plaintiff contends that: (1) The effect of the minute order was to compel him to pay the salaries of the deputy clerks or be deprived of his appointive offices. (2) If an officer accepts an office, the compensation of which it has been attempted illegally to reduce, and receives the compensation at a reduced rate, he is not estopped from claiming the balance as fixed by law. (3) The amount of compensation as fixed by law may not be changed by agreement, and any agreement attempted to be made which provides for compensation different from that fixed by law is void as against public policy.

[1, 2] The appointing board has no power by minute order to reduce the salary of a statutory officer when fixed by ordinance. Where the officer actually agrees to the acceptance of the reduced salary, before his appointment, and, after the salary had been earned, does so accept it, the officer will be held bound by his agreement and contract, the same as in any other case. De Boest v. Gambell, 35 Or. 368, 58 P. 72, 353.

[3] The minute order did not require plaintiff to pay any salaries. There is nothing in the order which, by any fair construction, can be interpreted to contemplate the payment of money by any one, and certainly no construction could be placed upon said order which would give rise to a conclusion that the order contemplated a reduction in plaintiff's salary as clerk.

[4, 5] It was discretionary with the city council whether the office of city attorney should be filled or not. Municipal Corporation Act, §§ 852, 879 (St. 1883, pp. 267, 277, as amended). Plaintiff's acceptance of the office was entirely optional with him; his refusal to accept could not have prejudiced his rights as city clerk. Having accepted the appointment with full knowledge of the circumstances it must be presumed he fully acquiesced in the arrangement. The payments made by plaintiff apparently were made without any protest on his part. This may properly be construed as a further indication that the payments were voluntary.

If the plaintiff were compelled to pay the salaries of the deputy clerk in order to protect his rights as clerk, or even to protect his rights as city attorney, a different situation would be presented; but where, as here, certain arrangements are made in advance of the appointment, and such arrangements have been fully executed and performed, the appointee will be held to them. It is one thing to agree with an officer before he enters upon his term of office as to the compensation he should receive, and quite another to hold over him, while in office, the menace of a removal therefrom unless he consents to a reduction of his salary and by that means induce him to consent to such a reduction. Nelson v. City of Superior, 109 Wis. 618, 85 N. W. 412; Hobbs v. Yonkers, 102 N. Y. 13, 5 N. E. 778.

[6, 7] There is nothing in the second amended complaint to warrant a conclusion that the payments made by plaintiff to the deputy

clerks were not what is known in law as voluntary payments, free from duress. If, as plaintiff contends, the minute order was illegal and void, it could not of itself constitute grounds for relief. There must be, in addition, some compulsion or coercion attending the order, which controlled the party making the payments. As said in Brumagim v. Tillinghast, 18 Cal. 265, at page 271, 79 Am. Dec. 176: "It is the compulsion or coercion under which the party is supposed to act which gives him a right to relief. If he voluntarily pay an illegal demand, knowing it to be illegal, he is of course entitled to no consideration; and if he voluntarily pay such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, for it would be against the highest policy to permit transactions to be opened upon grounds of this character."

[8] What constitutes the compulsion or coercion which the law recognizes as sufficient to render a payment involuntary is often a question of difficulty. It may be said in general that there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment from which the latter has no other means of immediate relief than by advancing the money. Bucknall v. Story, 46 Cal. 589, 13 Am. Rep. 220.

[9] Reading the second amended complaint in the light of these rules, and assuming that the minute order was void, the payments made by appellant must be deemed to have been voluntary. It evidently was the mutual understanding of the council and the plaintiff that in appointing him city attorney the city would not, as long as the appointment remained in force, be required to pay the salary of a deputy city clerk. Also, it seems reasonable to conclude that if the services of a deputy clerk should become necessary the council would be in a position to handle the matter, and possibly, if necessary, dispense with the services of an attorney. It is not at all likely that the council would have appointed plaintiff if it had been suggested or intimated by him that he claimed, or would claim, that the city should pay the salary of a deputy clerk during the period of his appointment as city attorney. City of Lexington v. Crane, 105 Ky. 779, 49 S. W. 787, 50 S. W. 1106; De Boest v. Gambell, supra. The plaintiff did not have to accept the appointment of city attorney, and, having accepted it, he was at liberty to resign at any time. No coercion or compulsion was exercised upon him. Whatever action he chose to take regarding the attorneyship could not have affected his rights and salary as clerk, and his appointment as attorney was not conditioned upon the surrender of any right, privilege, or emolument appertaining to the office of attorney. Plaintiff understood, and by his own conduct assented to, the arrangement. If he voluntarily paid the salaries of the deputy clerks, knowing full well that the city under the arrangement was not to be held for said salaries, he should not at this late date be allowed to recover from the city. Coyne v. Rennie, 97 Cal. 590, 32 P. 578.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

140 Cal.App. 318

PEOPLE v. SEMONE.

Cr. 1354.

District Court of Appeal, Third District, California.

Aug. 4, 1934.

1. Homicide ⇐254

Evidence supported conviction of second degree murder arising out of firing of pump gun at trespassing hunters.

2. Homicide ⇐23(2), 146

When unlawful act which results in death is deliberately performed by assailant who knows that his conduct endangers life of another and is executed without provocation or sudden passion, malice is presumed, and killing constitutes murder of second degree, when it is not perpetrated by means of any kind of premeditated killing (Pen. Code, § 189).

3. Criminal law ⇐1166½(6)

Refusal to allow examination of juror on details of newspaper article regarding homicide *held* not prejudicial error, where juror had not formed or expressed opinion regarding guilt of accused based on newspaper article, and wider examination of newspaper article would not have disclosed any actual bias (Pen. Code, §§ 1073, 1076).

4. Jury ⇐131(6)

While reasonable latitude should be granted in examination of jurors on their

voir dire to ascertain their state of mind with relation to presence or absence of bias or prejudice, court should restrict examination of jurors within reasonable bounds so as to expedite trial (Pen. Code, §§ 1073, 1076).

5. Criminal law ⇐823(1)

Entire charge should be construed together, and error cannot be predicated upon omission from single instruction of some exception, condition, definition, or phrase which is properly given in another portion of charge.

6. Homicide ⇐300(3)

Instruction that accused should be acquitted if, as reasonable person, he believed that he was in danger of receiving bodily harm at hands of his assailants and that he fired fatal shot in defense of his person, adequately and properly covered every necessary element of doctrine of self-defense.

7. Homicide ⇐300(3)

Instruction that if, acting as reasonable person, accused believed from circumstances he was in danger of bodily harm, he would be exercising due care even though he shot and killed his assailant, although his assumption subsequently proved to be false, contained sufficient definition of due care and circumspection.

8. Homicide ⇐340(1)

Addition to instruction, which stated that accused would be justified in killing assailant in self-defense if, acting as reasonable person, he believed from circumstances that he was in danger of bodily harm, of statement that whether such circumstances were real or apparently real was for jury to decide, *held* harmless.

9. Criminal law ⇐800(3)

Every legal phrase employed in giving of elaborate charge to jury need not be defined.

10. Homicide ⇐307(1)

Instructions which fully and correctly charged with respect to essential elements of first and second degrees of murder and voluntary and involuntary manslaughter and contained statutory definition of both types of manslaughter *held* not erroneous (Pen. Code, § 192).

11. Criminal law ⇐782(9)

Instruction that accused's proof of mitigating circumstances to justify killing need not be by preponderance of evidence, but only to extent sufficient to raise reasonable doubt as to mitigating circumstances, *held* correct (Pen. Code, § 1105).

12. Criminal law ⇐823(17)

Instruction that, to reduce voluntary killing accomplished without lawful excuse or justification to manslaughter, killing must be done in heat of passion, *held* not erroneous, where instruction purported to charge jury only upon voluntary manslaughter, and other instructions set out necessary elements of murder and manslaughter and defined voluntary and involuntary manslaughter.

13. Criminal law ⇐829(1)

Refusal of requested instructions which were covered by other instructions which were given *held* not error.

Appeal from Superior Court, Stanislaus County; Judge B. C. Hawkins.

John Semone was convicted of murder of the second degree, and he appeals.

Affirmed.

A. J. Carlson, of Modesto, and H. A. Mazzera, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was charged with the murder of Edward Cornwell. He was convicted of murder of the second degree. From the orders and from the judgment which was accordingly rendered, he has appealed.

John Semone leased a vineyard near Modesto upon which he resided with his family. He maintained signs on the property prohibiting hunting and trespassing thereon. December 10, 1933, he overtook and quarreled with two men who were hunting in his vineyard with a dog. Upon ordering them off the premises, one of the men became angry and threatened to shoot him. He fell upon the ground and begged them not to shoot. The affair ended without further demonstration. On the day of the homicide, which was December 16th, the defendant was engaged in cutting willows from an irrigation ditch adjoining his vineyard. He carried with him a pump gun which he placed on the bank beside the ditch where he was working. He said he took the gun with him hoping to get an opportunity to shoot a jackrabbit which he had seen in that vicinity.

On the morning of the last-mentioned day, the deceased, in company with James Davenport, was engaged in hunting quail on the Bald Eagle Ranch, which belongs to the Bank of America, adjoining the defendant's vineyard. They were hunting at a considerable distance from the point where the defendant was working in the ditch. They fired four or

five shots before winging a quail which flew into the vineyard. Following the bird, the hunters ran down between the rows of vines towards the point where the defendant was engaged in cutting willows. When they reached a point 535 feet from the defendant, he picked up his gun and, without warning, fired directly at them, but failed to hit them. Cornwell was about three steps ahead of Davenport, who called to the deceased to stop. Davenport testified that he saw the defendant standing in the ditch with about half of his person exposed to view above the bank. He said that he observed him raise the gun immediately after firing the first shot, and pointing it "right at us" he fired again. The gun was loaded with a shell containing a large slug which is ordinarily used for hunting deer. The slug struck Cornwell in the temple just above the eye and killed him. He pitched forward and fell to the ground, where he lay "with blood and brains oozing from the wound." The defendant saw him fall. Picking up his pruning shears he ran towards his house flourishing his gun in one hand and the shears in the other. Davenport observed that his companion was seriously injured and he ran for aid through the vineyard towards the home of his brother-in-law, who lived near by. His course took him towards the ditch from which the defendant had fired the fatal shot. He saw the defendant running away and called to him to stop, saying, "You have killed a man." The defendant indicated that he heard the call, for he waved his gun and shears above his head, but continued to run towards his house. Davenport reached the home of his brother-in-law and promptly telephoned to Modesto for aid. Within half an hour an officer arrived in an automobile. Cornwell was promptly removed to a hospital at Modesto, where he died within a few hours.

The officer went immediately to the home of the defendant, where he found him in company with his two sons and the other members of his family. Upon being asked why he shot Cornwell, the defendant replied, "Why didn't he get off my place when I shot?" The gun with which the deceased had been shot was delivered to the officer, but the cartridges had been removed from the magazine by one of the defendant's sons before the officer arrived. Two cartridges loaded with number five chilled shot were handed to the officer with the claim that they had been taken from the magazine of the pump gun, and that it contained no cartridges loaded with slugs. The defendant said he did not know that any of the cartridges which were used in the gun contained slugs.

At the trial the defendant testified that the hunters with whom he quarreled in his vineyard six days before the homicide occurred were accompanied by a dog which was colored the same and looked like the dog with Cornwell and Davenport at the time of the homicide. He gave the impression that he thought they were the same men with whom he quarreled on the previous occasion. The defendant told a very improbable story of Cornwell and Davenport firing directly at him several times and of the shot falling about him so that he was compelled to raise his arms to protect his head and face from injury. Davenport testified positively that they did not fire their guns while they were in the defendant's vineyard, and upon the contrary, that they only fired at quail four or five times while they were in the adjoining field far beyond a point where it was possible for the shot to reach him. The defendant did testify that he fired his pump gun into the air and that he did not "intend to kill anybody."

Upon appeal it is contended the verdict and judgment are not supported by the evidence for the reason that there is a lack of proof of malice on the part of the defendant and because the record shows that the homicide was merely the result of an accident; that the court erred in unduly restricting the examination of jurors upon the voir dire, and in giving and refusing to give to the jury certain instructions.

[1, 2] The verdict and judgment convicting the defendant of murder of the second degree are adequately supported by the evidence. Mr. Davenport testified that he saw the defendant deliberately point his pump gun at them when he fired the fatal shot. It is asserted the defendant did not know the cartridge which was fired by him when Cornwell was killed contained a leaden slug. It is claimed that he believed it contained only small bird shot which could inflict no injury to the men at a distance of over 500 feet. However, the cartridge did contain a large slug which killed Cornwell. The cartridges which remained in the magazine of the gun after the fatal shooting were removed before the officer arrived.

The defendant appears to have had a fair and an impartial trial. The serious question in this case is whether the defendant knew, or by the exercise of ordinary care, should have known, that the pump gun was loaded with shells containing leaden slugs, for it is entirely reasonable to assume that if he supposed they were loaded only with small bird shot he could not have anticipated that he

would inflict bodily injury upon the men upon whom he fired at a distance of 535 feet. But this was a problem for the determination of the jury under the circumstances of this case. We are of the opinion there is sufficient evidence to support the implied finding that the defendant knew the gun contained shells loaded with slugs at the time he fired the fatal shot. The record shows that the pump gun was previously used with cartridges loaded with slugs for hunting deer. Six days before the homicide occurred the defendant had a quarrel with two men over hunting on his premises, and he testified that they then threatened to shoot him. There is a conflict of evidence, but the fact that the defendant quarreled with these men over hunting on his premises a few days prior to the homicide, that he assumed Cornwell and Davenport were the same men with whom he had the controversy, that he armed himself with the pump gun on the day of the homicide, that he deliberately aimed at the hunters as they approached, that he fired at them twice, and that the shells which remained in the magazine of the gun were removed after the shooting and before the officer arrived, furnish satisfactory evidence that the shooting was done without provocation or in sudden passion, but rather in an unlawful manner with grave danger of fatally injuring those upon whom the defendant fired, and that he knew the gun was loaded with shells containing slugs. These facts must be deemed to have been determined against the defendant and therefore the jury was warranted in finding him guilty of murder of the second degree.

When an unlawful act which results in death is deliberately performed by an assailant who knows that his conduct endangers the life of another, and it is executed without provocation or sudden passion, which would reduce the offense to manslaughter, malice is presumed. Under such circumstances the killing constitutes murder of the second degree, when it is not perpetrated by means of poison, lying in wait, torture, or any other kind of willful, deliberate or premeditated killing. Section 189, Pen. Code; People v. Howard, 211 Cal. 322, 329, 295 P. 333, 71 A. L. R. 1385; People v. Hubbard, 64 Cal. App. 27, 37, 220 P. 315; 13 Cal. Jur. 603, § 18. While malice may be implied from the commission of an unlawful act under the circumstances above related (section 188, Pen. Code; 13 Cal. Jur. 683, § 72), the record in the present case contains evidence which justified the jury in assuming that the defendant actually entertained malice toward the individuals upon whom he fired. Six days before the homicide the defendant quarreled with two men over hunting on his premises. When he fired the fatal shot, he supposed he was shooting at these same men. In support of the judgment we may assume the jury reasonably concluded the defendant was angry at the conduct of these men and the threat which they made against him on December 10th, and that he took his gun with him for the express purpose of firing upon them or at least with the intention to frighten them with it if they chanced to again return to his vineyard to hunt. We are of the opinion the evidence sufficiently supports the verdict and judgment of murder of the second degree.

[3, 4] The attorney for the defendant was not unduly restricted in his examination of jurors upon the voir dire. Upon the examination of Mr. Tatting as a prospective juror, he testified that he had read "about the case" in the Modesto Bee, but he asserted that he had not discussed the case with the members of his family or with any one else. He declared that he had neither formed nor expressed an opinion regarding the guilt or innocence of the accused. He said in that regard: "I did not form any opinion about it because that is all I knew, what was in the paper. * * * I have known papers to make mistakes." The attorney for the defendant then attempted to examine the juror upon the details of a very lengthy newspaper article regarding the homicide in question which appeared in the Modesto Bee, and which article called attention to the fact that the grand jury failed to indict another man by the name of Piiani for the previous shooting of a trespasser in his watermelon patch. The Piiani case had no connection with the case at bar. While the juror admitted that he had read the article referred to and stated that it created no impression on his mind as to the guilt or innocence of this defendant, an objection to an examination of the juror with respect to the details of that particular article was sustained. It is now contended this ruling of the court constituted prejudicial error for the reason that it unduly restricted the examination of this and other jurors for the purpose of ascertaining, under the provisions of section 1073 of the Penal Code, whether they possessed a state of mind which would prevent them from acting fairly and impartially without bias or prejudice to the substantial rights of either party to the suit. There is no prejudicial error in this ruling. Tatting, the prospective juror, was subsequently excused by the prosecution. He did not serve as a juror in the trial of the case. The peremptory challenges to which the defendant was entitled

were not exhausted. The juror admitted that he had read the newspaper article in question and declared that it left no impression on his mind regarding the guilt or innocence of the defendant. He asserted that he could act fairly and impartially upon the evidence which was actually adduced at the trial. The jury was instructed in that regard: "You are instructed to disregard all gossip and rumor and all newspaper accounts of this case which you might have read and all and any information which might have come to you outside of the evidence introduced in this case. You are not only not to allow such gossip and rumor and outside information to influence your own deliberations, but if you have come into possession of any such gossip, rumor or information outside of the evidence you are not to tell your fellow jurors about it or disclose it in the jury room. Confine your deliberations to the evidence introduced and allowed to remain and do not discuss or consider anything else but the evidence in or out of the jury room."

Section 1076 of the Penal Code provides in part: "No person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, circulars, or other literature, or common notoriety; provided, it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him."

In the present case it affirmatively appears that the juror had neither formed nor expressed an opinion regarding the guilt or innocence of the defendant based upon newspaper articles or otherwise. It does not appear that any similar questions were propounded or that objections thereto were sustained with relation to other jurors who were not excused from service. It does not appear that a wider scope of examination of jurors with respect to the details of particular newspaper articles would have disclosed any actual bias on the part of any of the jurors. While it is true that a reasonable latitude should be granted by the court in the examination of jurors on their voir dire with the object of ascertaining their state of mind with relation to the presence or absence of bias or prejudice, it is not only the privilege but it is also the duty of the court to restrict the examination of jurors within reasonable bounds so as to expedite the trial. There was no abuse of discretion in that regard on the part of the court in the present case.

[5-9] The defendant assigns as erroneous the giving of instructions numbered 2, 9, 10, 11, and 20. Upon a careful examination of the entire charge which was given, we are of the opinion the jury was very fully and fairly instructed upon all the essential elements which are involved in this case and that the charge contains no prejudicial error. It is asserted that instruction No. 2 is erroneous and misleading chiefly for the reason that it omits the element of self-defense upon which the defendant relied, and that it contains no adequate definition of the term "due care and circumspection." It is fundamental that the entire charge should be construed together, and that error may not be predicated upon the omission from a single instruction of some exception thereto, condition, definition, or phrase which is elsewhere properly given in another portion of the charge. People v. Brittan, 118 Cal. 409, 50 P. 664. There is no merit in defendant's claim that instruction No. 2 omitted the element of self-defense. The primary object of this instruction was to inform the jury that the defendant should be acquitted if they found that, as a reasonable person, he believed that he was in danger of receiving bodily harm at the hands of his assailants and that he fired the fatal shot in defense of his person. Every necessary element of the doctrine of self-defense appears to have been adequately and properly covered. Moreover, in another instruction which was given at the request of the defendant, the jury was instructed that it was only necessary that the evidence should create a reasonable doubt in the minds of the jurors as to whether the defendant acted in self-defense, to entitle him to an acquittal. We are of the opinion the challenged instruction also contains a sufficient definition of the term "due care and circumspection." That instruction contains the following language in that regard: "The law of self defense is a law of necessity and that necessity may be real or reasonably apparently real. The defendant * * * may act upon appearances, and if the appearances were such as to raise a reasonable apprehension in an ordinarily prudent person of great bodily injury, then the defender will be justified * * *."

The jury was here told in effect that if *acting as a reasonable person* the defendant believed from the circumstances that he was in danger of receiving bodily injury, he would be exercising due care even though he shot and killed his assailant although his assumption subsequently proved to be false. Certainly this instruction was as favorable to the defendant as he was entitled to have given.

A court is not required to specifically define every legal phrase that is employed in the giving of an elaborate charge to the jury. There was no harm in adding to the portion of the challenged instruction above quoted, the following language: "Whether they (the circumstances) were real or apparently real is for the jury to decide upon all the circumstances out of which the necessity springs." The jury had just been informed that it did not matter whether the danger to the defendant was real or just "reasonably apparently real." The jury was told that in either event the defendant would be justified in acting upon the appearances, provided he acted as a reasonably prudent man would have acted under similar circumstances. It was therefore harmless and immaterial whether the jury determined that the defendant's fear of harm was real or merely apparently real.

[10] Instructions numbered 9 and 10 are declared to be erroneous because they omit the doctrine of *involuntary* manslaughter. In this assertion the appellant is mistaken. Instruction No. 9 fully and correctly charges the jury with respect to the essential elements of both the first and the second degrees of murder. Instruction No. 10 correctly and elaborately charges the jury with respect to both voluntary and involuntary manslaughter, including therein the definition of both offenses in the exact language of section 192 of the Penal Code. These instructions are not susceptible of the construction contended for by the appellant. They are therefore not erroneous.

[11] The giving of instruction No. 11 is charged as misleading and erroneous. That instruction covers the principle that one is ordinarily presumed to intend the natural result of his willful or deliberate act. It then quotes verbatim the language of section 1105 of the Penal Code to the effect that upon proof of the commission of a homicide, the burden of establishing circumstances of mitigation, or which justify or excuse the killing, shifts to the defendant. To the language of that section of the Code the court added the following well-established rule of evidence: "But such proof need not be by a preponderance of the evidence, but only to an extent sufficient to raise a reasonable doubt in the minds of the jurors as to his guilt *or the mitigating circumstances.*" The italicized clause is all that the defendant challenges as erroneous. We are of the opinion that language constitutes a correct statement of the law. People v. Elliott, 80 Cal. 296, 305, 22 P. 207. Since by the provisions of section 1105, supra, the burden shifts to the defendant to establish mitigating circumstances or facts which may justify or excuse the willful killing of a human being, after the homicide has been proved, and since the rule is well established that an accused is entitled to an acquittal if a reasonable doubt exists as to any necessary element of the crime with which he is charged, it follows that after proof of the commission of a homicide, it is necessary that only sufficient evidence shall be adduced to raise a reasonable doubt of the existence of mitigating circumstances or of facts which will justify or excuse the homicide. That is exactly what the court informed the jury. That instruction is a correct statement of the law.

[12] Instruction No. 20 is assigned as erroneous for the reason that it charges the jury that in order to reduce the voluntary killing of a human being which is accomplished "without lawful excuse or justification" to manslaughter, it must appear that it was done in the heat of passion. It is contended this language omits to instruct the jury that a charge of murder may also be reduced to involuntary manslaughter by proof of facts which constitute "an unlawful act not amounting to a felony," or which consist of a "lawful act which might produce death in an unlawful manner, or without due caution and circumspection." There is no merit in this contention. The foregoing instruction was predicated on the assumption that the killing was accomplished "without lawful excuse or justification." It is inferred from the language of section 192 of the Penal Code that if the killing occurs as the result of acts which are performed in the exercise of due caution and circumspection, in the absence of elements which constitute murder of the first or second degree, the homicide is excusable. The same reasoning applies to the other elements constituting involuntary manslaughter. The challenged instruction purports to charge the jury only upon the subject of voluntary manslaughter. The jury was elsewhere instructed regarding the necessary elements of both murder and manslaughter. Both voluntary and involuntary manslaughter were properly defined. The giving of instruction No. 20 was therefore not erroneous.

[13] The refusal to give to the jury defendant's instructions numbered 50 and 55 is assigned as erroneous. Defendant's proposed instruction No. 50 was fully covered by plaintiff's instruction No. 2 which was given to the jury by the court. We are of the opinion the definition of the term "due care and circumspection" which is used in defendant's pro-

posed instruction No. 55 was also sufficiently covered by instruction No. 2 which was given in the court's charge. There was therefore no error in refusing to give these two instructions to the jury.

The judgment and the orders are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

140 Cal.App. 317

McINTEE et al. v. AMMERMAN.

Civ. 7937.

District Court of Appeal, Second District, Division 1, California.

Aug. 4, 1934.

New trial ⇐70

In action for death of automobile passenger when car was driven into trailer parked on highway, court *held* not to have abused discretion in granting plaintiffs new trial for insufficient evidence after verdict for driver of automobile.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Letty McIntee and Dennis Bert McIntee, a minor, by Letty McIntee, his guardian ad litem, against Earl S. Ammerman and others. Verdict for defendants, and, from an order granting plaintiffs a new trial as to named defendant, he appeals.

Affirmed.

Harry D. Parker and Raymond G. Stanbury, both of Los Angeles, for appellant.

Pelton & Warne, of Los Angeles, for respondents.

CONREY, Presiding Judge.

This is an action brought by the widow and minor son of one Bert J. McIntee against defendant Ammerman and other defendants to recover damages for the death of said Bert McIntee, caused by the negligence of the defendant Ammerman in the operation of an automobile. The case was tried before a jury, which returned a verdict in favor of the defendants. Plaintiffs moved for a new trial, and the court granted the motion as to defendant Ammerman, upon the ground that the evidence was insufficient to justify the verdict. Defendant Ammerman appeals from the order granting the motion for a new trial.

The grounds of appeal as stated by appellant are: That there was uncontradicted testimony without any conflict whatever which entitled appellant to the verdict which the jury rendered in his favor, and that the trial court abused its discretion in granting the motion. At the time of the accident, the deceased, Bert McIntee, was a passenger in the automobile driven by Ammerman. The accident occurred on the 21st of June, 1929, at about 8 o'clock in the evening. The automobile was driven with great force into a trailer at the rear of a truck parked at the right side of that part of the highway then in use for traffic purposes. The facts are not such as to require an extended statement of the case, or a new exposition of the well-settled law applicable thereto. There was evidence directly tending to prove negligence on the part of appellant, which would have justified a verdict affirming his liability to the plaintiffs. We are satisfied that the court did not commit any abuse of discretion in granting as to appellant, the motion for a new trial

The order is affirmed.

We concur: HOUSER, J.; YORK, J.

140 Cal.App.400

Ex parte MACKAY.

Cr. 2560.

District Court of Appeal, Second District, Division 2, California.

Aug. 15, 1934.

1. Contempt ⇐63(4)

Order and commitment of attorney for contempt for failure to appear at time set for trial of criminal action in which he was counsel for defendant *held* fatally defective in not reciting that such attorney had ability to do such act.

Order and commitment for contempt should have recited, not merely that attorney was not present at hour for court to convene or for some time thereafter, and that he failed to give any sufficient excuse therefor, but also what excuse he did give, if any, and, if none, what was said and

done showing affirmatively that he had opportunity to present excuse.

2. Contempt ⇐63(4)

Contempt order must contain recital of acts constituting contempt, and must state facts, not mere conclusions.

3. Contempt ⇐63(3)

No presumptions can be indulged in contempt proceeding in support of committing court's jurisdiction, but matter must be judged entirely by order, in which all facts necessary to show jurisdiction must appear affirmatively.

Petition by Olin N. Mackay for a writ of habeas corpus.

Application granted, and petitioner discharged.

Olin N. Mackay, of Los Angeles, in pro. per.

Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for respondent.

CRAIG, Acting Presiding Justice.

The petitioner was adjudged in contempt of court upon failure to appear therein until more than one-half hour after the time set for resuming the trial of a criminal action in which he was counsel for the defendants. A fine was assessed and sentence of imprisonment ordered in lieu of payment thereof. Nonpayment of such fine was followed by the issuance of a commitment, whereupon the instant proceeding was instituted.

The events underlying the controversy are recited as follows in a minute order entered at the time: "The trial having been continued on May 18, 1934, to 2:00 o'clock P. M., of May 21, 1934, Olin Mackay being in court at the time of said continuance on May 18th, 1934, and said Olin Mackay having failed to appear in court on said May 21st, 1934, at 2:00 P. M., but said Olin Mackay having arrived in court 38 minutes after 2:00 o'clock P. M. on May 21st, 1934," it was adjudged that petitioner was "guilty of contempt for failure and neglect to discharge his duty as a lawyer to appear in court at the hour to which the trial was continued." By the commitment it appears that petitioner was sole counsel for the defendants in a criminal trial then in progress; that he was present and heard the order of continuance until 2 o'clock p. m. of said date; that at that time the judge, jury, district attorney, witnesses, and defendants were present, but that petitioner did not then appear or give "any sufficient excuse" for his failure and neglect to appear until 38 minutes thereafter, nor justify his absence from the court at the hour to which said trial had been continued.

[1] We are of the opinion that for the purposes of this proceeding it is unnecessary to consider and judicially determine the issue argued at some length, as to whether or not the contempt herein involved, if any there be, is direct or indirect. We find that the order and commitment are fatally defective, measured by any one of several tests. One point which we think is here decisive is that the judgment, either alone or considered in connection with the commitment, contains no finding or recital to the effect that the petitioner had the ability to do the act for the failure to do which he was found and adjudged in contempt. The authorities are uniform that such a finding must appear. Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903; In re Cowden, 139 Cal. 244, 73 P. 156; Ex parte Silvia, 123 Cal. 293, 55 P. 988, 69 Am. St. Rep. 58; Bakeman v. Superior Court, 37 Cal. App. 785, 174 P. 911.

[2] The order must contain a recital of the acts constituting the contempt. 5 Cal. Jur. 950, § 46, and cases there cited. Also facts and not mere conclusions must be stated. In re Shortridge, 5 Cal. App. 371, 90 P. 478. These matters are jurisdictional. Otis v. Superior Court, 148 Cal. 129, 82 P. 853; Overend v. Superior Court, 131 Cal. 280, 63 P. 372, 374. In the last-named case, referring to the portion of section 1211 of the Code of Civil Procedure, which deals with a case of contempt committed in the presence of the court, it is stated: "This provision can only mean that the order must contain a recital of those facts which make out a case of contempt; that is, a recital of those facts which in a case of constructive contempt the law says must be incorporated in an affidavit." It is obvious that, measured by this rule, the order and commitment before us are insufficient. For example, it would not be questioned that such an affidavit would be fatally defective if no allegation of ability to comply with the court's order were contained in it. It would not do to merely recite in such an affidavit some such conclusion as that the petitioner failed to give "any sufficient excuse."

In the early case of Ex parte Rowe, 7 Cal. 181, 183, often cited in later decisions, where the contempt charged consisted of a refusal to answer questions as directed by the trial court, it is said that the questions asked the

witness should have been set forth in the commitment as well as the refusal to answer them. This would be necessary to comply with the requirement that the facts be stated. In the instant proceeding it should have been recited, not merely that the attorney was not present at the hour for court to convene or for some time thereafter, and that he failed to give any sufficient excuse therefor, but also what excuse he did give, if any, and, if none, what was said and done showing affirmatively that he had opportunity to present an excuse.

[3] Keeping in mind always that no presumptions or intendments can be indulged in support of the committing court's jurisdiction, but that the matter must be judged entirely by its order, and that all of the facts necessary to show jurisdiction must appear therein affirmatively, we think the application should be granted and the petitioner discharged, and it is so ordered.

We concur: DESMOND, J.; SCOTT, Justice pro tem.

140 Cal.App. 345

MILLER v. SILVESTER.

Civ. 9042.

District Court of Appeal, First District, Division 1, California.

Aug. 6, 1934.

1. Evidence ⇐359(1), 380

Introduction of photographs made three days after accident of skid marks made by automobile, upon testimony of defendant that photographs correctly portrayed scene and skid marks at time of accident and of photographer as to correct portrayal at time pictures were taken, *held* not error, where correctness of photographs were substantiated by five more witnesses and photographs were offered only as approximate aid in applying testimony.

2. Evidence ⇐380, 474(1)

That photograph is accurate representation of object sought to be shown is sufficient foundation for its admission, and it is not essential that such testimony be given by photographer who took picture, but it may be given by any witness having sufficient knowledge of object to say that photograph is faithful representation thereof.

3. Trial ⇐139(1)

Value of photographs of skid marks introduced in trial of automobile accident case *held* for jury.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Grace E. Miller against Michael Silvester. Judgment for defendant, and plaintiff appeals.

Affirmed.

James Wesolo, of Oakland, for appellant.

Charles V. Barfield, of San Francisco, and Donahue, Hynes & Hamlin, of Oakland, for respondent.

KNIGHT, Justice.

Plaintiff was riding in an automobile driven by one Halpern when it collided with one driven by the defendant, Silvester, at the intersection of Sonoma and Monterey avenues in Berkeley about 7:30 o'clock in the morning; and, on account of the injuries plaintiff received as a result of the collision, she brought this action for damages against Silvester. At the trial the jury found a verdict in favor of Silvester, and from the judgment entered thereon plaintiff prosecutes this appeal, urging as grounds for reversal that the trial court erred in receiving in evidence four photographs taken of the intersection, showing certain skid marks on the pavement, and in allowing defendant and his witnesses to refer to said photographs in connection with the giving of their testimony. The photographs were taken on the third day following the accident. We find no merit in the appeal.

[1-3] Silvester testified that, as he was about to enter the intersection at a speed of 15 miles an hour, he observed the Halpern car some 95 feet away, traveling at a speed of about 35 miles an hour; that, after he (Silvester) was well within the intersection and crossing the same, he heard a screech of brakes, instantly following which the front end of the Halpern car crashed into the running board of his car, turning his car completely around and shoving it over some 12 feet against the iron pole of a power line. He further testified that immediately following the crash he saw the skid marks made by the Halpern car, which extended along the pavement of the street for a distance of approximately 66 feet. He was then shown the photographs in question which he stated correctly portrayed the scene of the accident as it existed on the morning it occurred, including the

skid marks. Thereupon the photographer was produced. He testified that the pictures correctly portrayed said location, including the skid marks, at the time the pictures were taken. The photographs were then received in evidence over plaintiff's objection, following which five more witnesses for the defendant, who either were at the scene of the accident at the time it occurred or arrived there shortly afterwards, testified as to the existence of the skid marks, their length and location on the pavement, and that the conditions as they observed them were correctly reproduced by the photographs.

As held in Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675, testimony that a photograph is an accurate representation of the object sought to be shown is sufficient foundation for its admission in evidence, and it is not essential that such testimony be given by the photographer who took the picture. It may be given by any witness having sufficient knowledge of the object to say that the photograph is a faithful representation thereof. The purpose of using the photographs as evidence in the present case was not, as plaintiff seems to argue, to prove the existence of the skid marks. Such fact was fully established by the testimony of the six witnesses who saw them immediately after the accident occurred. The photographs served merely as an approximate aid in applying such testimony, and for that purpose they were clearly admissible in evidence. (Hayes v. Emerson, 110 Cal. App. 470, 294 P. 765), the question of their value in any event being one for the jury to determine. Gregoriev v. Northwestern Pacific R. Co., 95 Cal. App. 428, 273 P. 76.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

140 Cal.App. 544

PEOPLE v. SCHUNKE.

Cr. 2545.

District Court of Appeal, Second District, Division 1, California.

Aug. 31, 1934.

Criminal law ⇐1168(4)

Where defendant, accused of burglary and robbery, showed alibi in that he was at home of sister, court's action in striking, on its own motion, as incompetent, testimony of defendant's mother that sister's husband was working and sister was ill to explain their absence *held* reversible error, particularly where prosecution emphasized absence of such witnesses in argument (Code Civ. Proc. § 1963, subd. 5).

YORK, J., dissenting.

Appeal from Superior Court, City and County of Los Angeles; Harry F. Sewell, Judge.

Verne Schunke was convicted of robbery and burglary, and he appeals.

Reversed.

Monta W. Shirley, of Los Angeles (Glenn A. Lane, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From a judgment which was rendered against him pursuant to his conviction of each of the crimes of robbery and of burglary, as well as from an order by which his motion for a new trial was denied, defendant has appealed to this court.

No question is raised by appellant regarding the sufficiency of the evidence to sustain the judgment. But since his defense to the charges upon which he was tried consisted in an unsuccessful attempt on his part to establish an "alibi," in that at the time when the offenses were committed he was at a place remote from the scene of the crime, to wit, many miles therefrom and at the home of his sister and her husband, appellant complains of the ruling made by the trial court "of its own motion," by which, in an offered explanation by defendant of the absence of his sister and her husband from the trial of the action, testimony that was given by the mother of appellant, in substance that the sister of appellant was sick and her husband was working, was stricken from the record as "incompetent, irrelevant and immaterial," and thereby withdrawn from the consideration of the jury.

Particularly in view of the fact concerning the family relationship that existed between defendant and the absent witnesses, and the presumed availability of the testimony of the latter in behalf of defendant, not only the applicability of the statutory inference (subdivision 5, § 1963, Code Civ. Proc.) that if

produced the testimony that might have been given by such witnesses would have been adverse to the asserted defense of "alibi" became apparent, but as well the situation thus presented assumed greater magnitude and importance as it affected and related to such "defense." The substance of the pertinent testimony given by the mother of defendant, and which testimony, by order of the trial court, was stricken from the record, was that her daughter was "at home; * * * she is in a delicate condition and is not able to be up"; confined to her bed; attended by a physician: "It has been a week or so she has not been able to be up and around;" that her husband was a foreman in a tire shop and that "he is working."

It was not shown whether either of the absent witnesses had been served with a subpœna to appear at the trial; but manifestly that fact would be immaterial to the point here presented. The question is not whether their failure to appear constituted a legal justification therefor, but rather is whether the offered excuse for the absence of the witnesses was in any wise material as affording an offset to the presumption that, if produced, the testimony of such witnesses would have been adverse to defendant's claim of "alibi." In other words, was the testimony that the sister of defendant was "in a delicate condition; * * * not able to be up," etc., and that her husband was "working," such evidence that the defendant had the right to have the jury consider it in determining what consequence or effect should attach to the fact that such witnesses were not produced, nor their testimony given in evidence—all to the end of reaching a conclusion as to what credence should attach to the testimony given by defendant regarding his "alibi."

The importance to defendant of the proffered evidence cannot be overestimated. An alibi was his sole "defense" to the accusation made against him. He himself testified to his whereabouts at the time when the offense was committed; that is to say, that at such time he was in the presence of his sister and her husband, at their home, which was remote from the scene of the crime. Had the jury believed his testimony in that regard, his acquittal of the charge preferred against him necessarily would have followed. But in accord with the statutory provision to which reference hereinbefore has been had, the jury had the right to expect a corroboration of such statement by defendant from both his sister and her husband; and unless such witnesses were produced, in the absence of a satisfactory reason for their failure to be present, and to testify, the jury was at least authorized to assume that, if given, the testimony of such witnesses would not harmonize with that given by defendant. In other words, but going farther, the presumption of even an unequivocal contradiction of the testimony given by defendant lawfully might have been indulged by the jury; with the possible result that the force of such presumption would outweigh or overcome the other positive evidence adduced in regard to the establishment of the asserted alibi. The "defense" of alibi is equally as legitimate and just as important and critical as any other so-called "defense" which may be made in a criminal action. Ofttimes it is "the only hope" upon which an accused person may rely to establish his innocence; and a defendant who seeks to avail himself of such "defense" should be as fully protected in all the incidental rights appertaining thereto as should any other defendant, whether in the same or another action, who may invoke any other defense to the accusation specified in the indictment or the information filed against him.

If instead of having been charged with the commission of a robbery or a burglary, defendant had been accused of the crime of manslaughter and his defense thereto had been "self-defense," and for asserted reasons, identical with those presented herein for the absence from the trial of his "alibi" witnesses, defendant had failed to produce the only eyewitnesses to the altercation which resulted in the killing of the man for whose death defendant was on trial—would it seriously be contended that a ruling made by the trial court by which was stricken from the record testimony to the effect that one of such witnesses was "at home; * * * in a delicate condition; * * * not able to be up; confined to her bed; attended by a physician; * * *" etc., did not constitute serious error, prejudicial to the substantial rights of defendant?

Supposing that instead of having had two assumedly interested witnesses, defendant had had twenty wholly disinterested witnesses who were expected to testify in support of his "alibi"; and supposing that on the night preceding the day on which they were to give their testimony, at a house party, which all such witnesses had attended, each of them was made quite ill from the effect of ptomaine poison, and by reason thereof on the succeeding day, when he was expected to testify on the trial of the action, was "at home; not able to be up; confined to his bed; attended by a physician," etc., and that on such succeeding day all such facts

were testified by a lay witness; whereupon the court, "of its own motion," on the ground that such evidence was "incompetent, irrelevant and immaterial," ordered all such testimony stricken from the record—is it possible that any one would assert that in such circumstances the defense of defendant had sustained no substantial injury?

Nor is the point now made by respondent herein for the first time that the proffered testimony was given by a lay witness, and not a physician, determinative of defendants' rights in the premises. In the first place, no objection of any sort was made to any of the pertinent questions propounded to the mother of defendant. Nor was any motion made to strike the evidence from the record. As hereinbefore has been indicated, that result was accomplished by the court "of its own motion" and for the stated reason that it was "incompetent, irrelevant and immaterial." For aught that appears, the mother may have been a well-known physician and fully qualified to give expert testimony relating to the physical condition of the sister of defendant. But giving no force to any such possibility, at any rate, in the absence of objection to her qualifications, the testimony of the mother of the young woman that the latter was "in a delicate condition; * * * not able to be up; confined to her bed; attended by a physician," etc., properly should be regarded, at least as in accordance with appearances of the daughter and the observations made thereon by the mother. As far as concerns the "cold" record, the testimony given by the mother should have been regarded by the jury as established facts, and as such should have been carefully weighed in determining what credence should attach to the "alibi" claimed by defendant.

In the case of People v. Clark, 106 Cal. 32, 39 P. 53, 54, wherein an analogous situation was present, the court said: "Ah Wi was present at the time of the robbery, and was not present at the trial. It was competent to show where he was and why he was absent, as otherwise he should have been called as a witness."

Likewise in State v. Remick, 163 Wash. 326, 300 P. 1054, 1055, in the opinion of which the court, in part, commented as follows: "Evidence explaining the absence of a material witness is admissible when failure to produce him would warrant an unfavorable inference against the party not producing him."

To the same effect are numerous authorities cited under ⇐392 of the title "Criminal Law" in each of the several decennial editions of Century Digest. But a case that in its facts is practically "on all fours" with those in the instant case is Melton v. State, 110 Tex. Cr. R. 439, 10 S.W.(2d) 384. It was there held not only that the ruling made by the trial court by which offered testimony similar in many respects to that herein eliminated from consideration by the jury was excluded, constituted error, but also that such error was so prejudicial to the substantial rights of the defendant that because thereof the judgment rendered against him should be reversed.

In the instant case, in addition to the prejudicial effect of the error of the trial court of which complaint is here made, in his argument to the jury the deputy district attorney in charge of the prosecution of the action commented upon the situation as follows: "Thank God there are some honest people left in the world; these people did not come to court and you have a right to assume their testimony would have been adverse to the defendant, as long as they are not here."

It thus appears that the fact that the witnesses to whom reference hereinbefore has been had were not present at the trial of the action, together with the statutory presumption that had they been present and had they given their testimony it would have been adverse to the testimony that was given by defendant, were emphasized by the prosecution to the disadvantage and detriment of defendant.

Although it may be that, as presented, the evidence fairly showed that defendant was guilty of the commission of the offenses of which he was charged, and that even had the evidence that was stricken from the record been permitted to remain therein, the verdict of the jury would not have been different from that which was returned, nevertheless it is impossible for this court, with any degree of assurance, to accurately determine either the exact or the probable effect that such excluded evidence would have produced had it not been withdrawn from the consideration of the jury.

The judgment and the order by which defendant was denied his motion for a new trial are, and each of them is, reversed.

I concur: CONREY, P. J.

I dissent: YORK, J.

140 Cal.App. 460

PEOPLE v. BRUNO.

Cr. 2519.

District Court of Appeal, Second District, Division 1, California.

Aug. 20, 1934.

Rehearing Denied Aug. 31, 1934.

Hearing Denied by Supreme Court Sept. 18, 1934.

1. Kidnapping ⊂⊃1

Seizure of victims and carrying them away against their will with intent and for purpose of committing robbery *held* "kidnapping" for purpose of robbery, constituting crime separate from robbery (Pen. Code, § 209, as amended by St. 1933, p. 2617).

[Ed. Note.—For other definitions of "Kidnapping," see Words & Phrases.]

2. Criminal law ⊂⊃543(2)

Whether showing of sufficient diligence in endeavor to serve subpœnas was made by prosecution so as to permit reading of depositions of absent witnesses into trial record *held* for trial court upon evidence before it.

3. Criminal law ⊂⊃543(2)

Where trial court found that it was impossible for prosecution to produce absent witnesses because they were concealing themselves from process servers and there was no showing that witnesses could have been located, admission of depositions of such absent witnesses *held* not abuse of discretion.

Appeal from Superior Court, City and County of Los Angeles; William Tell Aggeler, Judge.

Sam Bruno was convicted on two counts of robbery in the first degree and on one count of kidnapping for the purpose of robbery, and he appeals.

Affirmed.

Nathan O. Freedman, of Los Angeles (A. William Christlieb, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

YORK, Justice.

Defendant was charged by information with the two crimes of robbery and one charge of kidnaping for the purpose of robbery and was tried by the court sitting without a jury, a jury trial having been waived. The court found defendant guilty as charged in the information, and found the crimes, as charged in counts 1 and 2 thereof, each to be robbery in the first degree; count 3 being a charge of the crime of kidnaping for the purpose of robbery, as denounced by section 209 of the Penal Code, as amended by St. 1933, p. 2617.

As stated by appellant in his opening brief, the questions involved in this appeal are as follows:

"1. What showing of diligence must be made by the prosecution in a criminal cause before the depositions of absent witnesses may be read into the trial record?

"2. Can a defendant be convicted of kidnaping for the purpose of robbery where such kidnaping is merely incidental to the robbery?

"3. Did the trial court err in announcing its decision of guilty as charged before permitting defendant's counsel to argue the case?"

As to the third question raised, the court did not announce its decision of guilty until after counsel for defendant had announced that he had completed his argument as to facts. Evidently the defendant wanted to argue a question of law thereafter to the court. This he was permitted to do. There is no merit in the third point raised by appellant.

[1] As to appellant's second point, section 209 of the Penal Code, as amended in 1933, clearly denounces as kidnaping the acts committed by defendant, as shown by the evidence in this case, to wit, seizing the two victims and carrying them both away against their will, with intent and for the purpose of committing robbery. These acts, as shown by the evidence here, while connected with the robbery, were of such different nature that they constitute an offense which the law regards as a crime distinctly separate from robbery, and visits upon it other and more severe incidents of punishment. Moreover, proof of the crime of kidnaping calls for other evidence than the evidence necessary to prove robbery (People v. Painetti, 210 Cal. 476, 292 P. 965; People v. Clensey, 97 Cal. App. 71, 274 P. 1018; People v. Pickens, 61 Cal. App. 405, 214 P. 1027); and the evidence necessary to prove the robbery was not identically the same as that necessary to prove the kidnaping. Therefore, we hold there is nothing in the second point raised by appellant.

[2, 3] As to the first point raised, as above stated, the degree of diligence used in each case, before depositions of absent witnesses may be used in the trial thereof, is a question depending entirely upon the facts and circum-

stances of each particular case. In the given cause, the trial court found before he admitted the depositions that it was impossible to produce the witnesses by reason of the fact that these witnesses were concealing themselves from process servers and from the service of subpœnas issued for them. There is no showing that, if any of the other things had been done which the defendant alleges should have been done, the parties would or could have been located, and there is nothing to show that a search of the directory, as is suggested by appellant, would have resulted in the location of, or the service upon, the absent witnesses of subpœnas to testify in the given case. It was a matter for the trial court to determine upon the evidence before it, and having determined that they could not be located, in the absence of an abuse of discretion or any showing from which an abuse of discretion could be inferred by this court, we cannot say that there was a resulting miscarriage of justice. The depositions presented showed sufficient facts to justify the court in finding the defendant guilty as charged in the three counts.

The judgment and the order appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

140 Cal.App. 506

NICOLL v. FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO.

Civ. 1117.

District Court of Appeal, Fourth District, California.

Aug. 29, 1934.

Appeal and error ⇐78(3)

Appeal, taken from order sustaining demurrer to portions of complaint before rendition of judgment not in record, must be dismissed for want of jurisdiction (Code Civ. Proc. § 963).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Clara H. Nicoll against the First National Trust & Savings Bank of San Diego. From an order sustaining a demurrer to the first and third causes of action stated in the complaint without leave to amend, and judgments entered in pursuance thereof, plaintiff appeals.

Appeal dismissed.

W. S. Staley, of San Diego, for appellant.

James G. Pfanstiel and John A. Hewicker, both of San Diego, for respondent.

GRIFFIN, Justice pro tem.

This is an attempted appeal, by plaintiff, from an "order sustaining demurrer without leave to amend," to the first and third causes of action of the complaint and from judgments made and entered in pursuance thereof.

The record indicates that on January 4, 1934, the trial court, after argument of counsel, made its written order sustaining the demurrer of the defendant to the first and third causes of action of plaintiff's complaint, without leave to amend, and as to the second cause of action the demurrer was overruled.

Plaintiff, on January 10, 1934, filed her written notice of appeal, appealing from the "order sustaining demurrer without leave to amend, dated January 4, 1934," and from the "order sustaining defendant's demurrer without leave to amend, to plaintiff's first and third causes of action, and from the whole of the said order and any and all orders and/or judgments made and entered in pursuance thereof."

A motion to dismiss the appeal was made on the sole ground that it was taken from an "order sustaining demurrer without leave to amend," and was considered by this court and denied [33 P.(2d) 838], as the notice of appeal referred to both a judgment and order. This was done so that further consideration might be given to the appeal from the judgment and in order that the record might be examined. The record does not contain a copy of any judgment, nor does it disclose the filing of a final judgment in compliance with section 963 of the Code of Civil Procedure, although the notice of appeal refers to a judgment.

In appellant's answer to respondent's motion to dismiss the attempted appeal filed in this court April 26, 1934, she refers to some entry of a judgment of dismissal by the trial court, dated April 10, 1934, the contents of which do not appear in the record before us. However, if this statement in the brief were to be considered, the appeal is not taken from

the judgment; it having been rendered several months after the notice of appeal was filed.

The facts and holding of the court set out in the case of Worth v. Witt, 62 Cal. App. 134, 216 P. 90, are so similar to the instant case that further discussion here would be but a repetition of the decision in that case.

Having attempted to appeal from an order from which the statute gives no right of appeal, no judgment having been rendered at the time the appeal was taken, and no judgment appearing in the record, this court has no jurisdiction. Therefore the appeal of necessity must be, and is, dismissed.

It is so ordered.

We concur: MARKS, Acting P. J.; JENNINGS, J.

STRATTON et al. v. SUPERIOR COURT OF COUNTY OF LOS ANGELES et al. *

Civ. 9775.

District Court of Appeal, Second District, Division 2, California.

Aug. 17, 1934.

Hearing Granted by Supreme Court Oct. 15, 1934.

1. Courts ⇐487(5)

Reason, appearing from another source than verified pleadings, for transfer of case or certification of pleadings to another court, or pendency of other proceedings outside court of first instance, is not ground for such certification (Code Civ. Proc. § 396).

2. Courts ⇐487(5)

Defendants *held* not entitled to transfer of action and counterclaim in municipal court for amounts within its jurisdiction to Superior Court because of their subsequent action therein against plaintiff for damages in larger amount and annulment of contract on which first action was based, pleadings not showing necessity for trial of questions outside municipal court's jurisdiction (Code Civ. Proc. § 396).

3. Courts ⇐488(4)

Superior Court, without jurisdiction of case transferred to it from municipal court, was not required to send it to trial department when called in calendar department, but had power to remand it to municipal court (Code Civ. Proc. § 396).

Proceeding for a writ of review by Cora L. Stratton and another to review an order of the Superior Court of the County of Los Angeles, retransferring to the municipal court of the city of Los Angeles, a cause transferred to the Superior Court on the motion of petitioners as defendants therein.

Transfer to the Superior Court annulled, and retransfer to the municipal court affirmed.

J. M. Clements and J. V. Brewer, both of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, W. B. McKesson, and Stanley E. Fox, all of Los Angeles, for respondents.

CRAIG, Acting Presiding Justice.

An action and counterclaim pending in the municipal court of the city of Los Angeles were transferred to the Superior Court on motion of the defendants, on the ground that the latter had subsequently filed in the Superior Court a suit against the plaintiff for damages and praying annulment of the contract upon which the first action was based. When called for trial in the Superior Court the cause was ordered retransferred to the municipal court, and defendants pray a review of said proceedings.

[1] The respective demands in the municipal court were less than $2,000, whereas fraud and damages in a larger amount were alleged in the subsequent action in the Superior Court. It does not appear that the pleadings in either case revealed any relationship between the two or that both arose from the same transaction. The order of transfer recited, however, that the second action constituted "a counterclaim to this action and involves the determination of questions not within the jurisdiction of this court." By the statute under which such order was entered it is provided, in part: "If an action or proceeding is commenced in a court which has jurisdiction of the subject matter thereof as determined by the complaint, and it thereafter appears from the verified pleadings, or at the trial, that the determination of the action, or of a counterclaim arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or of a cross-complaint, will necessarily involve the determination of questions not within the jurisdiction of the court,

*For subsequent opinion see 43 P.2d 539.

in which the action is pending, the court, whenever such lack of jurisdiction appears, must suspend all further proceedings in the action or proceeding, and certify the pleadings * * * to a court, having jurisdiction thereof." Code Civ. Proc. § 396.

It is at once patent that it may not appear from another source than that so provided that there may be reason to transfer or certify the pleadings as above provided; nor is the pendency of other proceedings outside the court of first instance a ground for such certification specified in said section. Arroyo Ditch & Water Co. v. Superior Court, 92 Cal. 47, 28 P. 54, 55, 27 Am. St. Rep. 91, involved an action which was transferred to the Superior Court upon the erroneous theory that it had jurisdiction, and after trial judgment was rendered from which the unsuccessful party sought a review of the proceedings, which was granted. The Supreme Court there said: "Although the exercise of jurisdiction by the superior court will be presumed to have been rightful, yet if it appears upon its own records of its action in any matter that it had not acquired jurisdiction either of the subject-matter, or of the parties, this presumption is destroyed. It cannot exercise jurisdiction in any instance until after it has acquired it, and it can acquire it only in the mode prescribed by statute. Merely certifying to the county clerk by a justice of the peace the pleadings in a case pending before him does not confer jurisdiction upon the superior court of a matter of which jurisdiction has not been conferred upon it by the constitution." In Raisch v. Sausalito Land & Ferry Co., 131 Cal. 215, 63 P. 346, a party attempted to appeal to the Supreme Court from a judgment of the Superior Court after transfer thereto and trial of a cause praying $299. The appeal was dismissed for like reasons, upon the authority of Arroyo Ditch & Water Company v. Superior Court, supra.

[2] The citation of cases by petitioners wherein a municipal or justice's court was restrained from passing upon the same issues, or a transfer was required by other and different conditions and statutes, are not helpful to their cause herein. The quoted section plainly specifies as the single ground for certifying pleadings to a court having jurisdiction thereof that they show the necessity for a trial of questions over which the certifying court has not jurisdiction. This is not such a case.

[3] It is contended that when called in the calendar department it had no authority other than to send the case to a trial department, and was without power to remand the same to the municipal court. But the Superior Court had no jurisdiction of the case, and all proceedings dependent upon the order of transfer thereto, were null and void. Hopkins v. Anderson, 218 Cal. 62, 21 P.(2d) 560. No authority is cited nor do the petitioners suggest how they could have benefited by assignment to a trial department and remand of the case therein to the court vested with exclusive jurisdiction, and whose order and subsequent steps based thereon were void. Egan v. McCray (Cal. Sup.) 28 P.(2d) 18.

The transfer to the Superior Court is annulled, and the retransfer to the municipal court is affirmed.

We concur: DESMOND, J.; SCOTT, Justice pro tem.

McDANELS v. GENERAL INS. CO. OF AMERICA et al. *

Civ. 8641.

District Court of Appeal, Second District, Division 2, California.

Aug. 30, 1934.

Rehearing Granted Sept. 29, 1934.

Insurance ⇐311(1)

Assured's violation of co-operation clause in automobile liability policy is valid defense against injured party's action on policy.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by James L. McDanels against the General Insurance Company of America and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Koenig & Brunton, of Los Angeles, for appellant.

Joe Crider, Jr., of Los Angeles, for respondents.

CRAIG, Acting Presiding Justice.

Plaintiff McDanels was injured in an automobile accident and a judgment for person-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 36 P.2d 829.

al injuries there sustained was recovered against one Haag. Prior to the accident Haag had secured a liability insurance policy from respondent companies. At the time of trial of the personal injury action Haag did not appear. Numerous continuances had been ordered because of his absence or inability to be present. McDanels then brought suit against respondents upon the insurance policy. Judgment was rendered against him, and he has appealed.

Prior to trial and rendition of judgment against the insured personally he was repeatedly requested by counsel for the companies to aid them in obtaining and furnishing information and witnesses and in preparing a defense in the action against them on the policy, but he failed so to do; and although he promised to be present at the trial, he could not be found. The policy contained a provision requiring that the assured report accidents, claims, suits, and co-operate with the companies in securing information, evidence, and attendance of witnesses, and in effecting settlements, preparing for trial, and prosecuting appeals. Upon such a condition of the case it is not possible to say as a matter of law that the insurers suffered no detriment from a failure to comply with the provisions last mentioned.

The principal question presented is whether or not a person injured by the automobile of another may after judgment against the latter for damages recover from his insurers upon a policy of insurance containing the above-mentioned clause as well as the usual provisions permitting the maintenance of an action notwithstanding insolvency, etc., of the insured, where the negligent party unquestionably has violated the provision first above stated.

Since the trial of the instant case our Supreme Court, in the leading case of Hynding v. Home Accident Insurance Co., 214 Cal. 743, 7 P.(2d) 999, 85 A. L. R. 13, has definitely decided this question. There, as here, the policy contained a clause "requiring the assured to report accidents, claims, and suits, and to co-operate with the company in securing information, evidence, the attendance of witnesses, and in effecting settlements and in prosecuting appeals." Also, as here, the policy contained no express forfeiture provision for violation of this stipulation. After extensive review of authorities the opinion concludes: "We see no escape from the conclusion that the violation of the co-operation clause by the assured was a valid defense against the injured party's action. We say this with the knowledge that in some cases it may work a hardship on such party, who is ordinarily in no position to force the assured to co-operate." In view of this authority the law is, we think, settled in this jurisdiction on the issues presented on this appeal.

The judgment is affirmed.

We concur: DESMOND, J.; WILLIS, Justice pro tem.

140 Cal.App. 362

O'BRIEN v. MUNICIPAL COURT OF CITY OF LOS ANGELES, COUNTY OF LOS ANGELES et al.

Civ. 9755.

District Court of Appeal, Second District, Division 2, California.

Aug. 8, 1934.

1. Exceptions, bill of ⇐32(1)

Judge of municipal court properly refused to settle bill of exceptions, where court had lost jurisdiction through expiration of statutory period (Code Civ. Proc. §§ 650, 1054).

2. Appeal and error ⇐460(1)

Writ of supersedeas does not issue as of right, but only where it appears necessary to protect appellant's rights, and therefore supersedeas will not issue where it is not probable that appellant is entitled to relief denied, or where there is no basis for appeal.

Petition for writ of supersedeas by E. O'Brien against the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, and Honorable Le Roy Dawson, Judge thereof.

Petition denied.

George P. Cook, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Fred M. Cross, Deputy Co. Counsel, and Vinetz & Gitelson, all of Los Angeles, for respondents.

CRAIG, Justice.

It appears from the petition that upon the trial of an action in the municipal court of Los Angeles judgment was rendered in favor of the defendant, notice of appeal was served and filed by the plaintiff, a motion for an extension of time to prepare and serve the bill of exceptions was granted, and that the same was thereafter filed. Objection by the defendant to its settlement was sustained. Thereafter the plaintiff instituted a proceeding in the appellate department of the superior court praying a writ of mandamus to require settlement thereof. This petition was denied, whereupon an appeal was taken from that ruling to the District Court of Appeal. It is sought now to obtain a writ of supersedeas directed to said superior court restraining proceedings upon the appeal thereto from the municipal court pending decision upon the appeal from said order dismissing the petition for a writ of mandamus.

The answer of respondents sets forth that after judgment rendered in the municipal court, motion for new trial, and denial of the motion, petitioner herein was served with notice of the ruling and the date of such service was December 8, 1933; that on January 25, 1934, petitioner served on counsel for the other side notice of intention to move the municipal court on the 31st day of January, 1934, for an order giving him to and including the 15th day of February within which to prepare, serve, and file a proposed bill of exceptions; that on or about February 5, 1934, Honorable H. B. Landreth, presiding in division 10 of said municipal court, and not being the judge who tried the case, granted petitioner to and including February 15, 1934, within which to prepare, serve, and file a proposed bill of exceptions; that this order was without the consent of defendants in said action; that petitioner herein did serve said proposed bill of exceptions on the 15th day of February, 1934, but did not file the same with the clerk of said court until the 24th day of February, 1934.

[1] From these additional facts which are not controverted, it is apparent why the judge of the municipal court refused to settle the bill of exceptions and why the superior court refused to issue its mandate requiring the municipal court to settle it. The municipal court had lost jurisdiction through the lapse of more than thirty days after the 18th day of December, 1933, which, in the absence of a legal order extending time, was the last day on which petitioner herein could have filed a proposed bill of exceptions with the clerk of the municipal court. Code Civ. Proc. § 650. The extension of time provided for in the order signed by Judge Landreth was to a date beyond the period of thirty days allowed upon proper showing by section 1054, Code of Civil Procedure. The municipal court was wholly without jurisdiction to act in the matter. Parry v. Campbell, 72 Cal. App. 755, 238 P. 130; Cameron v. Arcata, etc., R. R. Co., 129 Cal. 279, 61 P. 955.

[2] A writ of supersedeas does not issue as a matter of right, but only where it appears to the court that it is necessary to protect the rights of an appellant. People v. Jackson, 190 Cal. 257, 212 P. 4. Where it is not probable that the appellant is entitled to the relief denied by the judgment from which an appeal has been taken, supersedeas will not issue. Much less would an appellate court be justified in granting such a writ where, as here, it seems clear from the record presented that there is no basis for the appeal.

The petition is denied.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

140 Cal.App. 478

PEOPLE v. PHENEY.

Cr. 2556.

District Court of Appeal, Second District, Division 1, California.

Aug. 24, 1934.

Criminal law ⇐1186(4)

In prosecution for burglary, allowing introduction of confession without proof of its legality and without proof of an entry with intent to commit felony or petty larceny, and evidence in regard to finding burglarious tools in defendant's possession, *held* not reversible error, where accused had not objected to introduction of evidence and evidence of defendant's guilt was overwhelming (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

James A. Pheney was convicted of burglary, and he appeals.

Affirmed.

David Welts, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

HOUSER, Justice.

By an information filed against him, defendant was accused of the commission of the crime of burglary; also that theretofore, on each of five separate occasions, he had been convicted of a felony and had "served a term of imprisonment therefor."

On the trial of the action, it having been stipulated by respective counsel that the fourth and the fifth of such alleged prior convictions of defendant were "one and the same," defendant admitted the commission by him of each of the first four prior convictions of which he was charged, and that he had "served a term of imprisonment therefor." From a judgment of conviction of the crime of burglary, for the commission of which he was sentenced as a habitual criminal, defendant has appealed to this court.

In his opening brief herein, in effect the only point made by appellant is that the evidence adduced on the trial of the action was insufficient to support the judgment that was rendered against him. In that regard, neither defendant nor any other person would be in anywise benefited by having a recital of such evidence included herein. It is sufficient to say that, after a careful examination of the record, aside from the several denials by defendant of the testimony given by various other witnesses, it manifestly appears that, actively, knowingly, and with criminal intent, defendant participated in the commission of the crime of which he was found guilty.

[1] By his closing brief, although contrary to the rules of appellate procedure, appellant for the first time suggests that error was committed by the trial court, in that "the corpus delicti of this crime, i. e., the entry with intent to commit a felony or petty larceny, was not proven prior to the introduction of the purported confession, nor afterwards"; also "that the purported confession was inadmissible not only because of the fact that the state had unquestionably failed to prove the corpus delicti, but because such confession was allowed into evidence without any showing whatsoever of its legality, and not only that, but its legality was never proved prior to or after its admission"; furthermore, that "error was committed by the court in allowing the introduction of evidence in regard to the finding of the burglarious tools in the possession of the appellant. * * *"

In response to such contention on the part of appellant, it need only be said that appellant fails to show that any of such evidence was introduced over his objection thereto. For aught that is made to appear, all such evidence was properly and regularly presented to the trial court. But, even conceding (without so deciding) that error may have been committed, the evidence of the guilt of defendant was so overwhelming that none of such errors, nor all of them combined, should result in an order of reversal of the judgment. It is only where it satisfactorily appears that error has resulted in a miscarriage of justice that a reversal of the judgment is authorized. Section 4½, art. 6, Const.

It is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

140 Cal.App. 464

CITY OF FULLERTON v. ORANGE COUNTY.

Civ. 1151.

District Court of Appeal, Fourth District, California.

Aug. 22, 1934.

1. Limitation of actions ⇐11(3)

Where county officers collected taxes for city but failed to remit penalties and interest on delinquent taxes, city's right to recover such amount was subject to statute of limitations, since relationship between county and city was implied or constructive trust; an involuntary trust arising by operation of law (Code Civ. Proc. § 338, subd. 3; § 345; Gen. Laws 1931, Act 8464, § 1).

2. Municipal corporations ⇐978(1)

County officers when collecting taxes for municipality are ex officiis officers of municipality, and, while not losing identity as county officers, they become agents of municipality to collect taxes for it.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by the City of Fullerton against County of Orange. From an adverse judgment, plaintiff appeals.

Affirmed.

Albert Launer, City Atty., Launer & Thompson, and William B. Wade, all of Fullerton, for appellant.

S. B. Kaufman, Dist. Atty., and W. F. Menton, Asst. Dist. Atty., both of Santa Ana, for respondent.

MUNDO, Justice pro tem.

The cause was submitted to the court on an agreed statement of facts which in substance asserted that the city of Fullerton elected to have the county officers of Orange county collect its taxes under the provisions of an act entitled "An Act to provide for the levy and collection of taxes by and for the use of municipal corporations and cities incorporated under the laws of the State of California. * * *" Stats. 1895, p. 219, said act being designated 8464, Deering's Gen. Laws 1931. Section 1 of the act referred to provides in part as follows: "Any municipal corporation or city in this state, except municipal corporations of the first class shall have power to elect, by ordinance adopted by the board of trustees, common council, or other legislative body, or the electors, of such city or municipal corporation, that the duties of assessing property and collecting taxes provided by law to be performed by the assessor and the tax collector of such city or municipal corporation shall be performed by the county assessor and the county tax collector of the county in which such city or municipal corporation is situated."

In pursuance of such election the county officers of Orange county began the assessing, levying, and collection of the taxes of the city of Fullerton for the fiscal year 1905-1906, and have continued the process up to the present time. The moneys collected for taxes and special assessments were remitted to the city, but none of the moneys collected by said officers covering penalties and interest on taxes and special assessments that had become delinquent during all of the period from and including the fiscal year 1905-1906, up to December 31, 1930, were ever remitted to the city, but were by said county officers diverted to the county treasury. The city did not discover that the penalties and interest so collected had not been paid to the city, or that the same had been diverted to the county treasury, until some time in October, 1930, and the present action was brought against the county on May 21, 1931, for an accounting and for a judgment against the county for the amount so found due the city.

The complaint contains a separate count for each fiscal year beginning with the year 1905-1906, up to the 31st day of December, 1930, twenty-six counts in all. By leave of court the complaint was amended adding a count based on fraud, and another based on mistake. The twenty-seventh count alleged that certain misrepresentations were made in the warrants that were issued to the city which led the city to believe that the payments covered all the moneys collected; that the county officers concealed from plaintiff the fact that the moneys in issue had been diverted to the county treasury.

The defendant county filed its answer alleging it had fully accounted for all moneys collected, and setting up the defense of the the statute of limitations to the first twenty-two causes of action, but not to the twenty-seventh or twenty-eighth causes of action.

The court found that in assessing, levying, and collecting the taxes sued for, in the representations made, things done, and in the diversion of said funds, the county officers were not the agents of the county, but were acting solely for the plaintiff, and for that reason the county was not guilty of fraud; that the first to the twenty-second causes of action were barred by subdivision 3 of section 338 of the Code of Civil Procedure. Judgment was rendered for plaintiff on the twenty-third count to the twenty-sixth, inclusive (which counts covered penalties and interest on taxes collected for fiscal years 1927-1928 to and including 1930-1931). Plaintiff appeals from that part of the judgment limiting its recovery to the amounts of penalties and interest for the three years prior to the institution of the action.

This case is one of a number of similar cases filed against the county by various cities and in which a judgment similar to the judgment rendered here was rendered in each of such cases, except that in none of the other cases was fraud and mistake pleaded. In each of the other cases in which judgment was rendered, the court found against the defendant on the issue of the liability of the county for penalties and interest, but held that the statute of limitations as provided in section 338 of the Code of Civil Procedure applied in each case. The question to be decided is whether the action is barred by this section. Appellant submits three reasons for holding that the section does not apply, and they are: (1) The moneys collected and diverted are

funds held in trust for a public use, and, notwithstanding section 345 of the Code of Civil Procedure, the statute of limitations does not run against the action at all. (2) Fraud. (3) The county is an involuntary trustee of a fund arising out of fraud and the statute of limitations does not begin to run until the discovery of fraud.

[1] Plaintiff contends that the county holds these funds as a trust fund for the benefit of the sovereign people of the state and that, under the doctrine that lapse of time does not bar the crown, the statute of limitations does not apply where the question involved is the rights of the sovereign people of the state. "Controversies over the application of this rule more frequently arise from a failure to understand what are and what are not 'public rights,' than from a failure to understand the rule. In a sense, every right possessed by a municipal corporation is a public right, and every class of property held by it is held in its public capacity, and for public use, but for the purpose of distinguishing such rights, as only that part of the public included within the corporate limits of a municipality are interested in, from such rights in which all the people of the State are interested, the former class is designated by law writers and courts as 'private rights,' and the terms 'public rights,' 'public uses' and 'public capacity' are used only with reference to such rights, uses and capacities, as all the people of the State are alike interested in. To actions brought in relation to 'public rights,' using the term to indicate such rights as belong to all the people of the State alike, the statute of limitations does not apply, while as to actions brought in relation to 'private rights,' using that term to designate such rights as are limited to some local subdivision or municipality, such as a city, village, school district or the like, the statute of limitations applies to the same extent as to individuals." Chicago v. Chicago, etc., R. Co., 163 Ill. App. 251, 254; 37 C. J. 716.

In Payette v. Marshall County, 180 Iowa, 660, 163 N. W. 592, the rule was touched upon by the court, tersely, holding: "Where a county is seeking the enforcement of judgments not for the use or benefit of the state, nor for the use or benefit of the general public but solely in its own interest and in the interest of that particular part or fraction of the public within its local jurisdiction, the statute of limitations applies to the same extent as if the action were brought by an individual."

"* * * Local public corporations, such as municipalities, counties, and school districts, are amenable to the statute of limitations with regard to property or contract rights which the corporation claims for its own convenience as a corporation. In such cases it is held not to represent the sovereign, but only itself and the parties directly or locally interested." Central Hospital, etc., v. Adams, 134 Tenn. 429, 183 S. W. 1032, 1033, L. R. A. 1916E, 94; 37 C. J. 715.

In Ralston v. Town of Weston, 46 W. Va. 544, 33 S. E. 326, at page 328, 76 Am. St. Rep. 834, the court said: "The state is not the sovereign in this country. The people who make it are sovereign, and all its officers are but their servants. So, statutes of limitations, which are made to apply to the state, do not apply to the people or their public rights. But they only apply to the state in the same cases that they apply to individuals. The entry upon, or recovery of, lands held for sale, suits on bonds, contracts, evidences of debt, or for torts,—all these, though the state is a party, are subject to bar. As to all such things, there is no reason why the state should have any longer time than an individual. Such is not the case with the right of taxation, the right of eminent domain, the right to use the public highways, and other rights, which pertain only to the sovereignty of the people. None of these can ever be lost by the negligence of the public servants, who have no power of disposal over them in any way whatever except according to the express will of the people."

In Warren County v. Lamkin, 93 Miss. 123, 46 So. 497, 511, 22 L. R. A. (N. S.) 920, it was held that the statute of limitations applies against a county to bar an action of ejectment by it to recover possession of premises not devoted to a public purpose. The court said: "It is apparent on casual examination that, if between private persons, recovery in this case would be impossible. But a slice of sovereignty in the shape of a county as plaintiff erects itself here, and, while there can be no criticism of the authorities in trying to recover what may be legally public property, still courts will be disposed, if they can, to apply the same rules that the law applies as between the humblest and most unpretentious private citizens. This is incumbent on us, and exceptions in favor of sovereignty in matters of property on the application of the statute of limitations must have, of course, strict construction as against the sovereignty. The doctrine, 'Nullum tempus occurrit regi,' in its enlarged scope, is the invention and one of the instruments of despotism, and has no place in free countries, if it be attempted to go beyond the point of appli-

cation strictly to holdings for the public user by the people, such as streets, parks, necessary grounds for courthouses, jails, public hospitals, etc."

The case cited by plaintiff, and upon which it lays great stress, is that of City of Osawatomie v. Board of Commissioners of Miami County, 78 Kan. 270, 96 P. 670, 130 Am. St. Rep. 369. It is cited in support of the contention that "where a county diverts to its own treasury a part of the money it has collected upon taxes levied by a city, no statute of limitation runs against an action by the city to recover the amount so wrongfully withheld." This case rejects the geographical or territorial test proposed in Central Hospital, etc., v. Adams, supra (see, also, note on page 184 of 101 Am. St. Rep.), and holds that: "Inasmuch as the city exists in part as an agency of the state for general governmental purposes, and its maintenance depends upon its power to levy and collect taxes, it might be argued that the state itself, or the general public, has an interest in protecting the exercise of that power." But even this case recognizes the universal rule that no statute of limitations will run against the state or the sovereign authority unless the statute itself so provides, or unless the implications of the statute to that effect are so strong as to be utterly unavoidable. The court said: "The power of taxation is an essential attribute of sovereignty. * * * No statute of limitation should apply to any step in the exercise of that power unless a legislative intention that it should do so is expressly stated or appears by the clearest implication."

In this state the statute of limitations has, by express provision of the Legislature, been made applicable to actions brought in the name of the state or for the benefit of the state, in the same manner as to actions by private parties. Code Civ. Proc. § 345. The legislative policy evidenced by this section was construed in the case of State Board of Health v. Alameda County, 42 Cal. App. 166, 183 P. 455, to mean that the statutes of limitations are applicable to the state, or any arm thereof, even though the cause of action arises in the exercise of its governmental functions. People v. Melone, 73 Cal. 574, 15 P. 294; San Francisco v. Luning, 73 Cal. 610, 15 P. 311.

[2] In some states the duty of collecting taxes for municipalities of certain classes is performed by county officers. When the county officers act in this capacity for a city they are ex officiis officers of that city. Madary v. City of Fresno, 20 Cal. App. 91, 128 P. 340. They become, by law, the agent of the city to collect the taxes for the city. They do not lose their identity as county officers. Although they act for the city, they are county officers, performing a county function imposed upon them by law.

The trial court in the case of City of Centerville v. Turner County, 23 S. D. 424, 122 N. W. 350, 351, found, upon facts quite similar to the instant case, that the defendant county "is made by law the agent of the plaintiff to collect, and enforce the collection of, the said taxes, and the relationship existing between the plaintiff and defendant is a fiduciary one, and the said taxes when so collected by the county became, and is, a trust fund in the possession of the said county acting as a trustee of an express trust." Judgment was entered against the defendant county for the full amount claimed due covering a period of years. The county appealed, contending that the statute of limitations should operate to bar recovery for a part of said period. Upon this point the Supreme Court of South Dakota agreed with the county, and held: "It is contended on the part of plaintiff that inasmuch as the trial court found that the defendant is made by law the agent of the plaintiff to collect the said taxes, and that the relationship between plaintiff and defendant was a fiduciary one, and that said taxes, when collected, were a trust fund in the hands of the defendant, in the execution of an express trust, the statute of limitations will not run. This seems to be the general rule in some jurisdictions where there has been a misappropriation of trust funds; but, even in those jurisdictions, it seems to be held that, where the public officer or municipality retains the money under claim or color of right, as in the case at bar, then the statute of limitations applies, and that the claim will be barred after the statutory limit has expired. 25 Cyc. 1164; Newsom v. Bartholomew, 103 Ind. 526, 3 N. E. 163; Churchman v. Indianapolis, 110 Ind. 259, 11 N. E. 301; Jasper District Twp. v. Wheatland Twp., 62 Iowa, 62, 17 N. W. 205. But whatever the rule may be in other jurisdictions, we are of the opinion that section 60, subd. 2, Rev. Code Civ. Proc. providing: 'Within six years: An action upon a liability created by statute, other than a penalty or forfeiture'—is conclusive of this question. The right to recover in this action is upon a liability created by statute. Other jurisdictions having a similar statute of limitations on this point uniformly seem to hold that it applies to this very character of action, and that authorities in jurisdictions without such a statute are not applicable even in trust cases. 25 Cyc. 1052, and cases there cited under notes 29 and 30." See, also, City of Webster v. Day County, 26 S. D. 50, 127 N. W. 624.

The Centerville Case was reconsidered and the question of the relationship between the city and the county was dealt with. The court concluded that the trust relation involved was an implied or constructive trust, an involuntary trust arising by operation of law. " 'To prevent the application of the statute in favor of a trustee the trust must be created by the direct act of the parties, and, when a person is charged as trustee by implication or constructive trust of law, he may claim the protection and benefit of the statute.' " City of Centerville v. Turner County, 25 S. D. 300, 126 N. W. 605, 606.

The primary object of the statute, which authorized the defendant county to collect the taxes for the city of Fullerton and other cities, is to provide a means whereby the work and expense of collecting taxes by city officers may be eliminated. Moore v. City of San Diego, 90 Cal. App. 242, 265 P. 864. The work done by the county officers is paid for by the city, not to the officers performing the services, but to the county itself. The county officers, when performing under the provisions of the statute are, as we have indicated, performing a county function for which the county receives payment from the city. The relationship existing between the county and city is an implied or constructive trust, an involuntary trust arising by operation of law, and the county is entitled to claim the benefit of the statute of limitations.

Turning to the stipulation of facts we find, instead of fraud, a situation which fully warrants the conclusion that the retention of the moneys claimed could have been discovered by the city upon investigation, and nowhere do we find any acts on the part of the county officers which in any wise constitute concealment. In truth, the situation as a whole indicates that the county officers retained these moneys for the county under a claim of right adverse to the city. At any event, the record does not disclose, nor even suggest, any intent on the part of the county officers to defraud the city. Counsel for respondent declares that the counts charging fraud and mistake were pleaded to escape the bar of the statute of limitations; but, regardless of the purpose, it must be held that they are unavailing, for we find no fraud nor mistake to substantiate them. The causes of action, 1 to 22, inclusive, were amenable to and barred by subdivision 3 of section 338 of the Code of Civil Procedure.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

140 Cal.App. 403

PLEATERS' & STITCHERS' ASS'N v. DAVIS.

Civ. 7970.

District Court of Appeal, Second District, Division 1, California.

Aug. 15, 1934.

1. Arbitration and award ⇨72

On petition for confirmation of award in arbitration, trial judge must confirm award unless he vacates, modifies, or corrects it, but adverse party may object to granting of application when objections attack validity of arbitration proceedings, and, even though objections are denominated "demurrer" or "answer," court would have jurisdiction to entertain them (Code Civ. Proc. § 1280 et seq., and §§ 1285, 1287, 1288, 1289).

2. Arbitration and award ⇨72

Where petition for confirmation of award showed on its face that plaintiff was voluntary association doing business under fictitious name, but record did not show whether it had filed certificate, court properly sustained demurrer but erred in sustaining it without leave to amend, where one of grounds was that plaintiff had no legal capacity to sue (Civ. Code, § 2468; Code Civ. Proc. § 1280 et seq., and §§ 1285, 1287, 1288, 1289).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Suit by the Pleaters' & Stitchers' Association, a voluntary association, against S. J. Davis, doing business under the fictitious name and trade style of the Davis Pleating Company. From a judgment of dismissal with prejudice, complainant appeals.

Reversed and remanded, with directions.

H. W. Biddle and Morris & Gault, all of Los Angeles (James B. Abbey, of San Diego, of counsel), for appellant.

Shapiro & Shapiro and H. Y. Romayne, all of Los Angeles, for respondent.

YORK, Justice.

This is an appeal from a judgment of dismissal with prejudice entered pursuant to an order of the court denying complainant's amended petition to confirm award in arbitration, and sustaining demurrer of accused to said petition without leave to amend.

On February 13, 1931, the complainant filed its petition for confirmation of award in arbitration dated December 17, 1930, and served notice of motion for such confirmation; on

February 25, 1931, the respondent filed a demurrer to said petition, and on February 27, 1931, filed his answer and notice of motion to vacate the award, together with three affidavits in support of said motion. On March 23d these matters came on to be heard by the court, whereupon the following order was entered: "Motion to confirm award in arbitration and demurrer to petition come on for hearing, * * * motion to vacate award is ordered off calendar. Motion to confirm award is denied. Demurrer to petition is sustained without leave to amend." Appellant now maintains that the court erred in sustaining the demurrer without leave to amend and in rendering and entering the judgment of dismissal thereon, and also in denying appellant's motion to confirm award.

In support of these contentions, appellant claims that there is no provision in the sections of the Code relating to arbitrations (1280 et seq., Code Civ. Proc.), providing for the filing of a demurrer or answer, and that therefore the filing of the answer and the interposing of the demurrer in this proceeding were improper, and the court had no jurisdiction to entertain or pass upon either of these pleadings.

Section 1285 of the Code of Civil Procedure provides: "Any application made under the authority of this act shall be heard in a summary way in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."

Section 1287 of the same Code provides: "At any time within three months after the award is made * * * any party to the arbitration may apply to the superior court of the county or city and county in which said arbitration was had for an order confirming the award; and thereupon said court must grant such an order unless the award is vacated, modified or corrected, as prescribed in the next two sections. Notice in writing of the motion must be served upon the adverse party or his attorney five days before the hearing thereof."

Vacation of an award is permitted by section 1288, Code of Civil Procedure, when procured by corruption, fraud, or undue means, or when the arbitrators were guilty of misconduct in refusing to hear pertinent evidence, or of any other misbehavior. Correction of mistakes in the award is permitted under section 1289.

The statutory provisions for a review of arbitration proceedings are for the sole purpose of preventing the misuse of the proceedings, where corruption, fraud, misconduct, gross error, or mistake has been carried into the award to the substantial prejudice of a party to the proceeding. The design was to avoid useless proceedings and to make the practice simple and as speedy as would be consistent with justice. 3 Cal. Jur. p. 87.

[1] Upon consideration of the method of procedure outlined by the sections of the Code referred to, it would seem to be mandatory upon the trial judge to confirm an award, unless he vacates, modifies, or corrects it. However, the adverse party has a right to object to the granting of the application, when the objections attack the validity of the arbitration proceedings, and, even though these objections are denominated "demurrer" or "answer," they constitute the adverse party's statement of objections to the application, and the court would have jurisdiction to entertain and pass upon them.

[2] In the instant case the court in sustaining the demurrer held that the complaint did not state facts sufficient to authorize a confirmation of the award. One of the grounds of demurrer was that plaintiff had no legal capacity to sue. The complaint shows upon its face that the plaintiff is a voluntary association doing business under a fictitious name, but, as to whether or not it had filed the certificate required under section 2468, Civil Code, the record is silent. Therefore we are of the opinion that the court properly sustained the demurrer, but that the court erred in sustaining the demurrer without leave to amend. Ginsberg Tile Co. v. Faraone, 99 Cal. App. 381, 278 P. 866.

Respondent makes the point that the complaint shows upon its face that the parties entered into an illegal contract in restraint of trade, but, in view of the fact that respondent does not state what provisions of the contract constitute such illegality, we feel that this point does not merit a discussion in this opinion.

The judgment of dismissal with prejudice is reversed, and the cause remanded to the trial court for the proper proceedings in accordance with this decision.

We concur: CONREY, P. J.; HOUSER, J.

140 Cal.App. 330

SECURITY–FIRST NAT. BANK OF LOS ANGELES v. BAXTER et al.

Civ. 1299.

District Court of Appeal, Fourth District, California.

Aug. 4, 1934.

Rehearing Denied Aug. 30, 1934.

1. Banks and banking ⇐179

Where borrowers assigned to bank, as security for loans, a contract of sale of land in sister state to borrowers and a contract of sale of same land by them to nonresidents, and borrowers subsequently took title from record owners and conveyed land to daughter, bank *held* to have cause of action against borrowers and daughter to compel conveyance to bank to enable bank to collect on the security.

2. Banks and banking ⇐179

Where borrowers assigned land contracts to bank as continuing security for loans and last note was dated December 2, 1927, and due not later than December 2, 1928, and borrowers had obtained title and conveyed it to daughter, bank's action against borrowers and daughter, filed August 7, 1929, to compel conveyance to bank to enable it to collect on the security, *held* not barred by laches.

3. Banks and banking ⇐179

Evidence *held* to support finding that assignment of land contracts by borrowers to bank was given not only to secure contemporaneous loan but as continuing security for all loans made by bank to borrowers.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by the Security-First National Bank of Los Angeles against Karekin K. Baxter and wife and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

M. G. Gallaher, of Los Angeles, and N. Lindsay South, of Fresno, for appellants.

Sutherland, Dearing & Jertberg, of Fresno, for respondent.

MARKS, Justice.

The plaintiff, a national banking association, passed through various mergers, consolidations, and changes of name in the period of time covered by its business dealings with defendants. A number of documents which we will mention were executed to a predecessor of plaintiff under one of the former names. In this opinion we will refer to these documents as having been executed to plaintiff; it being understood that that term will include any of the various names by which it and its predecessors were legally known.

The defendants Karekin K. Baxter and Mariam K. Baxter are husband and wife. Margaret Senam Baxter is their daughter. She was nineteen years of age at the time of the trial in July, 1930. The complaint, and her answer, were filed against and for her in her individual capacity. During the trial her father was appointed her guardian ad litem for the purpose of defending the action against her. No formal amendments of the pleadings seem to have been made. Prior to moving to California, Mr. and Mrs. Baxter, who were then known as Karekin K. Bagdasarian and Mariam Bagdasarian, executed some of the documents involved here, under those names. We will refer to them under the name of Baxter without regard to which name was used in any particular transaction.

In 1924 the Baxters were the owners of a vineyard in Fresno county. They were already indebted to the plaintiff, and in the latter part of that year desired to borrow an additional sum of $15,000. They entered into negotiations with the officers of the plaintiff bank to secure the loan. The plaintiff was not satisfied with the security offered, and extended negotiations followed which resulted in the following arrangements being made:

The California Packing Corporation, which was to handle the crop of the Baxters, advanced $5,000 in cash, and agreed to advance the further sums of $5,000 in May, and $5,000 in August, 1925, both of the latter sums to be paid to the plaintiff, provided that, in May, the condition of the grape crop on the Baxter property justified such advancement. Paul Mosesian agreed to pay these sums to the bank if the California Packing Corporation failed to do so, and, in case he made such payments, he was to receive the collateral which the Baxters gave the plaintiff for their loans. (Mosesian did not make the payments, and the plaintiff retained the collateral.) On January 27, 1925, the plaintiff loaned the Baxters $10,000. The California Packing Corporation made the payments of $5,000 each, in May and August, 1925, to the plaintiff.

In 1918 the Baxters had entered into a contract of purchase of real property in Detroit,

Mich., from David and Augusta Mitchell. They made a contract of sale of this property to Abe and Jennie Marks; the purchase price being payable in installments. The Bankers' Trust Company of Detroit held a mortgage on the real estate, and acted as the agents of Mr. and Mrs. Baxter in making collections from Mr. and Mrs. Marks. In 1924 the Baxters had an equity of a substantial amount in the Detroit property.

Before making the loan of $10,000 to Mr. and Mrs. Baxter, the plaintiff required them to execute and deliver an assignment of the Mitchell and Marks contracts as security for that loan, and for other loans already made, and as a continuing security for these and any future loans made to them.

The loan account of Mr. and Mrs. Baxter with plaintiff was an active one, as they were frequent borrowers and executed numerous promissory notes, many being renewal notes for former unpaid balances, and many for additional loans. They never paid their indebtedness to the bank in full. On December 2, 1927, a balance was struck and their total indebtedness was found to be $18,472.57, for which they executed a note to the plaintiff. Thereafter further additional loans were refused them, and litigation followed as the bank attempted to reduce the amount of the indebtedness. After additional loans were refused them, Mr. and Mrs. Baxter demanded the return of their assignment of the Mitchell and Marks contracts, asserting that it had been given as security for the $10,000 loan guaranteed by Paul Mosesian, and no other, and which had been paid by the California Packing Corporation. Their demand was refused, and this litigation followed.

In May, 1925, Baxter had desired to refinance the indebtedness on the Detroit property. Under date of May 18, 1925, the vice president of plaintiff bank wrote to the Bankers' Trust Company of Detroit, holder of the mortgage on the property, that Baxter's refinancing plan was agreeable to the plaintiff, and that it would co-operate with him in the refinancing "taking assignment of his interest as before." Baxter did not meet the demands of the Bankers' Trust Company of Detroit, and this mortgage remained in the same condition as before. He did pay Mr. and Mrs. Mitchell the small balance due them, and received a deed conveying title to the property to himself and his wife, which deed was immediately recorded. By a deed dated September 27, 1926, and recorded October 2, 1926, this property was conveyed to Margaret Senam Baxter. It is admitted that she did not pay any consideration for the property. The Baxter assignment of the Mitchell and Marks contracts to plaintiff was recorded on October 28, 1926.

It was stipulated that Mr. and Mrs. Marks were willing and anxious to pay the balance of a little over $16,000 principal, and the interest, on their contract of purchase of the Detroit property, as soon as it could be determined to whom the payment should be made, so they could receive their deed. It was also stipulated that there was a balance of less than $50, principal and interest, due the Bankers' Trust Company of Detroit under its mortgage.

The trial court found all facts in favor of the plaintiff and against the defendants; that the assignment of the Mitchell and Marks contracts was given, not merely as security for the $10,000 loan guaranteed by Paul Mosesian, but as a continuing security for all loans made by plaintiff to Mr. and Mrs. Baxter; that the deed from them to their daughter was made with intent to defraud the plaintiff, without any consideration, and with notice and knowledge of the grantors and grantee of the assignment of the Mitchell and Marks contracts to plaintiff; that at the time of the execution of the assignment Mr. and Mrs. Baxter were indebted to the plaintiff in the sum of $5,529.67, principal, and $44.08, interest; that the assignment was given to secure this indebtedness and as continuing security for any other loans made to Mr. and Mrs. Baxter; that their indebtedness to the plaintiff was never paid; that at the time of the trial their indebtedness amounted to $17,231.85, principal, and $6,288.60, accrued interest, all of which was secured by the assignment. Judgment was rendered against Karekin K. Baxter and Mariam K. Baxter in the sum of $23,520.45; that this was secured by the assignment of the Mitchell and Marks contracts; that, to enable the plaintiff to execute the Marks contract and receive the unpaid balance due from them, the defendants execute and deliver to plaintiff a deed conveying the Detroit property to it subject to the mortgage of the Bankers' Trust Company of Detroit and the contract of purchase by Abe and Jennie Marks; that plaintiff collect the money due from Abe and Jennie Marks, conveying the Detroit property to them, and out of the money so collected pay the balance due the Bankers' Trust Company of Detroit on its mortgage, and the costs of making the con-

veyance to Abe and Jennie Marks, crediting the balance on the indebtedness of Mr. and Mrs. Baxter.

Appellants present numerous specifications of error which may be consolidated as follows: (1) The complaint does not allege facts sufficient to constitute a cause of action; (2) the complaint and plaintiff's evidence show that its cause of action is barred by laches; (3) the evidence does not support the findings and judgment; (4) the trial court erred in denying defendants' motion to reopen the case and permit them to introduce additional evidence after the conclusion of the trial and before the rendition of judgment.

[1] Appellants' argument that the complaint fails to allege facts sufficient to constitute a cause of action is based upon the theory that the action is one for specific performance. We do not so understand it. Clearly the action is one to place the plaintiff in such a position that it could collect a debt which had been assigned to it as security for loans to Mr. and Mrs. Baxter. This it clearly had the right to do, in view of the rather unusual circumstance that Abe and Jennie Marks, who owed the debt assigned as security, and the property involved in the assignment, were out of the state. Traders Bank of Los Angeles v. Wilcox, 42 Cal. App. 24, 183 P. 256. The complaint alleges all facts necessary to constitute a cause of action against the defendants.

[2] There is no merit in the claim that the plaintiff's action is barred by its laches. This defense was not urged in the court below. The last note given by Mr. and Mrs. Baxter to plaintiff was dated December 2, 1927, and was made payable "on demand, or if no demand be made, then Dec. 2, 1928." The action was filed August 7, 1929. We cannot hold as a matter of law that this delay was unreasonable. Furthermore, the defendants did not suffer any injury from this delay. In 10 California Jurisprudence, 530, it is said: "One important feature to be considered in determining the question of laches is whether any damage has been suffered by the delay. Before the doctrine of laches intervenes, some person must be shown to have been injured, either the defendant or another; or there must at least be such a lapse of time that it may be reasonably supposed that prejudice will occur if the remedy is allowed. A person is in equity guilty of laches only where he has, by his conduct or negligence and delay, induced or suffered another to do or abstain from something whereby he might be injured should he be allowed to enforce his rights. It seems, however, that mere expenditure of money or effort on the part of the defendant is not enough to show such prejudice as will support a plea of laches. It must also appear that it will be inequitable to enforce the plaintiff's claim."

[3] The principal argument supporting the contention that the evidence fails to support the findings and judgment is based upon the theory that the assignment of the Mitchell and Marks contracts was given to secure the loan of $10,000, payment of which was guaranteed by Paul Mosesian, and not as continuing security for all loans made by plaintiff to Mr. and Mrs. Baxter. In connection with the execution of this assignment, the answer of these two defendants contains the following: "Admit that on or about said December 1st, 1924, as security for said balance of said indebtedness and for such other and further advances as might be thereafter made to said defendants, that defendants executed and delivered to said Pacific Southwest Trust & Savings Bank an assignment in writing concerning the alleged agreements set forth in paragraph three." The evidence in the record is overwhelmingly to the effect that the assignment was executed to secure, not only the then present indebtedness of Mr. and Mrs. Baxter and the $10,000 loan, but as continuing security for all future loans made by plaintiff to them. Their testimony stands alone in controverting this conclusion, and their conduct after the assignment was given December 1, 1924, to at least during the year 1928, thoroughly impeaches their testimony on this question. There is ample evidence to support the findings and judgment.

Several months after the conclusion of the trial, the defendants moved the trial court to reopen the case and permit them to introduce further evidence, the substance of which is set forth in affidavits of N. Lindsay South and Karekin K. Baxter. We have examined these affidavits and have concluded that the proffered evidence, if before the trial court, could have had no effect on its judgment.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

140 Cal.App. 364

LEWIS v. MEMMLER et al.

Civ. 8495.

District Court of Appeal, Second District, Division 2, California.

Aug. 8, 1934.

1. New trial ⇐68

In action for injuries to automobile passenger struck by another car when she stepped into street from car which stopped on left side of street, new trial after verdict for defendant *held* not abuse of discretion on theory plaintiff was negligent as matter of law (Code Civ. Proc. § 657).

2. New trial ⇐71

Granting new trial to plaintiff in action based on automobile collision *held* not abuse of discretion on theory that there was substantial evidence of defendant's due care, where conflicting testimony would have justified holding that defendant entered blind intersection at excessive speed, collided with another car, and then hit plaintiff standing in street.

3. Appeal and error ⇐977(3)

Granting of new trial is discretionary with trial court, and appellate court will reverse order only when such discretion has been abused; trial court's action not being reviewable where there was appreciable conflict in evidence.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Ethel M. Lewis against Eugene J. Memmler and another. From an order granting plaintiff a new trial, named defendant appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Harry D. Parker, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

This is an appeal by defendant Memmler from an order granting motion for new trial after judgment for defendants. Plaintiff sued to recover damages for personal injuries sustained when she was struck by appellant's automobile. She had been riding in a car driven by a friend, and, when they approached plaintiff's residence, the driver abruptly crossed the street and drew up in front of the house, with the left side of the car next to the curb. Plaintiff got out into the street from the right and was about two steps away from the car when she was hit by appellant's machine, which had been diverted from its course by collision with the car of codefendant Hansen.

Upon the first trial of the case, the jury returned a verdict for defendants, and the court granted a motion for new trial on the ground of insufficiency of evidence to justify the verdict. On retrial the jury again returned verdict for defendants, and the trial court granted motion for new trial "on all the grounds set forth in the plaintiff's notice of intention to move for a new trial, and particularly on the ground of the insufficiency of the evidence to sustain the verdict." The grounds stated in the motion were in substance the matters set out in section 657 of the Code of Civil Procedure.

Appellant contends that the court erred in granting respondent's motion for new trial because (1) respondent "had voluntarily and without objection allowed herself to be placed in a position of peril by a violation of law except for which she would not have been injured," and because (2) "there was substantial evidence of due care on the part of this appellant."

[1] In support of the first point, appellant asserts that the driver of the car in which respondent was riding violated the law in pulling up to the left curb, that respondent, by consenting to his doing so, became chargeable with his misconduct, that she was guilty of a further breach of the law in getting out of the car into the street, and that such violation of law by her was negligence per se. There is nothing in the record to indicate that an opportunity was afforded respondent to protest against the driver's action in crossing the road. It is apparent that the direction in which that car was facing, having come to a full stop, had nothing to do with the accident. It is also clear, or at the most it is a matter of conflicting evidence, that respondent, under the conditions as she saw them when she alighted and before she was struck, violated no law and did nothing which a reasonable and prudent person would not have done, and her conduct could not be said to have been negligent as a matter of law.

[2, 3] Viewing the testimony in the light most favorable to appellant's position, it must be said that there was a conflict in the testimony which would have fully justified the court in holding that appellant was guilty of negligence which was a proximate cause of

the accident and of the injuries complained of by respondent. Appellant entered a blind intersection at a rate of speed which he admitted was in excess of that allowed by law, and which other witnesses declared was far more rapid, collided with the car of codefendant Hansen, and continued on and hit respondent. The granting of a new trial rests very largely in the trial court, and such an order will not be disturbed if it can be upheld upon any ground shown by the record. Smith v. Royer, 181 Cal. 165, 173, 183 P. 660. The motion was addressed to the sound discretion of the court, and it is only when that discretion has been abused that the appellate court will reverse the order. Since there is in this case an appreciable conflict in the evidence, the action of the trial court is not open to review. Work v. Whittington, 61 Cal. App. 302, 214 P. 474.

Order affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 537

WILLIAMS v. BRIDGES.

Civ. 9249.

District Court of Appeal, First District, Division 2, California.

Aug. 31, 1934.

Rehearing Denied Sept. 29, 1934.

Hearing Denied by Supreme Court Oct. 29, 1934.

1. New trial ⇐143(1)

Rule that affidavits of jurors will not be received to impeach verdict except one determined by chance does not apply where a juror had personal knowledge of material facts in case on trial, had formed and expressed an opinion thereon, and had stated on voir dire that she knew nothing about the facts and could sit as fair and impartial juror.

2. New trial ⇐42(2)

Ground for new trial exists where juror had personal knowledge of material facts in case on trial and had formed and expressed opinion thereon, but denied or concealed the truth on proper inquiry on voir dire examination (Code Civ. Proc. § 657, subds. 1, 2).

3. New trial ⇐42(2)

Where juror denied on voir dire knowledge of case and asserted her impartiality, proof of her personal knowledge of material facts in case and conviction that defendant was at fault required granting of new trial (Code Civ. Proc. § 657, subds. 1, 2).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Margaret Williams against H. A. Bridges. From a judgment for plaintiff, defendant appeals.

Reversed.

Louis Oneal, Maurice J. Rankin, and Arthur G. Shoup, all of San Jose, for appellant.

Gillis & Edwards, of Oakland, for respondent.

STURTEVANT, Justice.

In an action to recover damages for personal injuries the jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed.

In his first point he claims that his motion for a new trial should have been granted because of the juror, Miss Vina Lewis, who had witnessed the accident and had formed and held an opinion that the defendant was liable, on her voir dire examination falsely denied having any knowledge of the accident, her answers were believed, she was sworn as a juror, and thereafter with eight other jurors, nine in all, brought in a verdict in favor of the plaintiff. In support of the point the defendant quotes the voir dire examination of the juror. In part it is as follows:

"Q. You understand that you are to judge this case solely from the facts presented from the witness stand? A. Yes.

"Q. And that the court will instruct you in the law and you are to follow the instructions given to you by the court as to the law; will you do this? A. Yes.

"Q. After the testimony in this case has been submitted to you and the instructions have been read to you by the court, do you feel free to, yourself make your own judgment on the case? A. I do.

"Q. Would you allow any ulterior motive or anything else to influence you in your judgment? A. No.

"Q. Do you know of any reason whatsoever why you could not sit as a fair and impartial juror in this case? A. No. * * *

"Q. And you know nothing about the facts of this case? A. Absolutely nothing. * * *

"Q. You understand the defendant has the same right to come in and defend the case as the plaintiff has to bring the case in the first instance, and so you will enter upon this case with an open mind as you would like to have twelve jurors come here and hear the case and decide the facts, if you were one of the parties? A. Yes."

He then quotes from the reporter's transcript showing that after the jury had brought in its verdict the jurors were polled and in reply to the questions put by the clerk Miss Vina Lewis and eight others stated that it was their verdict. Three other jurors, including Mary Oaks, stated that it was not. Thereafter the defendant made a motion for a new trial on all of the statutory grounds. In support of his motion he introduced the entire voir dire examination of the juror Vina Lewis. He also introduced the affidavit of E. L. Edwards and the affidavit of Ethel Cashel, both of whom had acted as jurors and voted for the verdict. He also introduced the affidavit of Charles R. Stone and the affidavit of the defendant H. A. Bridges. The verdict was returned on March 30, 1933. The affidavits of those who had acted as jurors recited facts that transpired in the jury room. The affidavit of Charles R. Stone recited a conversation he held with Vina Lewis on the 11th day of April, 1933. The affidavit of H. A. Bridges recites that he is the defendant; that the trial commenced March 27, 1933, and terminated March 30, 1933; that Vina Lewis acted as a juror; that prior to the time she was accepted as a juror he was not acquainted with her, had never seen her, and knew nothing about her qualifications to act as a juror; that he did not know at the time she was called as a juror that she knew anything about the merits of the case on trial; that he accepted her as a juror acting solely on her statements made on her voir dire examination. Continuing he alleges that he knew nothing to the contrary until six days after the verdict was rendered. Mr. Rankin, the attorney for the defendant, presented his affidavit alleging, among other things, that he knew nothing about the qualification of Vina Lewis; that he did not know her, and as defendant's counsel accepted her as a juror acting solely on the statements made by the juror upon her voir dire examination. The defendant also introduced the affidavit made by the juror Mary Oaks, in which she deposed as follows:

"That she resides in the County of Santa Clara, State of California;

"That she was one of the members of the jury that tried the above entitled case in the above entitled court; that said jury rendered a verdict therein on March 30th, 1933, in favor of the plaintiff; that said jury stood nine for the verdict and three against it; that one of the jurors in said jury was a Miss Vina Lewis; that said Miss Vina Lewis voted in favor of the plaintiff; that after said jury was instructed by the judge in the above entitled court, the jury adjourned to the jury room for deliberation; that during such deliberation said Vina Lewis stated in the presence of affiant and the other jurors that she, the said Vina Lewis, knew about the accident out of which said case arose, as she had passed the place on South First Street where the accident occurred prior to or at the time of said accident, and that she had noticed that the fence was flimsily constructed and was not surprised that it fell because it was so poorly constructed."

The plaintiff offered no affidavits or evidence of any kind.

[1-3] The defendant earnestly claims that his motion should have been granted because, as he asserts, it was fully supported by the facts and came within the provisions of both subdivision 1 and subdivision 2 of section 657 of the Code of Civil Procedure. The plaintiff replies that it is settled law that the affidavits of jurors will not be received to impeach their verdict except where the verdict is reached by resort to the determination of chance. 20 Cal. Jur. 61. That reply is quite sufficient as to words or acts inherent in the verdict and which had their origin after the impanelment, and before the discharge of the jury. The authorities cited by the plaintiff all fall within that class. No one of them rested on facts, as presented in the instant case, which had their origin before the impanelment, and continued until the discharge of the jury. The rule seems to be general that: "It is ground for new trial that a juror had personal knowledge of material facts in the case, had formed and expressed an opinion on the case * * * if such ground of objection was denied or concealed by the juror on proper inquiry on his voir dire examination. * * *" 46 C. J. 92; Lane v. Vaselius, 137 Misc. 756, 244 N. Y. S. 585, 586; Kelley v. Adams County, 113 Neb. 377, 203 N. W. 544; Rhoades v. El Paso & S. W. Ry. Co. (Tex. Com. App.) 248 S. W. 1064, 1066; Harding v. Fidelity & Casualty Co. (Mo. App.) 27 S.W.(2d) 778. We do not understand the plaintiff to contend to the

contrary. However, she does challenge the proof that was offered by the defendant as being competent and she relies on the cases cited in 20 California Jurisprudence, 61. But no one of those cases involved a false answer made on the juror's voir dire examination. That distinction is very material. However, there are California cases in which it was claimed that a juror had intentionally made a false answer on his voir dire examination. The last one we have found is People v. Galloway, 202 Cal. 81, 259 P. 332. That case rested on the provisions of the Penal Code, §§ 1179–1182. Those sections are not so broad as the provisions of the Code of Civil Procedure. Nevertheless the court held that the affidavits of jurors which purported to state relevant evidence were competent and should have been received. The rules of evidence are the same in both civil and criminal actions. Pen. Code, § 1102. In Sherwin v. Southern Pacific Co., 168 Cal. 722, at page 725, 145 P. 92, 93, the court said:

"The only matter urged as ground for a new trial occurred during the examination of the jurors upon the voir dire. One C. C. Horton was called and sworn to answer questions. After having been examined and passed by the plaintiff, the following colloquy occurred during his examination by the attorneys for the defendant:

"'Q. Were you ever injured in a railroad accident? A. No, sir.

"'Q. Any member of your family ever injured in a railroad accident? A. No, sir.

"'Q. Never had any suits against the railroad company? A. No, sir.'

"After some further questions on other subjects, he was accepted by both parties, sworn as a juror, and sat in the trial of the cause. The defendant exercised its four peremptory challenges upon other persons called to serve as jurors.

"After the verdict the defendant asked for a new trial on the ground that Horton had given untrue answers to the last two of the aforesaid questions. In support thereof affidavits were filed showing that at the time of the trial an action was pending in that court wherein Harold Johnson, a minor, by C. C. Horton, his guardian ad litem, was plaintiff and the Southern Pacific Company was defendant; that it was an action to recover damages for personal injuries to Johnson alleged to have been caused by the negligence of said defendant; that Johnson was the grandson of the wife of Horton; that the attorneys for the defendant who conducted the trial were ignorant of the fact that Horton was acting as the guardian ad litem of Johnson in said action, or of his relation to Johnson, and did not discover the same until after he was accepted as a juror in the cause, and that if they had been aware of said facts they would have challenged Horton for cause, as a juror, and, if necessary, would have excluded him from the jury by a peremptory challenge, and that they exhausted their peremptory challenges on other jurymen.

"The affidavits in support of the motion for a new trial merely show that the attorneys conducting the trial for the defendant were not aware of the facts aforesaid at the time the impanelment of the jury was completed. They do not show that they did not discover said facts afterwards during the trial and before the rendition of the verdict. It may be conceded that the conduct of the juror Horton in giving a false answer to the questions put to him constituted misconduct or irregularity on his part sufficient to warrant the granting of a new trial therefor. See Hayne on New Trial and Appeal (Rev. Ed.) § 45."

In Earl v. Times-Mirror Co., 185 Cal. 165, 178, 196 P. 57, the defendant made the same contention that this defendant now makes and tendered affidavits to prove the answers by the juror on his voir dire were false. The court did not hold that the affidavits were inadmissible (Kimic v. San Jose-Los Gatos, etc., R. Co., 156 Cal. 379, 397, 104 P. 986), but carefully considered all of them and concluded that the moving party had not proved that the statements on voir dire, or any of them, were false. In West Coast Securities Co. v. Kilbourn, 110 Cal. App. 293, at page 296, 294 P. 57, 58 (application to transfer denied), after quoting the record to show that the same point was made, the court said: "The foregoing, if true, indicated that the juror was not unprejudiced; and it has been held that, where a person is prejudiced against a class of persons, he is not a proper juryman in a case where one of that class is interested (Lawlor v. Linforth, 72 Cal. 205, 13 P. 496; Lombardi v. California Street Ry. Co., 124 Cal. 311, 57 P. 66), and, if he gives false answers on his voir dire, a new trial should be granted (People v. Galloway, 202 Cal. 81, 259 P. 332)." In Clark v. United States, 289 U. S. 1, 53 S. Ct. 465, 77 L. Ed. 993, the question was presented in a criminal contempt arising in a case entitled United States v. Foshay. At page 14 of 289 U. S., 53 S. Ct. 465, 469, the court said: "Assuming

that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. Other exceptions may have to be made in other situations not brought before us now. It is sufficient to mark the one that is decisive of the case at hand. The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in. Upon that showing being made, the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would exist without them. Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote. The argument for the petitioner, if accepted, would bring us to a holding that the case for the people must go to the triers of the facts without proof that the vote has been responsive to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind. People ex rel. Nunns v. County Court [188 App. Div. 424, 176 N. Y. S. 858], supra."

As we understand it, the Supreme Court of this state declared the same rule for the same reasons in People v. Galloway, 202 Cal. 81, at page 91, 259 P. 332, 336, when it said: "We think that People v. Fair [43 Cal. 137], supra, omits the recognition of a well-defined distinction which exists between a case where a juror was not interrogated upon the subject, or where he admitted his bias and expressed the belief that he could lay it aside, and a case where a juror concealed his prejudiced state of mind when examined on his voir dire and entered upon the discharge of his duty as such juror while in such mental condition. In the second instance, actual bias becomes, where concealed, positive misconduct and continues to be such throughout such juror's service on the case, and if such misconduct is not known to the accused until after the trial and verdict, we see no reason whatsoever why the court should not have power to grant to the accused a new trial, basing it upon said subdivision 3 of section 1181 of the Penal Code." The distinction there made is the one on which it must be held that the defendant made a complete showing on his motion for a new trial and the court should have granted the motion.

In view of the conclusions we have reached on this point, it is not necessary to discuss other points presented by the record.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

MEEK et al. v. FOWLER et al.*

Civ. 1322.

District Court of Appeal, Fourth District, California.

Aug. 15, 1934.

Hearing Granted by Supreme Court Oct. 11, 1934.

1. Appeal and error ⇐977(3)
New trial ⇐6

Trial judges have wide discretion in passing on motion for new trial, and order granting motion will not be disturbed unless it appears that there has been abuse of discretion.

2. Automobiles ⇐245(87)

Liability for willful misconduct within guest statute is for jury under proper instructions except where court can say as matter of law that willful misconduct is not shown by proven facts (St. 1931, p. 1693, § 141¾).

3. New trial ⇐70

Grant of new trial to guest suing driver for willful misconduct after judgment for defendant *held* not abuse of discretion under evidence showing that driver seeing motorist from right proceeded across intersection at rate of 40 to 45 miles per hour and collided with such approaching automobile (St. 1931, p. 2126, § 131; p. 2120, § 113).

4. Automobiles ⇐181(1)

Degrees of negligence are recognized in California, and "willful misconduct" within guest statute is merely degree of negligence but of highest or greatest degree (St. 1931, p. 1693, § 141¾).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 45 P.2d 194.

"Willful misconduct" is willfully or intentionally doing something which a driver should not do, or failing to do something which he could do in the operation of a motor vehicle under circumstances from which an accident and injury to the passenger would be probable, and is more than negligence however gross; "gross negligence" being want of slight diligence as an entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others or that want of care which would raise a presumption of the conscious indifference to consequences.

[Ed. Note.—For other definitions of "Gross Negligence" and "Willful Misconduct," see Words & Phrases.]

5. Automobiles ⇐184

Signer of minor's application for operator's license, who may become responsible for negligence of minor, and owner of automobile, who is liable for negligence of a person using it with his express or implied consent, are also liable for willful misconduct of such minor or person (St. 1929, p. 522, § 62; Civ. Code, §§ 1714¼, 3536).

MUNDO, Justice pro tem., dissenting.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by Anne Meek, an infant, by her guardian ad litem, Lillian L. Meek, and others, against H. M. Fowler, Watha B. Fowler, and Harold M. Fowler and others. From an order granting a new trial to plaintiff as against named defendants, named defendants appeal.

Affirmed.

Francis J. Gabel, of Los Angeles, for appellants.

Henry E. Barbour and Tarance S. Magee, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from an order granting a motion for new trial. Plaintiffs moved for new trial and an order was made granting it as to defendants H. M., Watha B., and Harold M. Fowler, and denying it as to defendants Edgar M. and Mary Louise Peckinpah. The order stated that it was granted upon all grounds specified in the motion, which included insufficiency of the evidence to justify the judgment, and that the judgment was contrary to law.

Anne Meek was the minor daughter of Lillian L. and W. J. Meek. Harold M. Fowler was the minor son of Watha B. and A. C. Fowler (incorrectly named in the title of the complaint as H. M. Fowler). Harold's father had signed his application to the division of motor vehicles for an operator's license.

A study of the record discloses that at about 7 o'clock on the evening of August 14, 1932, Anne Meek and Elmo L. Stevenson were riding as guests of Harold in an automobile which was owned by his mother and which he was using with her consent. Harold was driving south on Del Rey street in Fresno county. As he approached the intersection of Del Rey street with Belmont avenue, which is an obstructed one as defined in section 113 of the California Vehicle Act (St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120), he saw, through the trees, when he was about one hundred feet north of the intersection, the flash of the lights of a car approaching from the west. The approaching car was then about one hundred feet west of the intersection. Harold increased the speed of his car so that he entered the intersection at between forty and forty-five miles an hour. He did not see the other car, after he glimpsed its headlights, until he entered the intersection, when it was between five and seven feet from him. Both cars entered the intersection at about the same time and crashed near its center. It should be observed that the other car, which was being driven by Edgar M. Peckinpah, entered the intersection on Harold's right. Section 131, California Vehicle Act (St. 1923, p. 560, § 131, as amended by St. 1931, p. 2126). Both passengers had remonstrated with Harold at the speed at which he was driving his car.

[1] Trial judges are given wide latitude and discretion in passing on motions for new trial, and an order granting a motion will not be disturbed on appeal unless it appears that there has been an abuse of discretion on the part of the trial judge. In Preluzsky v. Rittigstein, 51 Cal. App. 427, 196 P. 917, 918, it was said: "Where the court, in the exercise of its authority therein, has granted a new trial, and the case-made shows a reasonable or even fairly debatable justification under the law for the action taken, such action will not be set aside. Harrison v. Sutter Street Ry. Co., 116 Cal. 156, 47 P. 1019."

"Willful misconduct" has been so frequently defined in recent decisions that its definition cannot now be regarded as in doubt. Howard v. Howard, 132 Cal. App. 124, 22 P.

(2d) 279; Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520; Turner v. Standard Oil Co. of Cal., 134 Cal. App. 622, 25 P.(2d) 988; Olson v. Gay (Cal. App.) 27 P.(2d) 922, 924; Forsman v. Colton (Cal. App.) 28 P.(2d) 429; Norton v. Puter (Cal. App.) 32 P.(2d) 172; Gibson v. Easley (Cal. App.) 32 P.(2d) 983; Manica v. Smith (Cal. App.) 33 P.(2d) 418, 420; Horning v. Gerlach (Cal. App.) 34 P.(2d) 504. In Olson v. Gay, supra, quoting from Walker v. Bacon, supra, it was said: " 'Willful misconduct is willfully, that is, intentionally, doing something which a driver should not do, or failing to do something which he could do in the operation of a motor vehicle under circumstances from which an accident and injury to the passenger would be probable.' "

[2, 3] "Where liability attaches only for gross negligence, it is for the jury, under proper instructions by the court, to pass upon the question whether such negligence exists." Krause v. Rarity, 210 Cal. 644, at page 655, 293 P. 62, 66, 77 A. L. R. 1327. Undoubtedly the same is true as to willful misconduct, except in those cases where the court can say as a matter of law that it is not shown by the proven facts. In my opinion there is not sufficient showing of an abuse of discretion by the trial judge in granting the motion for new trial as to appellants, to justify its reversal here. I am assisted in reaching this conclusion by the analysis of the facts and application of the law to those facts by the court in the case of Olson v. Gay, supra, in which a petition for hearing was denied by the Supreme Court.

Appellants urge that because section 62 of the California Vehicle Act (St. 1923 p. 532, § 62, as amended by St. 1929, p. 522) and section 1714¼ of the Civil Code provide that the signer of a minor's application for an operator's license, in the one case, and the owner of an automobile used with implied or express consent, in the other, is liable for the negligence of the minor, or the user, no recovery can be had against Mr. and Mrs. Fowler by the guest of their son as such recovery can only be had for the willful misconduct and not the negligence of the young man.

In Walker v. Bacon, supra, at page 629 of 132 Cal. App., 23 P.(2d) 520, 521, it is said: "It invites difficulties to conclude that 'willful misconduct' is 'something different' from negligence. If there is no negligence, there can be no willful misconduct, for, if there be no negligence, the driver of an automobile must be operating it in accordance with all the rules of the road and the dictates of prudence and caution. It is obvious that under such circumstances there could be no willful misconduct. It should be true that willful misconduct is 'more than negligence, however gross.' Gross negligence has been defined as ' "the want of slight diligence," as "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and as "that want of care which would raise a presumption of the conscious indifference to consequences." ' Howard v. Howard, supra; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327; 19 Cal. Jur. 554, and cases cited. When the Legislature in 1931 * * * omitted gross negligence from the grounds upon which a guest could recover damages against the owner, driver, or person responsible for the operation of the motor vehicle, it restricted the right of recovery to intoxication or willful misconduct. While negligence may be involved in willful misconduct, it is apparent that the Legislature intended to confine the right of recovery to a degree of carelessness and recklessness that is greater and beyond that which the law then knew and defined as gross negligence and which is 'willful' on the part of the responsible person." In some cases the distinction between gross negligence and willful misconduct may be the willfulness, or the lack of willfulness, with which the act is done.

In Manica v. Smith, supra, we find the following: "We are of the opinion the conduct of the defendant Smith in recklessly driving the automobile in the manner above related amounts to gross negligence, and that it also constitutes willful misconduct. * * * From the foregoing definitions it is evident that acts or conduct which merely amount to gross negligence may not be aggravated enough to also characterize them as willful misconduct. Upon the contrary, acts which do amount to willful misconduct may also include gross negligence. In the present case, while the conduct of Smith does amount to willful misconduct, we are satisfied that it also constitutes gross negligence."

[4, 5] In this state the degrees of negligence are recognized. Krause v. Rarity, supra. In my opinion willful misconduct is merely a degree of negligence, but of the highest or greatest degree. If this be true it follows that the term "negligence" includes its several degrees and there can be no understandable reason why the signer of a minor's application for an operator's license, who may become responsible for the negligence of the minor, and the owner of an automobile who is liable for the negligence of any person using it with his express or implied consent, should not be lia-

ble for the willful misconduct of such minor or person under the familiar rule of interpretation that "the greater contains the less." Section 3536, Civ. Code. See, also, Taylor v. Cockrell, 116 Cal. App. 596, 3 P.(2d) 16.

In my opinion the order appealed from should be affirmed. It is so ordered.

I concur: BARNARD, Presiding Justice.

MUNDO, Justice pro tem. (dissenting).

The facts, as stated in appellants' opening brief, and declared by respondents to be sufficiently stated, are as follows:

"The plaintiff in this action is a personal friend of the defendant, Harold M. Fowler. She has been keeping company with Harold for some time and on the evening of the accident had been entertained at the home of defendant's parents.

"Pursuant to a mutual understanding the young people started out in the automobile of H. M. Fowler and Watha B. Fowler, parents of Harold M. Fowler, to go to a theatre in Fresno.

"On the way to the show, and after they had called for Elmo Stevenson, a mutual friend, the Essex car, while being driven by Harold M. Fowler, was involved in a collision with a DeSoto automobile driven by defendant Peckinpah, at the intersection of Del Rey Avenue and Belmont Avenue near the city of Fresno.

"The Essex car driven by Harold M. Fowler was traveling in a southerly direction on its right hand side of Del Rey Avenue before and while entering the intersection.

"Harold testified that when he was 100 feet from the intersection he was traveling at a speed of twenty-eight miles per hour. He looked to his right and saw the lights of an approaching car on Belmont Avenue. The automobile driven by the defendant, Peckinpah, was at that time two hundred feet from the intersection or twice as far from the intersection as was the car driven by appellant, Harold M. Fowler. After looking again to observe the lights of the approaching car, Harold continued towards the intersection believing he had ample time to negotiate a crossing ahead of the Peckinpah car, which was beyond the row of fig trees, or about two hundred feet from the intersection when Harold observed its lights. As the Essex car was entering the intersection Harold observed that the car, driven by defendant Peckinpah, was near the west line of the intersection. Harold immediately applied the brakes and swerved the car to the left. The DeSoto car came straight ahead colliding with the Essex car. After the collision, the DeSoto traveled approximately seventy-five feet beyond the intersection before overturning.

"There is no testimony that the defendant, Edgar M. Peckinpah, did, or even attempted to, decrease the speed of his automobile before the collision. The impact occurred near the center of Del Rey Avenue and on the south side of Belmont. The Essex car, driven by Harold M. Fowler, after entering the intersection, had crossed over more than one-half of Belmont Avenue which is twenty-three feet in width, whereas the DeSoto car had traveled somewhat less than one-half the width of Del Rey Avenue which is but fifteen feet wide, before the point of collision.

"The plaintiff brought suit against the defendant Fowler, and Edgar M. Peckinpah and Mary Louise Peckinpah and after a three day trial before the court, judgment was entered in favor of all of the defendants and against the plaintiff.

"Upon the hearing of a motion for a new trial the trial judge granted plaintiff's motion for a new trial as to defendants Harold M. Fowler, H. M. Fowler and Watha B. Fowler, and denied said motion as to defendants, Edgar M. Peckinpah and Mary Louise Peckinpah.

"From said order granting a new trial, the defendants Fowler are appealing."

The question to be considered is whether the evidence is sufficient to warrant a judgment in favor of plaintiff on the basis of willful misconduct.

In recent months this court has had before it several cases involving the question of "willful misconduct" as used in section 141¾ of the California Vehicle Act (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), and in some of the decisions it will be observed that the term "willful misconduct" is interpreted to mean something that involves positive elements rather than the merely negative elements of negligence or carelessness. Practically all of the cases have attempted to define "willful misconduct" without any definitely satisfactory results. The incongruity in the decisions is in mixing negligence with willful misconduct. The two differ in their essential elements and, as I shall endeavor to point out, the principal and governing distinction rests upon design and intention to bring about the injury complained of.

The law in California prior to 1929 gave a guest passenger a cause of action against a

driver of a motor vehicle for injuries based upon ordinary negligence. In 1929 the Legislature added section 141¾ to the California Vehicle Act by which section the right of the guest to recover was made dependent upon proof of gross negligence, willful misconduct, or intoxication of the driver. The reason for this change is readily apparent. The Supreme Court of Michigan, in the case of Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 583, 74 A. L. R. 1189, in commenting upon a similar statute, said: "It would be threshing old straw to discuss the accepted fact that the motorcar has presented social, financial, and governmental problems which justify the Legislature in reasonably classifying it apart from other vehicles in the enactment of laws. * * * Generally, gratuitous passengers are relatives or friends. Exceptionally, they are mere acquaintances, invited chance pedestrians, or those who deliberately solicit rides. Since the rule of liability was announced in Roy v. Kirn, 208 Mich. 571, 175 N. W. 475, there has been considerable litigation between guests and hosts. Some between husband and wife or other close relatives has found its way to this court. (Citing cases.) In many, probably most, of the cases between relatives or friends the real defendant is an insurance company. Ordinary negligence is not hard to prove if guest and host co-operate to that end. It is conceivable that such actions are not always unattended by collusion, perjury, and consequent fraud upon the court. * * * It is not inconceivable that some passengers who solicit rides may manufacture claims for liability. Groups of young folks, engaged upon a joint enterprise of social enjoyment in a borrowed car, have been known to combine to charge the owner for an accident. * * *"

The amendment of 1929 not proving sufficient to accomplish the end desired, the Legislature in 1931 eliminated "gross negligence" from the statute, making it necessary, aside from intoxication, to prove willful misconduct in order to recover on account of injuries received by a guest. Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279. In the case of Walker v. Bacon, 132 Cal. App. 625, 23 P. (2d) 520, 522, it was said that "while negligence may be involved in willful misconduct, it is apparent that the Legislature intended to confine the right of recovery to a degree of carelessness and recklessness that is greater and beyond that which the law then knew and defined as gross negligence and which is 'willful' on the part of the responsible person." Again on page 629 of 132 Cal. App., 23 P.(2d) 520, 521, the court says: "It invites difficulties to conclude that 'willful misconduct' is 'something different' from negligence." This latter statement had reference to the language in Howard v. Howard, supra, which in turn was taken from the earlier case of Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512, and which declared that "'willful misconduct' means something different from and more than negligence, however gross." The court in the Walker Case went on to point out that "if there is no negligence, there can be no willful misconduct, for, if there be no negligence, the driver of an automobile must be operating it in accordance with all the rules of the road and the dictates of prudence and caution." Thus the rule laid down in the Helme Case is narrowed by the exemption of the words "different from," and the modified rule as given in the Walker Case is based on the contention that in order to have willful misconduct there necessarily must be negligence of some kind.

With this contention I cannot agree. I do not believe it correct to say that willful misconduct is an ultimate form of negligence. The two are not properly associated with each other. They imply different situations. Negligence implies inadvertence; willful misconduct implies intentional acts. Whenever the element of knowledge and willfulness enters into an act, it ceases to be "negligence," and becomes at least "willful misconduct." Malone v. Clemow, 111 Cal. App. 13, 295 P. 70. In order to be intentional or wanton there must be actual knowledge of the danger to the other person, and actual intent to injure him. Holwerson v. St. Louis & S. Ry. Co., 157 Mo. 216, 57 S. W. 770, 777, 50 L. R. A. 850. Often we find the terms "willful" and "wanton" used synonymously and yet, a study of the two words will show they do not express the same thing. They should not be used as labels to mark different brands of the same product. In Webster's Unabridged Dictionary the following definitions are given: "Willful: Governed by the will without yielding to reason; obstinate, stubborn. Done by design; intentional; as, *willful* murder. Wanton: Reckless, heedless; malicious." The word "*will*" is given the following meaning: "That faculty or power of the mind by which we determine either to do or not to do something which we conceive to be in our power." In Crabb's English Synonyms the learned philologist has this to say: "The will is that faculty of the soul which is the most prompt and decisive; it immediately impels to action. We can *will* nothing but what we can effect. The want of will renders a person *negligent*."

And while we are on the subject of definitions let us see what is given for the words "*intent*" and "*design*." "Intent—The act of focusing the mind on an object; aim; purpose; whatever may be or may have been designed." A person is intent when his mind is on the stretch toward an object. "Intention is manifest when the mind, with great earnestness, and of choice, fixes its view on any idea." It is a "determination to act in a particular manner." Design: "To contrive for a purpose; to project with an end in view; to set apart in intention; to purpose; to intend; a scheme or plan in the mind." See Estate of Olmsted, 122 Cal. 224, at page 232, 54 P. 745. There should be no misunderstanding as to the employment of the adjective "willful" in the statute under construction. Misconduct, of course, is wrong conduct, to act or behave in an improper manner. The word "willful" as used in the statute describes the kind of misconduct that the Legislature had in mind. It is the attribute which expresses a particular quality of misconduct, the adjective which limits and qualifies the misconduct to acts dictated by the will of the actor. The literature is replete with epigrams apropos of our subject. Let us observe three instances where learned writers have given their happy, terse, and interestingly clear interpretations of the use of "will." "No action will be considered blameless, unless the will was so, for by the will the act was dictated." Seneca. "Whatever the will commands the whole of man must do; the empire of the will over all the faculties being absolutely over-ruling and despotic." Robert South. "To commit the execution of a purpose to one who disapproves of the plan it is to employ but one-third of the man; his heart and head are against you, you have commanded only his hands." Nathaniel Colton.

Any negligence may be misconduct; but "willful misconduct" implies that the misconduct must be more than negligence. It implies intentional misconduct, misconduct dictated by the will of the wrongdoer. In negligence the element of intent is lacking. Negligence is opposed to diligence, and signifies the absence of care. It is negative in its nature, implying a failure of duty, and excluding the idea of intentional wrong, and it follows that the moment a person wills to do an injury he ceases to be negligent. Whiteford v. Yuba City Union High School Dist., 117 Cal. App. 462, 4 P.(2d) 266.

"'An act is willfully done when done with deliberation, and not through surprise or confusion, or a bona fide mistake.' To do a thing willfully is to do it by design, with set purpose. To do a thing with deliberation is to do it after examining the reasons for and against a choice,—after consideration and reflection. After indulging in this mental process, if an act is done as the result of it, it is a willful act." People v. Sheldon, 68 Cal. 434, at page 437, 9 P. 457, 459. Willful misconduct may be characterized as conduct willfully designed to accomplish a specific result; not aimless of purpose or regardless of results. It had been held that even in cases of wanton wrongdoing no question of negligence is involved. The Holwerson Case has this to say upon that point: "'When the wrongdoing of the defendant is merely negligence, the contributory negligence of the plaintiff may, as is well understood, operate as a defense, but, when the defendant's conduct is willful, it is no longer negligence, and, when the injury sustained by the plaintiff is the result of the wanton and willful act of the defendant, the question of the plaintiff's contributory negligence as a defense cannot arise. In order to constitute contributory negligence on the part of the plaintiff, there must be negligence on the part of the defendant. It is accordingly the settled rule that when the defendant's conduct amounts to willfulness, and when the mischief is occasioned by his intentional and wanton wrongdoing, the plaintiff's negligence is no defense. Thus, in a late case in Illinois, it was said: "If the injury to the plaintiff was caused by the needless, and reckless, willful, or wanton, sounding of the whistle, her negligence in approaching the crossing, and driving so close to the track as to cause her team to be frightened by the cars, in no way affects her right to recover."'"

One can conceive, however, of cases where wantonness would be negligence, for, taking the definition just given—a reckless act, or an act heedlessly done would be acts done with an indifference to the welfare of others, which, after all, is what is known in law as negligence.

But it is not correct to attach any degree of negligence to acts which are done willfully.

Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief. In Tognazzini v. Freeman, 18 Cal. App. 468, 123 P. 540, 543, it was said: "Notwithstanding the confused and indiscriminate use at times of the terms 'negligence' and 'willfulness' by judges and textwriters, it is certain that the weight of authority supports the view that those terms have a distinct and well-defined meaning, which is clearly pointed out in Holwerson v.

St. Louis, etc., Co. [157 Mo. 216, 50 L. R. A. 850, 57 S. W. 774], supra, where it is said: 'By "negligence" is meant ordinary negligence—a term the significance of which is reasonably well fixed. By gross negligence is meant exceeding negligence—that which is mere inadvertence in a superlative degree. * * * By "willful negligence" is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of will in a particular direction there is an end of inadvertence, but rather an intentional failure to perform a manifest duty, which is important to the person injured in preventing the injury, in reckless disregard of the consequences as affecting the life or property of another. Such conduct is not negligence in any proper sense, and the term "willful negligence," if these words are to be interpreted with scientific accuracy, is a misnomer.' " Dyer v. McCorkle (Cal. App.) 274 P. 587.

In the case of Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474, 478, the court cautioned: " 'We should not confuse "gross negligence" with "willful misconduct," because there is a clear distinction between the two terms. In Helme v. Great Western Milling Co., supra, the court said: " 'Willful misconduct' means something different from and more than negligence, however gross. * * * The mere failure to perform a statutory duty is not, alone, willful misconduct. * * * To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent to actual knowledge, or the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury." ' " By striking the words "gross negligence" from the statute the Legislature could have meant nothing else but to take away from the guest the right to recover in cases where the injury complained of was caused by the negligence of the driver. It intended to restrict the right of recovery to willful misconduct and intoxication. Any other construction would deny the true meaning and import of the terms gross negligence and willful misconduct, and nullify the plain intent of the Legislature.

The knowledge or state of mind of the defendant with reference to the probability of injury to another is an important matter to be considered in determining whether his conduct toward the plaintiff is willful, wanton, and reckless. To establish such conduct the plaintiff must prove that the wrongdoer inflicted the injury intentionally or was "so utterly indifferent to the rights of others, that he acts as if such rights did not exist." Query v. Howe, 273 Mass. 92, 172 N. E. 887, 888.

Willful misconduct within the purview of section 141¾ of the California Vehicle Act would be conduct on the part of the driver dictated by a will, intent, and purpose to bring about the injury complained of. This conduct may be either positive or negative, acts of commission or omission, but in all cases there must exist the intent to accomplish a specific result. Intent implies knowledge. To do a thing knowingly is to do it with knowledge and clear perception of the facts and situations; designedly. To do a thing willfully is to do it knowingly. People v. Calvert, 93 Cal. App. 568, at page 573, 269 P. 969; People v. Swiggy, 69 Cal. App. 574, at page 580, 232 P. 174.

The evidence in this case before us does not justify a finding for the plaintiff based upon willful misconduct. Not even the plaintiff, who contends that the driver, Harold Fowler, tried to "beat the Peckinpah car to the intersection," would want to say that Harold Fowler desired to injure plaintiff and to that end intentionally wrecked his car. Nor could it be said that Harold Fowler's conduct was in utter disregard of, or that he was utterly indifferent to the rights of Anne Meek. Considering the evidence in the aspect most favorable to the plaintiff, it does not appear that the defendant was wantonly reckless in exposing the plaintiff to danger, nor did his conduct partake of the nature of a willful, intentional wrong.

The other propositions raised by appellant are not considered, in view of the evidence not supporting an action against the defendant Harold Fowler based upon willful misconduct.

140 Cal.App. 231

HOLLAR et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9825.

District Court of Appeal, Second District, Division 2, California.

July 30, 1934.

1. Criminal law ⇐195(1)

Petitioners could not restrain court from proceeding in contempt because petitioners were once in jeopardy, where in first contempt proceeding petitioners had taken possession of realty and in second contempt proceeding it appeared that inspection of records of company was demanded.

2. Contempt ⇐18
Receivers ⇐74

"Contempt of court" consists in the unauthorized interference with property in custody of law, and interference with or disturbance of possession of receiver, who is officer of the court, without permission of court, subjects one to proceedings in contempt.

[Ed. Note.—For other definitions of "Contempt," see Words & Phrases.]

3. Prohibition ⇐10(2)

Prohibition *held* to lie to restrain superior court from proceeding in contempt against persons who instituted suit in another county against receiver appointed by superior court, where, notwithstanding court made order restraining interference with administration of corporation by receiver, such court subsequently permitted petitioners to institute suit in another county with respect to real property located therein (Code Civ. Proc. §§ 392, 1209; Pen. Code, § 166).

Petition for writ of prohibition by X. H. Hollar and others directed to the Superior Court of the State of California in and for the County of Los Angeles and others.

Writ of prohibition granted.

Harry H. Parsons, of San Bernardino, and George R. Maury and Walter G. Danielson, both of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and Beach Basey, Deputy Co. Counsel, both of Los Angeles, for respondents.

CRAIG, Justice.

In a suit in the superior court of Los Angeles county praying annulment of transfers of property of Saline Products, Inc., a receiver was appointed and entered into possession and control. Shortly thereafter said court made an order restraining X. H. Hollar from entering upon property, or interfering with the administration of said corporation. Subsequently, on petition by the owner of real property in the county of San Bernardino through petitioners Parsons and Maury as attorneys, said court made an order granting permission to sue the corporation as lessee and one O. E. Saholt, receiver, in San Bernardino county in unlawful detainer and for rents and royalties alleged by a complaint submitted with said petition to have accrued. Following a trial judgment was rendered for possession, a referee or special master was appointed to inspect the books and records and determine any amounts due; a return of satisfaction of such judgment except as to asserted income was made. After completion of the trial in San Bernardino a citation was issued out of the superior court of Los Angeles county on petition of said receiver directing that the petitioners herein show cause if any they might have why they should not be held in contempt of court for interfering with its process and with the possession and control of its receiver. After a hearing such citation was discharged as to two and the third of said petitioners was fined.

Subsequent to entry of said judgment in San Bernardino county, on affidavit and petition of the receiver reciting proceedings above stated, and that said order for inspection of records was void, citation again issued out of the superior court in Los Angeles county, directing the petitioners and said referee or master to show cause why each should not be held in contempt of court.

[1] In the first contempt proceeding it appeared that those cited had taken possession of the realty in San Bernardino county pursuant to judgment and writ of entry in the action authorized by the Los Angeles superior court. In the second it was made to appear that inspection of the records of the company was demanded on premises of the corporation in Los Angeles county under authority of the judgment and order made in said action, so authorized and directed to be maintained in San Bernardino county. Hence petitioners' claim of once in jeopardy is not sustained as it was not, as contended by petitioners, a citation in each instance wholly upon the same alleged acts.

[2, 3] The respondent court found upon the first hearing that the granting of leave to institute suit in San Bernardino county was not

an error of the court nor of counsel, but "of policy or polity wherein the court allowed its receiver to be sued in another court." Contempt of court consists in the *unauthorized* interference with property in custody of the law. 13 C. J. p. 21, § 26. A receiver is an officer of the court, his possession is that of the court, and interference with or disturbance of his possession *without permission* of the court, subjects one to proceedings in contempt. 13 C. J. p. 22, § 26. As stated in Falloon v. Superior Court, 79 Cal. App. 149, 248 P. 1057, 1061, when the attorney of a party had caused a withdrawal of money deposited pending condemnation and receivership proceedings without complete disclosure of the facts: "It may be that even if he had advised Judge Willis of the making of the order, that judge, nevertheless, would have granted the order permitting the money to be withdrawn. But it was Hon. Frank R. Willis, and not this petitioner, whose duty it was to pass upon the question as to whether the proceedings had in the quiet-title action, including the order for a receiver, were of such a character that it would not be improper to order the withdrawal of the fund deposited with the court in the condemnation action." Likewise, it was the superior judge of Los Angeles, and not the petitioners herein, whose duty it was to read and who did read and consider the petition and proposed complaint and pass upon the question affirmatively as to whether the suit should be maintained in San Bernardino county. Its order unmistakably directs, "good cause appearing therefrom that a good and meritorious cause exists in favor of the above named plaintiff against Saline Products, Inc., and O. E. Saholt, as receiver thereof * * * and the land in the said action being located in San Bernardino county, California, permission is hereby duly granted to the above named plaintiff to sue said receiver in the superior court of the state of California in and for the county of San Bernardino." It then becomes impossible to perceive from the record how the alleged acts of petitioners could be held, as required in such a proceeding, to be an "abuse of the process or proceedings of the court," a "disobedience of any lawful judgment, order, or process of the court," or "any other unlawful interference with the process or proceedings of a court." Code Civ. Proc. § 1209; Pen. Code, § 166. "The judgment should be against the receiver in his official capacity, leaving the matter of its enforcement to be determined by the court having jurisdiction of the receivership." Painter v. Painter, 138 Cal. 231, 71 P. 90, 92, 94 Am. St. Rep. 47. In the instant case a suit was necessary primarily to determine whether the plaintiff lessor or the receiver's insolvent lessee was entitled to possession of real property outside the jurisdiction of the appointing court, and as to its income. The first question being determined, it remained but to ascertain what if any judgment for money should be given against the receiver in his official capacity in aid of liquidation by the appointing court. This presumably could be accomplished only by use of the records in question.

Pertinent to questions controverted by the parties is the language used in Colorado Fuel & Iron Co. v. Rio Grande Southern R. Co., 8 Colo. App. 493, 46 P. 845, 846, wherein after disposing of numerous extraneous and immaterial matters, the right to such action was sustained and the familiar rule stated: "We are not prepared to say that a failure to obtain leave would, in any event, be pleadable in bar to the action. Under some circumstances, possibly, the receiver could restrain the plaintiff from proceeding, and there may be cases which hold that the action will be dismissed on the receiver's application. It is not a universal rule, and some decisions intimate the application would be too late if made after the defendant had moved for a change of venue and filed a demurrer. The right to dismiss is treated as thereby waived. High, Rec., c. 8, subd. 5, § 261; Hubbell v. Dana, 9 How. Prac. [N. Y.] 424. Whether this be or be not true, the complaint, on its face, is sufficient. It alleges a leave granted. In the absence of a showing to the contrary, this would necessarily include the right to prosecute the suit to judgment in any form which the law warrants." Notwithstanding an antecedent restraining order, to say that permission by the appointing court to commence that portion of the litigation over which it had no jurisdiction (Code Civ. Proc. § 392) did not contemplate taking any evidence and carrying a suit to completion in aid of the receivership, would amount to a legal contradiction. The purpose and necessity of such an independent suit is ancillary and to adjudicate through the processes of another court questions not properly triable in the receivership court.

We think the acts which petitioners are represented as having attempted to do, and for which they were cited for alleged contempt, are only those required in carrying on the suit instituted in the superior court of San Bernardino. It may later devolve upon the latter to adjust all equities and to determine the time and manner of payment. Gableman

v. Peoria, D. & E. R. Co., 179 U. S. 335, 21 S. Ct. 171, 45 L. Ed. 220; Investment Registry v. Chicago & M. Elec. Ry. Co. (D. C.) 204 F. 500, affirmed 225 F. 1022, 140 C. C. A. 663.

The writ of prohibition is granted as prayed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

140 Cal.App. 437

McMILLAN et al. v. THOMPSON et al. (ASSOCIATED INDEMNITY CORPORATION, Intervener).

Civ. 1064.

District Court of Appeal, Fourth District, California.

Aug. 16, 1934.

Hearing Denied by Supreme Court Oct. 15, 1934.

1. Negligence ⇐62(1)

Original act of negligence is not proximate cause of injury when injury directly results from intervening act of another which was one not to be reasonably anticipated as reasonably likely to occur because of original act.

2. Automobiles ⇐201(9)

Where deceased was killed when another automobile crashed into rear of deceased's automobile as he attempted to pass truck which was stalled on highway, but which was clearly visible, act of driver of truck in stopping on highway *held* not proximate cause of deceased's death, but death was caused by intervening act of third party which could not reasonably have been anticipated by driver of truck.

3. Automobiles ⇐173(2)

In action for automobilist's death resulting when automobile crashed into rear of deceased's automobile as he attempted to pass truck which was stalled on highway, act of driver in stopping truck on paved portion of highway when motor stalled without warning *held* not negligence under statute (St. 1931, p. 2128, § 136).

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by Grace McMillan and another against J. R. Thompson, V. A. Deaver, Alpha C. Zimmer, Thomas O. Cagle, and others, in which the Associated Indemnity Corporation intervened. Verdict for plaintiffs for $4,000 as against Alpha C. Zimmer and Thomas O. Cagle and for $500 against V. A. Deaver, and, from an order denying their motion for judgment nowithstanding verdict, Alpha C. Zimmer and Thomas O. Cagle appeal.

Order reversed, and judgment directed for appellants.

Harry W. Horton, of El Centro, and Hindman & Davis, of Los Angeles, for appellants.

Hickcox & Trude, of El Centro, for respondents.

BARNARD, Presiding Justice.

Shortly after 6 o'clock on the evening of September 17, 1931, the defendant Cagle, driving a loaded truck and trailer belonging to the defendant Zimmer, was proceeding south on a paved highway near the city of Brawley. While passing what is known as Carter's Service Station at a speed of some 15 or 20 miles an hour, the engine on the truck commenced to sputter or slow down. Cagle pulled the choke out, and the motor started to pick up again. When he had proceeded about 450 feet from the service station, the engine suddenly stopped, and the truck and trailer came to a stop on the extreme right-hand side of the paved portion of the highway. The highway consisted of a concrete roadway 20 feet wide with dirt shoulders on either side which were from 7 to 10 feet wide, and the road was straight for a considerable distance on either side of the point where the vehicle stopped. When the truck stopped, Cagle went to the rear of the trailer and saw that his tail-lights and five courtesy lights were burning, and then proceeded to make an investigation as to the cause of the trouble. He found the gas pump out of order, and, seeing no car coming along which was large enough to pull the load farther off the road, proceeded to make the necessary repair.

Shortly thereafter, a light Ford truck driven by one Hubert L. McMillan, and in which his brother John McMillan was a passenger, which was also traveling south, approached the truck and trailer from the rear. The driver of this car observed the tail-light on the stalled truck and trailer when he was about 450 feet away, and at that point could see the truck itself and that it was "completely stopped." When he was about 150 feet away, he could see the entire body of the truck and trailer, and "how much room I

needed to clear it." The left half of the highway was entirely clear, with no car approaching from the south, and the driver of the Ford truck turned to the left and started to pass the stalled truck and trailer. As the front of this car reached a point about opposite the rear of the trailer, another car, driven by the defendant Deaver, which was also proceeding south, crashed into the rear end of the Ford truck, as a result of which the Ford truck crashed into the stalled truck and trailer, causing injuries to John McMillan which resulted in his death.

This action for damages was brought by the widow and minor child of the deceased, the complaint alleging concurrent negligence on the part of all of the defendants. A motion by the defendants Zimmer and Cagle for an instructed verdict was denied, after which a verdict for $4,000 was returned against those defendants and one for $500 against the defendant Deaver. From a subsequent order denying their motion for judgment notwithstanding the verdict, the defendants Zimmer and Cagle have appealed. A new trial was granted on motion of the plaintiffs, although this is not involved on this appeal.

The first point raised is that it appears from the evidence that, if the appellant Cagle was guilty of any negligence in stopping the truck and trailer on the paved portion of the road, such negligence was not a proximate cause of the injuries to the deceased. It is the appellants' contention that the accident in question was proximately caused by the intervening act of a third person, Deaver, while the respondents contend that the stopping of the truck and trailer upon the paved portion of the highway was a proximate cause of the accident in spite of any independent act of this third person, since the driver of the truck and trailer must be held to have known, in the ordinary and natural course of events, that the intervening act was likely to happen.

[1] The general rules applicable to such a situation were outlined in Newman v. Steuernagel, 132 Cal. App. 417, 22 P.(2d) 780, 782, as follows:

"It is the general rule that an original act of negligence is not a proximate cause of an injury when the same directly results from an intervening act of another party which was one not to be reasonably anticipated by the first party as reasonably likely to occur and follow through and from his own act. The general rules are thus expressed in 19 Cal. Jur.:

"'An independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage was in no way a natural or probable consequence of the original wrongful act or omission. If a wrongdoer could have anticipated that an intervening act might, in natural and ordinary sequence follow the original act of negligence, he is not released from liability by reason of the intervening cause.' Page 570.

"'In order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must not only appear that the injury is the natural and probable consequence of the negligent or wrongful act but that it ought to have been foreseen in the light of attendant circumstances.' Page 562.

"In 22 Ruling Case Law, page 134, the rule is thus stated: 'It is universally agreed that the mere fact that the intervention of a responsible human being can be traced between the defendant's wrongful act and the injury complained of will not absolve him. On the contrary the general rule is that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary course of events, though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer, or was in reality only a condition on or through which the negligent act operated to produce the injurious result. Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first, and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause. The question always is, was there any unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? The test is to be found in the probably injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.'

"In Hale v. Pacific Tel. & Tel. Co., 42 Cal. App. 55, 183 P. 280, 281, the court said: 'The rule, as we understand it, applicable to such

cases, is that, where the original negligence of a defendant is followed by an independent act of a third person, which results in a direct injury to a plaintiff, the negligence of such defendant may nevertheless constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if *the intervening act constituting the immediate cause of the injury* was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury.' (Italics ours.)

"In Reynosa v. Pickwick Stages System, 115 Cal. App. 383, 1 P.(2d) 548, 549, it is said: 'An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and but for which the injury would not have occurred. The law will not look back from the injurious consequences beyond the last efficient cause, where a responsible and intelligent person has intervened, if the chain of events is so broken that they become independent and the result cannot be said to have probably and naturally accrued from the primary cause, or to have been anticipated.'

"In Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 1064, 62 A. L. R. 825, the court said: '* * * The acts of a defendant are deemed the proximate cause of such consequences as a reasonably prudent man would anticipate as likely to result therefrom. (Citing cases.) Intervening wrongful acts of third persons, but for which injuries complained of would not have been received, ordinarily break the chain of causation, because they are not to be anticipated as probable consequences, but are occasional and exceptional results.' "

[2] If it be assumed that the driver of the truck and trailer was negligent in stopping where he did, we think it must be held, under the established rules, that this act upon his part was not a proximate cause of the accident here in question. Had the truck and trailer been moving at the time, the appellants would not have been negligent, but the general situation, so far as the negligence of Deaver is concerned, would have been the same. The stalled truck was plainly visible, with its lights burning, and the left half of the highway was entirely clear, as testified to by the driver of the light truck which was about to pass. Under such conditions, while the driver of the stalled truck must have known that other vehicles would be apt to pass, it would be unreasonable to expect him to also anticipate that, while another car was passing, a third car would come up from behind and crash into the passing car. While a sudden stop frequently causes a collision with a car approaching from the rear, it is not ordinarily to be expected that drivers of automobiles will run head-on into cars ahead of them which are in plain sight and have been long stopped. Much less is it to be expected that a driver will cross to the left half of a highway when the way is not clear, and then crash into a car ahead which is not stopped, but is moving in the same direction as himself. That the defendant Deaver should cross over to the left side of the road and then crash into a car directly in front of him is a circumstance hardly to have been expected whether the truck and trailer were stopped or moving. In our opinion, the injury here resulted, not only from the intervening act of a third party, but from one which was not reasonably to have been anticipated by the driver of the stalled truck as likely to occur and follow through and as the result of his own act.

[3] We also think the second contention, to the effect that the evidence is not sufficient to show negligence on the part of the appellants, must be sustained. The respondents argue that such negligence appears since the driver of the truck and trailer stopped on the paved highway in violation of section 136 of the California Vehicle Act (St. 1923, p. 561, as amended by St. 1931, p. 2128), and since he could have driven off the pavement when the engine first missed. The driver of the truck testified that this was the first time he had had any trouble with the engine. He also testified: "Right in front of Carter's service station, a little bit this side, I first noticed this trouble. I was going then about twenty miles an hour and it commenced to sputter or slow down, but not for long; I just pulled the choke out and the motor started to pick up again." "When my car stopped there at the scene of the accident it stopped suddenly, just a little ways before it cut out on me right by the service station and I pulled the choke out; I didn't know at the time, but thought maybe the gas line was stopped up through the carburetor and I could pull it out of there with the choke; there could be water in the gasoline or air, or the gas line could be stopped up; there could be a vacuum in the gas line, and when you choke it that puts more gasoline in from the

tank, and when I choked the car at Carter's station it went for a way pretty good and then suddenly it just stopped, quit on me all at once and when it stopped until I had made my investigation I didn't know what was the matter with it. * * *" The only evidence in the record is to the effect that, when this engine started to sputter or slow down near the service station, the action taken by the driver caused it to work pretty well until it suddenly stopped. It is not an uncommon experience for a motor to miss or sputter for a moment and then run all right. There is nothing in the evidence to justify an inference that the driver of the truck knew, or should have known, that the engine was about to stop suddenly, and nothing to indicate that a reasonably prudent man would have acted otherwise under the same circumstances. Section 136 of the California Vehicle Act provides an exception to the rule relied on by respondents, in the case of disabled vehicles, and the facts of this case bring it within that exception.

The order appealed from is reversed, with directions to enter a judgment in favor of these appellants.

We concur: MARKS, J.; JENNINGS, J.

CAMERER v. CALIFORNIA SAVINGS & COMMERCIAL BANK OF SAN DIEGO et al.*

Civ. 1105.

District Court of Appeal, Fourth District, California.

Aug. 17, 1934.

Rehearing Granted Sept. 14, 1934.

1. **Principal and agent** ⇐166(1)

Unauthorized act of another cannot be ratified by one who has no knowledge of act.

2. **Banks and banking** ⇐63½

Superintendent of Banks, in taking over an insolvent bank, acts for creditors of the institution and its depositors and can assert defenses which are not available to bank.

3. **Banks and banking** ⇐76

Bond owner who "hired" bonds to bank president and accepted security for their return and compensation for their hire, which he was told would come from profit bank was expected to make on hiring, *held* not entitled to recover from insolvent bank, bonds which were converted by president in fraudulent transactions intended to conceal bank's deficit, where innocent creditors would be injured.

4. **Estoppel** ⇐72

One who through misplaced confidence in another puts it in power of the other to injure innocent third parties must bear loss occasioned by wrongful act of party in whom confidence was misplaced.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Clyde B. Camerer against the California Savings & Commercial Bank of San Diego and Edward Rainey, as Superintendent of Banks and trustee in charge of the liquidation of the California Savings & Commercial Bank. From the judgment, the defendants appeal.

Reversed.

Gray, Cary, Ames & Driscoll, of San Diego, and Sullivan, Roche, Johnson & Barry, of San Francisco, for appellants.

Stearns, Luce & Forward and Whelan & Whelan, all of San Diego, for respondent.

MARKS, Justice.

Respondent instituted this action against appellants, and others, to recover possession of $45,500 par value of bonds and other securities, or their value, if possession could not be had. Other relief was sought which it is not necessary that we consider here. Judgment was rendered against Edward Rainey as Superintendent of Banks for the recovery of all of the securities in his possession of the par value of $44,500, or their market value in the sum of $39,385, in case redelivery could not be made. The case was ordered dismissed against the California Savings & Commercial Bank of San Diego, which we will hereafter refer to as the bank.

I. I. Irwin was a banker with an experience of more than eighteen years in the city of San Diego. Respondent was a medical officer in the United States Navy, a friend and acquaintance of Irwin's, and a depositor in the financial institutions with which he was connected.

Irwin organized the California Savings & Commercial Bank of San Diego and became its president. He owned four thousand one

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 48 P.2d 39.

hundred twelve out of the total issue of five thousand shares. He dictated the policies of the bank, except during the last few months of its existence as a going concern. About the time of its organization he induced respondent to transfer his account to the bank and to purchase fifty shares of its capital stock.

The California Safe Deposit Company of San Deigo conducted a safe deposit business in the basement under the bank. While it had a separate corporate entity, it was a subsidiary of the bank and was controlled by it. On November 5, 1927, respondent rented a safe-deposit box from it in which he kept his valuable papers. According to the signature card and rental agreement, C. B. Camerer, Mrs. C. B. Camerer, his wife, and I. I. Irwin were authorized to open the box. Respondent was frequently away from San Diego for considerable periods of time on duty with his ship, at sea, or at hospitals in other localities. During such times Irwin opened the safe-deposit box, clipped and collected the coupons and performed other services for respondent, with his knowledge and consent.

The bank continuously lost money from the time it opened until it was closed. Either quarterly, or semiannually, Irwin placed in the profit and loss account of the bank sufficient money to cover the loss during the period succeeding his prior payment so that no loss would appear on the books.

Irwin started using respondent's bonds in the fall of 1927, and continued using them in 1928 and 1929, when the bank needed money to make up its deficit. In all but one of these transactions he described his actions as follows:

"A. Well, as far as my memory serves me, at each quarter the bank needed money to pay the deficit, and when that occurred I took these bonds and sold them to the bank and deposited this money to my account and gave the bank a check to pay on the profit-and-loss account. Later on, when I had money in my account, I took the bonds back, and later on I put them back again. That is my recollection of it.

"Q. Did some of the other officers of the bank know the nature of these transactions? A. I suppose so. * * * Those bonds were turned over to the official who had charge of the bonds, and he made out the statement and credited the amount to my account and charged the bonds to the bank's bond account. That's my recollection.

"Q. During this period that you were speaking of, the bank was not making any profits, but, on the contrary, was losing money? A. Yes.

"Q. And needed the money at the end of each quarter to pay its running expenses? A. Yes.

"Q. And these bonds were simply manipulated in that way so that the bank would have money? A. Yes. * * *

"Q. Into which of the bank's accounts was that put? A. It was charged to my account and credited, as far as I know, to the profit-and-loss account of the bank.

"Q. Was the same thing done in regard to money ostensibly raised by the other negotiations with these bonds that you say were similarly sold to the bank? A. As far as I remember.

"Q. All went into the profit-and-loss account of the bank and it was needed for the running expense of the bank? A. Yes, sir."

Respondent at no time prior to the closing of the bank in July, 1930, had any knowledge that Irwin had sold any of his bonds or securities or used them as a pledge to secure payment of a promissory note to the bank, and prior to November 21, 1929, did not know that Irwin had removed any of the securities from the safe-deposit box.

The "sales" of respondent's securities to the bank were made by Irwin upon his express understanding with the other bank officials that they were to be kept separate from other securities owned by the bank; that the bank would not sell them; that Irwin would repurchase them when he could; that the coupons would be clipped and delivered to Mr. Irwin. Irwin repurchased all of the securities "sold" to the bank prior to September, 1929, and returned them to the Camerer safe-deposit box.

In the latter part of September, 1929, Irwin needed over $20,000 to make good the losses of the bank. He removed securities of the par value of $22,500 from the safe-deposit box of respondent and "sold" them to the bank, at their market value, with the instructions we have outlined. These were never repurchased by Irwin, but, with the exception of one $1,000 bond which matured and was delivered to Irwin, remained in possession of the bank and were taken over by the Superintendent of Banks when he closed the bank.

In the latter part of November, 1929, respondent made an unexpected and hurried return to San Diego. Irwin contacted him and explained that he wanted to rent the use of some of the securities. He explained to Camerer that the bank had ways of making profit from the securities in addition to their regular interest. Camerer consented and gave Irwin the securities he desired which were the same ones which Irwin had "sold" to the

bank in September, 1929. They were all in Camerer's safe-deposit box, though how, when or by whom they were taken from the bank safe and returned to the Camerer safe-deposit box is not explained. Irwin gave Camerer the following receipt and agreement:

"California Savings & Commercial Bank
of San Diego
San Diego, Cal., Nov. 21, 1929
Bonds borrowed
from C. B. Camerer
by I. I. Irwin

As follows:

$9,500.—Bryant Building Inc.	6½%
"3,000.—Midland Counties Land Co.	7 %
"3,000.—Otis Steel Co.	6 %
"5,000.—Pickwick Corporation	7 %
"2,000.—Utilities L & P Corp.	5½%

$22,500.—par value (Twenty Two Thousand Five Hundred Dollars)—

As security for the return of said Bonds I hereby deposit with C. B. Camerer

59

Certificate No. /~~200~~ for two hundred (200) shares of the capital stock of the California Savings & Commercial Bank of San Diego to be redelivered to me upon the return by me to C. B. Camerer of the above Bonds.

¼% (one quarter of one per cent.) Premium as hire to be paid by I. I. Irwin to C. B. Camerer or $56/25 (Fifty six 25/100 Dollars) for each three months or less

November 21, 1929
I. I. Irwin."

On December 31, 1929, the bank again needed funds to make up its deficit. Irwin had one of his employees execute a promissory note to the bank in the sum of $23,000 and pledged $23,000 par value, of respondent's securities for the payment of this note. The money was deposited to the credit of the employee, transferred to Irwin's account, then transferred to the profit and loss account of the bank. These securities are now in the possession of the Superintendent of Banks.

On January 8, 1930, Irwin telephoned the residence of respondent. He was not at home and Irwin explained to Mrs. Camerer that he could use more securities under the same arrangments as before. She communicated with her husband who consented to the transaction. She went to the bank and opened the safe-deposit box, where the exact securities which Irwin desired to use were reposing. She delivered them to Irwin and took a receipt in substantially the same form as the one dated November 21, 1929. The securities were the identical ones pledged to the bank to secure the note of December 31, 1929. How these securities were returned to the safe-deposit box does not appear unless an explanation is offered in the testimony of Irwin that they might have been delivered to the bank after the date of the note.

Some time after the 1st of January, 1930, the bank returned to Irwin $54,000 of the money he had paid to it. Later, on demand of other officers of the bank, Irwin paid the bank over $70,000 of his private funds which were used to adjust irregular transactions not connected with his use of the Camerer securities. Some time before the bank was closed, and after January 8, 1930, officers of the bank, other than Irwin, learned that the securities "sold" to the bank in September and pledged on December 31, 1929, were not the property of Irwin but belonged to Camerer.

Numerous other facts were developed at the trial which form the basis of extended arguments in the briefs. From the view we take of the case it is not necessary to extend this opinion by detailing those facts or considering the questions of law which counsel raise and are based upon them.

The trial court found that the bank was insolvent on July 23, 1930; that it was taken over by the Superintendent of Banks on that day, together with the Camerer securities of the par value of $44,500; that these securities have remained in the possession of the Superintendent of Banks; that Irwin, in September and December, 1929, had no right nor authority to sell, transfer, pledge, or convey any interest in the securities to the bank and that the purported sale and pledge were made without the knowledge or consent of Camerer; that the money derived from the "sale" and pledge of the securities went into the funds and assets of the bank; that the receipt given by Irwin to Camerer on November 21, 1929, was given after the purported "sale" to the bank of the same securities described in the receipt; that the same was true of the receipt dated January 8, 1930; for the securities pledged to the bank on December 31, 1929; that Camerer had no notice or knowledge of the sale or pledge of his securities until after the bank was closed on July 23, 1930; that all, or most of, the securities so sold or pledged to the bank were purchased by Camerer through the bank, which fact was known to the assistant cashier of the bank at the time of the purported "sale" and pledge; that the two receipts for the securities dated November 21, 1929, and January 8, 1930, and signed by Irwin individually were executed by him for and on behalf of and for the benefit of the bank; that all the interest coupons were de-

tached from the securities while in possession of the bank, delivered to Irwin or the agent of Camerer, and deposited in Camerer's personal account in the bank; that all of the "sales" of the Camerer securities to the bank, and their pledge, between the fall of the year 1927 and January 9, 1930, were made by Irwin wrongfully, without any authority and for the purpose of showing fictitious assets of the bank in order to deceive the Superintendent of Banks; that the bank had notice and knowledge through its officers that Irwin did not have title to the securities at the time of their "sales" and pledge; that the bank received the benefit of the unlawful sale and pledge of the securities to it.

All of the foregoing findings are supported by ample evidence or by reasonable inferences to be drawn from it.

The trial court made the following finding: "That in the transactions above referred to the said plaintiff acted in all respects as an ordinary, prudent person would act, having full confidence at all times in the integrity and honesty of the said defendant Irwin as president of the said California Savings & Commercial Bank of San Diego, * * * plaintiff was not negligent in accepting the receipts above referred to or in permitting the said California Savings & Commercial Bank of San Diego to borrow the said bonds and securities as represented by said receipts above referred to, and the said plaintiff was not negligent in any of the acts done or taken by him, and was not negligent in the omission of any acts whatsoever." This finding is seriously assailed by appellants.

[1] It will shorten this opinion to frankly state that if the bank were not an insolvent institution with its assets in the possession of the Superintendent of Banks, but were a going concern, we would unhesitatingly affirm a judgment against it which would require the return to Camerer of his securities which had been taken from his possession by the dishonest acts of the president of the bank. We are not impressed with the argument that Irwin was acting in his private and not his official capacity in obtaining possession of the securities and in "selling" and pledging them to the bank. We are equally unimpressed with the argument that the receipts signed by Irwin on November 21, 1929, and January 8, 1930, gave Irwin authority to sell or pledge the securities. The "sale" occurred in September, 1929, two months before the first receipt was executed, and the pledge on December 31, 1929, a number of days before the second receipt was signed and delivered to Camerer. He had no knowledge of a prior conversion of his securities. That a person cannot ratify the unauthorized act of another, of which he had no knowledge, is too elemental to need support of authority. We are equally unimpressed with the argument that the bank and its officers, other than Irwin, neither had nor should have had notice of the fraudulent character of the several transactions in which Irwin purported to "sell" and pledge the securities. The bank was not to dispose of any of them but was to hold them for repurchase by Irwin. They were not to be placed among the securities owned by the bank, but were kept separate until a bank examiner ordered the practice discontinued a short time before the bank was closed. The coupons were clipped and delivered to Irwin, he giving his check to the bank for their face value. The coupons, or most of them, were deposited to Camerer's personal account. The "sales" were known to be "wash sales." The signer of the note was known to be a "dummy" and at least two officers of the bank objected to making the loan. A large part, if not all of the securities, were purchased by the bank for Camerer. All the transactions with the securities were made for the purpose of concealing the losses of the bank and deceiving the Superintendent of Banks as to its actual condition. Surely these and other facts which must have been known to the responsible officers of the bank should have caused them to inquire into the good faith of the transactions.

We must inquire into the position of the Superintendent of Banks, representing as he does the innocent depositors and other creditors of the bank, and determine if he can successfully defend this action when the bank could have no adequate defense.

[2] The Superintendent of Banks in taking over an insolvent bank acts for the creditors of the institution and its depositors. Hoff v. First State Bank of Watson, 174 Minn. 36, 218 N. W. 238; In re Farmers' Exchange Bank of Toronto, 55 S. D. 190, 225 N. W. 307; First State Bank of Herrick v. Conant, 117 Neb. 562, 221 N. W. 691; Bush v. Lien, 57 S. D. 501, 234 N. W. 29; Cockrill v. Abeles (C. C. A.) 86 F. 505; Case, as Receiver, v. Terrell, 11 Wall. 199, 20 L. Ed. 134; Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476.

The Superintendent of Banks, in taking over the assets of an insolvent bank, and acting for the creditors and depositors, can assert defenses which are not available to the bank. Wood v. Kennedy, 117 Cal. App. 53, 3 P.(2d) 366; Texas & Pac. Ry. Co. v. Pottorff, 291 U. S. 245, 54 S. Ct. 416, 78 L. Ed. 777; Hamor v. Taylor-Rice Engineering Co. (C. C.) 84 F. 392; Bank of Orland v. Harlan, 188

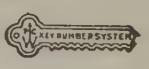
Cal. 413, 206 P. 75; First National Bank v. Reed, 198 Cal. 252, 244 P. 368.

The findings negative negligence on the part of the plaintiff in his dealing with Irwin and the bank. After examining a long line of California cases we have concluded that lack of negligence alone on the part of Camerer is not necessarily all that is required to resolve the equities of the case in his favor and against the Superintendent of Banks representing creditors and depositors. In Moss v. Bowman, 116 Cal. App. 720, at page 727, 3 P.(2d) 377, 380, it is said: "'In Shirey v. All Night and Day Bank, 166 Cal. 50, 134 P. 1001, the court said: "Where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence, or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." See Schultz v. McLean, 93 Cal. 329, 28 P. 1053; Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964; Chucovich v. San Francisco Securities Corp., 60 Cal. App. 700, 214 P. 263.' In the case of Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 274 P. 512, 514, 73 A. L. R. 1398, it was said: '* * * that where the true owner clothes another with the indicia of ownership of property, and therefore the apparent authority to transfer title thereto, and innocent third parties are thereby led into dealing with such apparent owner, the true owner will be estopped to deny that the apparent authority is the real authority. Code Civ. Proc. § 1962, subd. 3. In such cases the equities are found to be in favor of the bona fide purchaser rather than in favor of the owner who has by his own conduct clothed another with the power to commit the fraud.'" See, also, Sidney v. Wilson, 67 Cal. App. 282, 227 P. 672; Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 P. 704, 41 L. R. A. (N. S.) 529; Maynard v. Firemen's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; Bedell v. Herring, 77 Cal. 572, 20 P. 129, 11 Am. St. Rep. 307; Butters v. Brawley Star, 48 Cal. App. 57, 191 P. 987; Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 24 P. 1067; Hollywood Holding, etc., Corp. v. Oswald, 119 Cal. App. 21, 5 P.(2d) 963; Smeade v. Rosen, 121 Cal. App. 79, 8 P.(2d) 507.

[3, 4] When we measure the conduct of Camerer and Irwin by these rules, we are forced to the conclusion that through misplaced confidence in Irwin, Camerer put into his hands the power to commit the fraudulent acts which we have detailed. The securities were made payable to bearer. Irwin had free and unlimited access to them. After they were wrongfully removed from the safe-deposit box by Irwin and "sold" and pledged, they again found their way back into the box and the possession of Camerer. He caused them to be delivered to Irwin, or "hired" to the bank as he expressed it, accepted compensation for their hire and security for their return. He was told that the bank expected to make a profit on the transactions. In accepting a compensation for the hire of the securities a reasonable man must have supposed that something would be done with them, other than letting them repose in the vaults of the bank, to make a profit over the interest they regularly earned. The facts of this case bring it well within the rule that a person who through misplaced confidence in another puts it in the power of the other to injure innocent third parties must bear the loss occasioned by the wrongful act of the party in whom he misplaced his confidence.

The portion of the judgment appealed from is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



140 Cal.App. 554

TROWBRIDGE et ux. v. BRIGGS et al.

Civ. 8647.

District Court of Appeal, Second District, Division 2, California.

Sept. 4, 1934.

1. Automobiles ⇐245(3)

In action for injuries in automobile collision, nonsuit requested by defendants who were on wrong side of highway at time of head-on collision *held* properly refused.

2. Automobiles ⇐242(3)

That defendants' automobile was on wrong side of road at time of head-on collision constitutes prima facie showing of negligence, casting burden on defendants to explain that they drove to wrong side of highway without want of care.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Appeal and error ⇐1012(1)

Estimates of distance and speed by several witnesses, where they differ only within reasonable limits, are proofs to be weighed by trial court, and findings thereunder will not ordinarily be disturbed.

4. Automobiles ⇐244(12)

In action for injuries to occupants of automobile following truck which made left turn just before head-on collision, evidence *held* to show that truck driver gave arm signal for distance of more than 50 feet before making turn (St. 1925, p. 413, § 130).

5. Evidence ⇐19

It is common knowledge that speedometers ordinarily register speed, total mileage, and trip mileage on automobiles.

6. Witnesses ⇐406

It cannot be concluded that witness was testifying falsely when he said he read speed on truck speedometer merely because truck driver stated there was no speedometer on truck to check miles.

7. Automobiles ⇐244(12)

In action for injuries in automobile collision, evidence showing head-on collision with defendants' automobile just after truck preceding plaintiffs' car had made left turn *held* to support finding of negligence of defendants, proximately contributing to injuries.

8. Appeal and error ⇐1008(1)

Sufficiency of evidence to establish given fact is primarily question for trial court.

9. Appeal and error ⇐989

Power of appellate court in reviewing fact matters begins and ends with inquiry whether there is substantial evidence which will support conclusion reached in trial court.

10. Appeal and error ⇐931(1)

Where testimony is conflicting on any material point, reviewing court must assume that conflict was resolved in favor of prevailing party.

11. Automobiles ⇐244(12)

In action for injuries in automobile collision, evidence showing head-on collision just after truck which preceded plaintiffs' car had made left turn *held* to support finding that truck driver was not negligent (St. 1925, p. 413, § 130).

12. Automobiles ⇐159

Doctrine of imminent peril is never available to relieve one from consequences of vehicular collision unless he is himself otherwise without negligence.

13. Negligence ⇐83

"Last clear chance doctrine" is that party who has last chance to avoid accident, notwithstanding previous negligence of a plaintiff, is solely responsible.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words & Phrases.]

14. Automobiles ⇐227(3)

Where plaintiffs were injured in head-on automobile collision with defendants just after truck preceding plaintiffs' car had made left turn, last clear chance doctrine *held* not available to defendants against truck driver, where element of clear opportunity for truck driver to avoid impending accident was entirely absent.

15. Appeal and error ⇐110

Order denying motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by A. L. Trowbridge and another against J. A. Briggs and others, in which J. A. Briggs and another entered a cross-complaint against F. M. Meek. From an adverse judgment, J. A. Briggs and another appeal.

Affirmed.

John Coker, of San Diego, for appellants.

Arthur W. Eckman and Louis Thomsen, both of Los Angeles, for respondents Trowbridge et ux.

David D. Stuart, of Los Angeles, for respondent F. M. Meek.

WILLIS, Justice pro tem.

Appellants herein, J. A. Briggs and Marie Plane Briggs, his wife, appeal from a judgment for damages in favor of respondents (plaintiffs below) A. L. Trowbridge and Mamie Trowbridge, his wife, and from a judgment in favor of respondent (a codefendant below) F. M. Meek upon a cross-complaint of appellants against him, and from an order denying the motion for new trial made by appellants.

The respondents Trowbridge and wife, as plaintiffs, commenced this action against Briggs and wife and respondent F. M. Meek, as well as several other defendants sued under fictitious names, under one of which Beverly Building Material Company, a corporation, answered. The action is for damages to person and property arising from an automobile collision on the Roosevelt highway near Malibu, in Los Angeles county, between the automobile occupied and operated by plaintiffs and that occupied and operated by defendants Briggs and wife; the latter being the driver

at the time of collision. Defendants Briggs and wife, Meek and Beverly Building Material Company answered separately, and with their answer appellants filed a cross-complaint against their codefendants Meek and Beverly Building Material Company, to which they in turn filed their answer. The cause was tried without a jury, findings and conclusions were filed, and judgment entered thereon as above recited, from which Briggs and wife prosecute this appeal. Cross-defendant Beverly Building Company was granted a nonsuit.

Appellants base their claim for reversal upon the following points: That there is no evidence to support the finding that appellants were negligent; nor to support the finding that defendant-respondent Meek was not negligent; nor to support the finding that negligence of appellants, if any be shown, proximately contributed to plaintiffs' injuries; and that appellants' motion for nonsuit should have been granted.

[1, 2] The motion for nonsuit was properly denied under the rules governing such motions, too well known to herein require further statement. Suffice it to say that at the close of plaintiffs' case there was presented a prima facie case of negligent operation of their automobile by appellants, as a result of which it collided with that of respondents Trowbridge and wife, who were at the time shown to be without fault, resulting directly in injuries to them and their property. At the time of collision, appellants were operating their automobile on its wrong side of the highway, meeting in a "head on" collision with that of respondent Trowbridge and wife, which machine the evidence revealed was at the time being operated on its right side of the highway at a prudent and careful speed. This constitutes negligence of a prima facie character, sufficient in itself to overcome the motion for nonsuit. In Lawrence v. Goodwill, 44 Cal. App. 440, 449, 186 P. 781, 784, it is stated: "In other words, the fact that the driver of a vehicle has taken the wrong side of the highway when meeting or in overtaking another, where damage occurs, is not conclusive, but only prima facie, evidence of negligence, which may either stand as proof of the fact or be overcome or rebutted by the circumstances of the particular case." Herein such prima facie proof operated in law to cast the burden on appellants to explain that they drove their automobile to the wrong side of the highway without want of care. This the appellants sought to explain by subsequent proofs, and now contend that the whole proofs, taken together, are insufficient to support the findings that they were negligent and that their cross-defendant Meek was not negligent.

In several of the material issues involved in this appeal there is a conflict of evidence, but, in accordance with the well-established rule of law with respect to appeals based on insufficiency of evidence, the following recitation of facts must be accepted as true, as they are supported by substantial evidence:

About 5 o'clock p. m. of June 24, 1930, on a bright, clear day, respondents Trowbridge and wife, the former driving, were traveling west or northwest on Roosevelt highway near Malibu Beach in Los Angeles county, in a Studebaker sedan automobile, and for 2 or 3 miles had been following a Sterling truck, 20 feet in length and of some 22,000 pounds weight with its load of sand and gravel, operated by respondent Meek, at a speed of about 30 miles an hour, and about 60 feet behind it. The highway at this place consists of 20 feet of concrete pavement with 12-foot gravel shoulders on each side. Suddenly discovering that the truck was slowing down, Trowbridge also slowed down to 12 or 15 miles an hour; his machine approaching to within about 15 feet of the rear of the truck. At this point the truck made a left-hand turn to enter the premises of Marblehead Land Company through a gate, and, when the truck had cleared the right or east half of the road, its rear being about the center line thereof, Trowbridge accelerated his speed to pass on, when he saw immediately in front of him—about 15 or 20 feet—the Packard automobile of appellants, approaching the front of his machine at an angle of about 45 degrees to the center line of the road. He immediately applied his brakes, and thereupon a collision occurred on the east half of the road. Both automobiles stopped at the point of collision; the Trowbridge car being on the east half of the highway and appellants' auto being at an angle across the east half, with the rear wheels about over the center line. In the meantime the truck, untouched, passed into and through the gate and stopped.

As the truck approached the point where the turn was made, respondent Meek reduced its previous speed of 25 or 30 miles an hour to 10 or 15 miles an hour, and at a distance of some 200 feet before turning he started giving a signal by extending his arm horizontally; and when, some 50 or 60 feet from the gate, he saw through his rear view mirror that the car behind him was not attempting to pass, with his arm signal still out he proceeded and made the left turn, just after awaiting the passing on his left of an automobile going

south. At the time he began to make this turn he looked north and saw another automobile (appellants') about 250 feet away, approaching at a speed of about 40 miles an hour. He completed his left turn and had partly entered the gate when he heard the crash of the collision. Appellant Mrs. Briggs, who was operating the Packard, did not see any signal given by the truck driver and did not notice that the truck was turning until her automobile was within 30 or 40 feet of the truck. She immediately applied her brakes, which operated on the rear wheels only, and swerved to her left to avoid hitting the truck, which was at the moment across the west half of the highway, passed its rear end at a distance of about one foot, and then collided with the front end of the Trowbridge car. On the highway, after the collision there were found two skid marks leading near to the Packard rear wheels, extending about 8 feet in a diagonal direction across the highway and beginning about a foot to the west of the center line of the highway.

[3, 4] There is not so much of conflict as there is of inconsistency in certain parts of the evidence. Thus, estimates of distance and speed by the several witnesses, where they differ only within reasonable limits, are proofs to be weighed by the trial court and the facts found in accordance with their convincing preponderance. Such findings the appellate court ordinarily will not disturb. Appellants specifically refer to the testimony of respondent Meek, in respect to the giving of the arm signal, and claims that it affirmatively shows that he gave the signal only during the last 35 feet before turning, which is less than the distance fixed by law. Section 130, California Vehicle Act (St. 1923, p. 558, as amended by St. 1925, p. 413). In his examination he was asked: "How far from the gate were you when you gave it (the arm signal)?" To this he replied: "About 35 feet." He then demonstrated to the court the manner of giving the signal, and was then asked: "Did you put your arm out just as far as you could?" To this he answered "Yes, sir," whereupon this question was put: "How far did you leave it out?" To this he answered: "About 200 feet, until I made my turn." The witness Zeran, who was traveling south on the highway at the time, testified that, as he passed the truck some 50 feet south of the gate, just before it turned, he saw the arm signal being given by Meek and had continued to see it from a point about 18 feet north of the gate. The witness Wills, who was following and attempting to pass the Trowbridge automobile as well as the truck on their right or east side, using the graveled shoulder for passage, testified that he saw the truck driver give a signal that he was going to turn, while the witness was still behind the Trowbridge automobile. The witness Kimball testified that he was driving an automobile behind that of appellants and saw respondent Meek give the arm signal when the truck was 150 feet from the gate, and that Meek continued to give the signal until he turned. The witness McIntyre, who was riding with Meek, testified that he saw the latter give the signal "for a long ways" before turning.

From the foregoing it is quite clear that the trial court's implied finding that respondent Meek gave the arm signal for a distance of more than 50 feet last before making the turn is amply supported by the evidence.

[5, 6] Appellants also specifically attack the credibility of the testimony of the witness McIntyre in respect to his reading of the speedometer on the truck, and as a basis of such attack quotes from the testimony of respondent Meek, who testified in answer to a question as to how far he had driven this particular truck: "I don't know exactly. There is no speedometer on this truck to check the miles." It is a reasonable implication to be drawn from this answer that there was a speedometer on the truck but that it was not one that would register mileage. It is common knowledge that speedometers ordinarily register speed, total mileage, and trip mileage. It cannot be concluded that the witness McIntyre was testifying falsely when he said he read the speed on the truck speedometer, simply because the respondent Meek stated there was no speedometer on the truck to check the miles.

[7-10] From the foregoing statement of facts supported by substantial evidence, it is clear that the finding of negligence on the part of appellants, proximately contributing to the injuries of the respondents Trowbridge and wife, is supported by the evidence. The sufficiency of evidence to establish a given fact is primarily a question for the trial court and the jury, and, if there be substantial evidence to support the conclusion reached below, the finding is not open to review on appeal. The power of the appellate court begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached in the trial court. If on any material point the testimony is in conflict, it must be assumed that the conflict was resolved in favor of the prevailing party.

Treadwell v. Nickel, 194 Cal. 243, 260, 228 P. 25; Comstock v. Morse, 107 Cal. App. 71, 290 P. 108.

[11] Under the same rule and for the same reasons it is likewise clear that there is substantial proof supporting the finding that respondent Meek was not negligent as charged in appellants' cross-complaint. Section 130 of the California Vehicle Act (amended by St. 1925, p. 413), as it existed at the time of the collision herein, contained three constituent parts relevant to the facts of this case in respect to turning a vehicle on a public highway. First, the driver shall first see that such turning may be made in safety; second, if the operation of any other vehicle may be reasonably affected by such turning, the driver shall give a signal plainly visible to the driver of such other vehicle, by extending his hand and arm horizontally from and beyond the left side of the car, continuously during the last 50 feet traveled by the vehicle before turning; and, third, if the vehicle is so constructed or carries a load in such manner as to prevent the hand and arm signal above specified from being visible both to front and rear of such vehicle, it shall be equipped with an approved mechanical or electrical device which shall be used to signal in place of the hand and arm. There is substantial evidence herein that Meek gave the hand and arm signal for more than 50 feet continuously before turning, that it was plainly visible to another driver in his rear and to other drivers to his front, both in front of and behind appellants' automobile, from which it follows that a mechanical or electrical device for signalling was unnecessary. As to whether he saw that the turning could be made with safety, the trial court, upon all the evidence, impliedly found that he did so see. The facts recited above, if believed by the trial judge, furnish ample support for the conclusion that one in the position of the truck driver, seeing what he saw, in the exercise of ordinary care, would reasonably believe that a left turn could be made in safety.

In the case of Inouye v. Gilboy Company, 115 Cal. App. 25, 300 P. 835, 836, in construing section 130 of the California Vehicle Act, the court says: "This section provides that before turning the driver 'shall first see that such movement can be made in safety, and if it can not be made in safety, shall wait until it can be made in safety.' This section must be given a reasonable construction. 'Safety' does not mean absolute safety, for under that construction a driver intending to turn would be required to await the time when no other vehicle could possibly be affected in any way by such movement. The quoted portion of the section should be construed to require that the driver see first that the movement could be made in safety, assuming that both he and others using the highway exercise ordinary care."

[12] Appellants invoke the doctrine of imminent peril as excusatory of their conduct in swerving to the wrong side of the road. This doctrine is not available to them, as it is never available to relieve one from the consequences of a vehicular collision unless he is himself otherwise without negligence. The rule is stated in the text in 19 California Jurisprudence, at page 598, as follows: "One who, without negligence on his part, is suddenly confronted with imminent danger or seeming imminent peril is not required to exercise that degree of care and skill which is required in the commission of an act after careful deliberation." The case of Dewess v. Kuntz, 106 Cal. App. 665, 289 P. 912, cited by appellants, recognizes this rule. The rule as stated above is supported by numerous decisions of our appellate courts, one of the latest and most positive of which is Miner v. Dabney-Johnson Oil Corporation, 219 Cal. 580, 28 P.(2d) 23.

[13, 14] Appellants also invoke the doctrine of last clear chance in their appeal against respondent Meek. Briefly stated, this doctrine is: "A party who has the last chance to avoid the accident, notwithstanding the previous negligence of a plaintiff, is solely responsible." Girdner v. Union Oil Co., 216 Cal. 197, 13 P.(2d) 915, 918. The same case defines the necessary elements of the doctrine as follows: "That plaintiff has been negligent, and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." Under the facts of this case, this doctrine will not avail appellants anything, as the element of a clear opportunity for respondent Meek to avoid the impending accident is entirely absent. The situation of danger did not arise until the truck had turned across appellants' route, and there is no evidence to indicate that respondent Meek knew that appellants had

not seen his signal and knew, or in the exercise of ordinary care should have known, that appellants did not intend to slow down until too late. The findings of the trial court negative the application of the doctrine, and on the evidence in the record herein this court cannot say that, as a matter of law, respondent Meek was afforded a clear opportunity, by the exercise of the proper degree of care, to have avoided the collision. Lawrence v. Goodwill, 44 Cal. App. 440, 450, 186 P. 781.

[15] The order denying the motion for new trial is not appealable, and the appeal therefrom is dismissed.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 300

In re BRUCK'S ESTATE.
BRUCK v. HENN.

Civ. 9584.

District Court of Appeal, Second District, Division 1, California.

Aug. 3, 1934.

1. Property ⇐12
Intent alone is insufficient to accomplish legal transfer of ownership in realty.

2. Deeds ⇐177
Grantor cannot lawfully regain ownership of realty by regaining possession of delivered but unrecorded deed after death of grantee.

3. Executors and administrators ⇐85(4)
In proceeding in probate court, where controversy as to ownership of property is between representative of estate and the estate, probate court has jurisdiction to determine validity of claim of ownership.

4. Executors and administrators ⇐194(1)
Probate court has power to reduce family allowance to deceased's widow (Probate Code, § 681).

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

In the matter of the estate of John J. Bruck, deceased. From a judgment decreeing title to certain property to be in Robert B. Henn individually and denying the petition of Clara Bessie Bruck, widow, that Robert B. Henn, executor, be directed to include such property in the inventory of the property to the estate, and from an order reducing the family allowance to the widow, she appeals.

Judgment reversed.

William G. Randall and Clarence L. Belt, both of Los Angeles, for appellant.

A. J. Verheyen, of Los Angeles, for respondent.

HAHN, Justice pro tem.

This appeal is brought by Clara Bessie Bruck, widow of John J. Bruck, deceased, from an order and judgment of the superior court sitting in probate. Involved in this proceeding is the question of ownership of certain real and personal property, and also the matter of amount of family allowance to the appellant as widow of deceased.

Upon the death of John J. Bruck, which occurred in Los Angeles on December 9, 1930, his last will and testament was duly admitted to probate, and respondent, Robert B. Henn, a nephew of decedent, was appointed executor thereof. Upon filing an inventory of the estate, he did not include as part of the estate the "So. 40 ft. Lot 7, Tr. No. 1554," which will be referred to as 1231 Vista street, or the furnishings situate therein. Whereupon appellant, as widow of deceased and as a devisee and legatee under the will, filed a petition in the probate court requesting that the court order the executor to make a return of the property in question in the inventory of the property belonging to the estate.

Respondent filed an answer to the petition, admitting that he was in possession of the real and personal property in question, but asserted that he was the owner of the property and that the estate of John J. Bruck was not the owner, nor did said estate have any interest in said property. After a hearing on the matter, the court made its findings of fact and conclusions of law adverse to the contentions of petitioner, and found in favor of respondent's assertion that he was the owner of the property in question. Judgment was entered decreeing title to the property in respondent.

Appellant urges a reversal of the judgment on the following grounds:

"(a) That that portion of the said judgment which decrees that Robert B. Henn, the executor and respondent herein, is the owner in fee

of certain real and personal property described, is in excess of the jurisdiction of the court, sitting as a court of probate.

"(b) That if said portion of the judgment is not in excess of jurisdiction, it is nevertheless erroneous in that it is based on findings that are outside the issues, and in that the findings are against the evidence.

"(c) That the remaining portions of the said judgment are erroneous on the grounds stated under (b) above."

The evidence fairly justifies the following recital of facts material to a consideration of the questions presented for determination on this appeal:

On or after May 29, 1923, the exact date not appearing, title to the property here involved was conveyed to respondent Robert B. Henn by deed dated May 21, 1923, executed by Charles E. Nichols and wife, as grantors, and by them acknowledged on May 29, 1923. While there is no direct evidence in the record as to who furnished the money that was paid to Nichols for the property, respondent in his brief asserts that the purchase price was paid entirely by John J. Bruck, and bases his argument in part at least on the assumption that this is a proven fact in the case. Inasmuch as counsel for appellant in his reply brief seizes upon this admission as a point supporting his side of the controversy, we feel justified in accepting this admission of respondent as an established fact in the case. On May 28, 1923, respondent Henn executed and acknowledged a deed conveying to John J. Bruck the property deeded to him by Nichols. While the date of delivery of this deed is not shown, it does appear that the execution and delivery of the Henn deed was a part of the plan in accordance with which the property was purchased by deceased and title taken in respondent's name. Concerning the transaction of acquiring the property, the execution and delivery of the deed to Bruck, and the occupation of the property, respondent testified as follows:

"Mr. Randall: Q. Mr. Henn, you testified that you had been in possession of the property for about ten years? A. Yes, sir.

"Q. Prior to the death of the decedent, Mr. Bruck, you paid the rent on the property to him, did you not? A. Yes, sir.

"Q. How much did you pay? A. Fifty dollars a month.

"Q. You still occupy the property? A. Yes, sir.

"Q. That property you rented from Mr. Bruck, furnished, did you not? A. Yes, sir.

"Q. And the furniture you took possession of at the time you entered in as lessee is also still there, is it not? A. Part of it. Most of it has been changed, worn out, replaced. * * *

"Q. What would you say is the fair market value of the personal property now in the house which you received from Mr. Bruck as a lessee? A. I would say nothing at all. It must have some value, but there isn't much of it left—perhaps fifty dollars. * * *

"Q. Since you have been in possession of the property—since the death of Mr. Bruck and since you were appointed executor, have you paid any rent on the estate? A. No, sir.

"Q. When was the last rent you paid, Mr. Henn? A. The month of my uncle's death; I think it was the first of December—must have been 1930.

"Q. The record shows, I believe that Mr Bruck died on December 9th, 1930? A. Yes, sir.

"Q. And you paid rent for that month, of December? A. Yes, sir.

"Q. But nothing since? A. No, sir."

Question by Mr. Verheyen, attorney for respondent:

"Q. At the time that this deed to the property was delivered to you, and the deed which is introduced here in evidence was handed to your uncle, Mr. Bruck, what was said and what was done at that time? * * * A. I was to pay him $50 a month during his lifetime, but I was to consider the property mine. I was to pay $50 as long as he lived—was to pay him—on the first of each month. * * *

"Q. What was said between you and your uncle at the time this deed was handed back to him, regarding that deed? * * * A. He said that he would take the deed, and that in case I died before him that the deed could be filed by him—put the property back to himself. * * *

"Q. What did he say if anything? A. But, he said, as long as he lived that I was to pay him $50 a month rent; that at his death, decease, the property was mine.

"Q. What was said and done by your uncle at the time the deed was delivered back to him? * * * A. He said that I was to own the property, that that was the purpose of the deed."

Question by Mr. Randall, attorney for appellant:

"Q. One more question in regard to this deed which has been put in evidence—did you

deliver this deed to your uncle at that time? A. Yes, sir.

"Q. And it remained in his possession thereafter, as far as you know, until you found it in his safe deposit box? A. Yes, sir."

Respondent offered in evidence a letter which he found in decedent's safe deposit box, addressed to him dated April 18, 1928, the date of decedent's will. The only part of the letter referring to the property here involved reads as follows: "In my will I bequeath to you house & lot on Vista Street, as this house is deeded to you, but you gave me a deed back on same, which I have in my box 24 First Nat. Bank. You can either record same or destroy Deed to me as I have never recorded it, but do as you see best."

The will of John J. Bruck, duly admitted to probate, contains the following provision: "Second. To my Nephew Robert B. Henn House and Lot and contents of house on 1231 Vista Street Hollywood Calif." The property referred to in the will is the property involved in this proceeding.

Inasmuch as we have come to the conclusion that appellant's contention that certain of the findings are not supported by the evidence, is correct we will confine our discussion in the main to this point. The portions of the findings necessary to our consideration of the matters urged read as follows:

"That it is untrue that at the time of the death of John J. Bruck, decedent, or at any other time since the said decedent, John J. Bruck, deeded said property to Robert B. Henn, said Bruck was the owner of the real and/or personal property in the County of Los Angeles, to wit, a house and lot situated at 1231 Vista Street in the City of Los Angeles, with the contents of said dwelling.

"That it is true that by the terms of decedent's, John J. Bruck's, last Will, said decedent devised and bequeathed all of said real and personal property to Robert B. Henn, the Executor herein, although he did not own said property to so devise and bequeath; that it is true that for a long time prior to the death of said decedent, the said Robert B. Henn had resided in and had occupied the said property, and had done so as owner thereof, and it is also true that he paid said decedent, John J. Bruck, $50.00 per month until his death; but it is untrue that said Robert B. Henn was a lessee and/or tenant of said decedent and paid decedent rental of $50.00 per month; that it is true that ever since the death of decedent, the said Robert B. Henn has continued to and does now occupy the said premises and has not paid rental since the death of decedent and/or charged himself, in his accounting in this proceeding, with the said rental and/or the rental value of said property, or any part thereof, and he is not required to do so.

"That it is true that the decedent, John J. Bruck, deeded the property to Robert B. Henn prior to his death, and that Robert B. Henn gave a deed back to decedent, which was in decedent's safe deposit box at the time of his death; that it is true that it was not intended by said deed to deliver title back to said decedent, and title was not so delivered back; that it is true that said decedent and Robert B. Henn had an agreement between them that said deed was not to be effective and was not to be recorded in the event decedent, John J. Bruck, died before Robert B. Henn; that it is true that Robert B. Henn agreed to pay decedent the sum of $50.00 per month as long as decedent lived and no longer and said deed was delivered to said decedent as security for the performance of said agreement and that he did pay said sum of $50.00 per month to decedent as long as he lived and fully performed under said agreement and was entitled to a return of said security and said security was fully satisfied; that it is true that Robert B. Henn did not intend to deliver title of said property to decedent, John J. Bruck, by the deed dated May 28th, 1923, that said deed was handed to John J. Bruck only for the purpose of such security and of having the same recorded in the event that Robert B. Henn died prior to John J. Bruck, the decedent, or failed to make the payments aforesaid; that it is true that there was no intention on the part of the said Robert B. Henn to deliver title to said property to decedent, John J. Bruck, by deed dated May 28, 1923."

As conclusions of law from the findings of fact, the court declared: I. "The deed dated May 28th, 1923, executed by Robert B. Henn to John J. Bruck of the real property in the County of Los Angeles, described as (here follows description) was merely delivery of the deed's possession and was not accompanied by the intent that the deed should become operative as such, and that it was the intention of both parties that the party surviving should have his deed returned in case the other party should die, and furthermore, said deed was handed over merely to be used as security if it was to be used at all.

II. "* * * It is not necessary for the said Robert B. Henn, Executor, to make and return an Inventory and Appraisement of said above described real property, and/or the personal property contained in said dwelling

house, and/or account for the rents, issues and profits of said real and personal property.

III. "That Robert B. Henn is the owner in fee of the real and personal property described as follows: [then follows a description of the real property and contents of the dwelling house.] * * *"

The judgment, among other things, decrees:

"That Robert B. Henn is the owner, in fee, of the real and personal property described as follows: (then follows a description of the property) * * * that the deed dated May 28th, 1923, executed by Robert B. Henn to John J. Bruck, to the property above described, was given as security for an obligation which is fully performed and satisfied and is now of no force and effect; that said deed was delivery of the deed's possession only, and was not accompanied by the intent that the deed should become operative as a deed, and that it was the intention of John J. Bruck and Robert B. Henn, that should Robert B. Henn survive John J. Bruck, the decedent, the delivery of said deed should not be accepted by said John J. Bruck and said deed should not be recorded.

"* * * That Robert B. Henn, as Executor, need not make and return an Inventory and Appraisement in the above entitled Estate of John J. Bruck, deceased, of the above described real property and/or personal property contained in said dwelling house, and/or account for the rents, uses and profits of said real and personal property. * * *"

Not only is there no evidence to support the repeated finding that John J. Bruck deeded the property to Robert B. Henn, but the record shows conclusively that one Charles E. Nichols and wife deeded the property to Henn. Again, if we may indulge the fancy that the first quoted finding relative to ownership was intended to mean that Bruck never was the owner from the time the title to the property was vested in Henn by the Nichols deed, this finding would seem to be in direct conflict with the admission of the respondent that it was Bruck's money that paid the entire purchase price of the property, and respondent's own testimony that he leased the property from Bruck, and from 1923 until Bruck's death in 1930 he occupied it as a tenant and paid to Bruck as rental therefor during said period the sum of $50 per month. The evidence justifies the conclusion that it was Bruck's intention that, if Henn survived him, Henn was to become the owner of the property, provided Henn paid him $50 per month as rental as long as Bruck lived, and, in the event that Henn failed to make such payments or Henn predeceased Bruck, then neither Henn nor his estate would have any interest in the property, but the ownership would remain in Bruck with the means in his possession to easily acquire record title.

The method adopted to carry out Bruck's plan, aside from the devise contained in the will, fell far short of the requirements of the law.

[1, 2] In order to accomplish a legal transfer of ownership in property, there must be, in addition to the intent, such overt acts as the law requires to be observed, in order that ownership may pass legally from one to another. Nor may one lawfully regain ownership in property which he had deeded to another by regaining possession of his delivered but unrecorded deed after the death of the grantee. In order to have effectively passed ownership from Bruck to Henn other than through the devise in Bruck's will, it would have required the execution and delivery by Bruck of a deed of conveyance prior to his death.

In support of the court's finding that ownership of the property is in him, respondent dwells at length on the purposes for, and conditions upon which, he executed and delivered the deed to Bruck. The considerations urged might be persuasive, if Henn at the time he executed and delivered the deed was the owner of the property. Inasmuch as Bruck was unquestionably the owner of the property, the only effect of Henn's deed was to put into Bruck's hands the means of easily making the record title show in him. In view of this situation, it would seem that the execution and delivery of the deed by Henn to Bruck does not affect the basic considerations which must determine the question of ownership here involved.

Viewed from the standpoint of the conduct of the parties, the evidence abundantly supports the conclusion that both Henn and Bruck considered that Bruck was the owner of the property during his lifetime for, first, Henn testified he leased it from Bruck and paid Bruck as rental therefor $50 per month; second, Bruck in his will, made five years after the property was acquired, devised the property to Henn; third, in his letter to Henn found in the safe deposit box, Bruck expressed the view that the only way ownership of the property would pass to Henn was through his will, unless Henn could manage to secure possession of his unrecorded deed after Bruck's death and destroy it. This in the belief that such destruction of the deed would operate to accomplish the same result as

would be accomplished by the devise of the property under the will.

There is also confusion and conflict in the findings in this, that it is declared that the deed from Henn to Bruck was executed and delivered as security for the fulfillment of Henn's agreement to pay Bruck $50 per month, while it is also found that the deed was delivered upon an agreement that it was not to be effective in the event Bruck died first. In addition to these defects in the findings, the following findings of fact included in the conclusions of law are ambiguous and confusing: "The deed dated May 28th, 1923, executed by Robert B. Henn to John J. Bruck, of the real property * * * was merely delivery of the deed's possession and was not accompanied by the intent that the deed should become operative as such, and that it was the intention of both parties that the party surviving should have his deed returned in case the other party should die, and furthermore said deed was handed over merely to be used as security if it was to be used at all."

The following paragraph in the judgment is equally confusing, and in part, at least, without support in the findings or conclusions of law: "It is further ordered, adjudged and decreed, that the deed dated May 28th, 1923, executed by Robert B. Henn to John J. Bruck, to the property above described, was given as security for an obligation which is fully performed and satisfied and is now of no force and effect; that said deed was delivery of the deed's possession only, and was not accompanied by the intent that the deed should become operative as a deed, and that it was the intention of John J. Bruck and Robert B. Henn, that should Robert B. Henn survive John J. Bruck, the decedent, the delivery of said deed should not be accepted by said Bruck and said deed should not be recorded." It will be noted that there are conflicting findings as to whether or not the deed was delivered, the purposes for which the deed was delivered, and the conditions upon which it was to become effective. The findings, conclusions of law, and the judgment are all vulnerable to the attack made upon them by appellant.

[3] As to the point urged by appellant that the court exceeded its jurisdiction as a court of probate in decreeing respondent to be the owner of the property, it is well settled that the probate court in such a proceeding, where the controversy as to ownership of property is between a representative of the estate and the estate, has jurisdiction to determine the validity of the claim of ownership. Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Estate of Klumpke, 167 Cal. 415, 139 P. 1062.

We do not deem it necessary to discuss the point raised by appellant that the court's judgment decreeing title in respondent is outside the issues raised by the petition and answer thereto. If the property does not belong to the estate, appellant cannot be affected by the questioned part of the decree.

[4] As to the order of the court reducing the family allowance to appellant as widow of decedent, which appellant urges was, first, in excess of the power of the court to make, and, second, if within the court's power, constituted abuse of discretion, we find no merit in either of these contentions. The power to make such a change is committed to the court. Probate Code, § 681; Estate of Nelson, 167 Cal. 321, 139 P. 692.

In view of the conclusions indicated on the points discussed, we do not deem it necessary to consider other questions raised and discussed in the briefs filed.

The judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

1 Cal.2d 460

In re CROSSLEY.

CROSSLEY v. ELIEL.

L. A. 14368.

Supreme Court of California.

Aug. 31, 1934.

1. Insane persons ⇐11

Proceeding to declare ward incompetent and appoint guardian of the estate, being personal in character, abated with ward's death.

2. Appeal and error ⇐330(1)

Where proceeding in which ward was declared incompetent and guardian of her estate appointed was abated by death of ward, appeal would be dismissed without prejudice, to preclude incidental effect of adjudication of incompetency upon estate proceedings.

In Bank.

Appeal from Superior Court, City and County of Los Angeles; Walton J. Wood, Judge.

Proceeding in the matter of Carrie C. Crossley, an incompetent person, in which Carrie C. Crossley appealed from an order declaring her mentally incompetent and appointing a guardian of her estate, opposed by Elizabeth S. Eliel, who moved to dismiss the appeal.

Appeal dismissed.

Charles J. Wendland, of Pasadena, and W. I. Gilbert, of Los Angeles, for appellant.

Elliot Gibbs, of Pasadena, for respondent.

WASTE, Chief Justice.

This is an appeal from an order declaring appellant "mentally incompetent and incapable of taking care of or managing her property," and appointing a guardian of her estate, but not of her person. Since taking the appeal the ward has died. Respondent has filed herein a copy of the death certificate and suggests that the appeal be dismissed for the reason that the issue as to appellant's competency became moot by her death.

[1, 2] Preliminarily, we do not hesitate to state that we have examined the appeal on its merits and find nothing suggesting a reversal of the order. However, the proceeding being personal in character abated with the death of the ward. If the order should be reversed, the guardianship hearing could not be retried. Examination of the authorities discloses similar instances wherein appeals from adjudications of incompetency were dismissed because of the death of the ward pending appeal. In re Fleming, 223 App. Div. 849, 228 N. Y. S. 544; Palmer v. Wolf, 178 Iowa, 932, 160 N. W. 285. See, also, In re Estate of King, 43 Cal. App. 307, 308, 184 P. 964.

However, as in Palmer v. Wolf, supra, and in order to preclude any incidental effect of an adjudication of incompetency upon estate proceedings, the appeal is dismissed without prejudice.

We concur: PRESTON, J.; CURTIS, J.; SHENK, J.; SPENCE, Justice pro tem.

1 Cal.2d 400

MIRABITO v. SAN FRANCISCO DAIRY CO. et al.

S. F. 15084.

Supreme Court of California.

July 31, 1934.

As Modified on Denial of Rehearing.

Aug. 30, 1934.

1. New trial ⇐143(5)

Where jurors agreed in advance to be bound by majority vote on one of two verdicts, and ninth juror assented to final verdict only because of such agreement, verdict *held* not "chance" verdict within statute admitting jurors' affidavits to show that verdict was reached by resorting to chance (Code Civ. Proc. § 657, subd. 2).

"Chance" is commonly understood to imply an absence of explainable or controllable causation, and has been defined as hazard, risk, or the result or issue of certain and unknown conditions or forces.

[Ed. Note.—For other definitions of "Chance," see Words & Phrases.]

2. Automobiles ⇐244(26)

Evidence *held* to support finding that truck driver was acting for defendant at time of accident.

Evidence disclosed that name of defendant company appeared on truck which had been regularly used by truck driver in milk deliveries; that truck was kept with many other similar trucks bearing similar signs at the place where defendant maintained its office where another company maintain-

ed an office; and that officers of both companies were identical.

3. Appeal and error ⇐932(1)

On appeal from judgment on ground of excessiveness of verdict, reviewing court will give plaintiff benefit of every inference that can reasonably be drawn from evidence in his behalf.

4. Appeal and error ⇐1004(1)

Before reviewing court can set aside verdict as excessive, it must appear that award is so grossly disproportionate to any reasonable limit of compensation warranted by facts as to shock sense of justice and raise strong presumption that it is based on prejudice or passion rather than sober judgment.

5. Damages ⇐132(7)

$5,000 to seven year old boy who sustained splintered fracture of first metatarsal bone of right foot, and who was in cast for three months and walked on crutches for four months, and who sustained permanent impairment of foot and suffered great pain, *held* not excessive.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Edmond Mirabito, a minor, by his guardian ad litem, Katherine Mirabito, against the San Francisco Dairy Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, 27 P.(2d) 106.

Pillsbury, Madison & Sutro and Eugene M. Prince, all of San Francisco (Norbert Korte, of San Francisco, of counsel), for appellants.

Sol Silverman and George Olshausen, both of San Francisco, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, First Appellate District, Division 2, for the purpose of giving further consideration to the contention of appellant that the verdict was arrived at by means of a resort to chance and hence might be impeached by affidavits of the jurors.

The facts are stated in the opinion of Mr. Justice Spence as follows:

This action was brought to recover damages for personal injuries sustained by plaintiff, a boy seven years of age. A jury trial was had and a judgment for $5,000 was entered in favor of plaintiff and against the defendants San Francisco Dairy Company and Ray Vogel. Said defendants appeal from said judgment.

On this appeal it is urged: (1) That a new trial should have been granted because of misconduct on the part of the jury "in resorting to the determination of chance"; (2) that the evidence was insufficient to sustain a judgment against the defendant San Francisco Dairy Company; and (3) that the damages awarded were excessive.

Due to the nature of appellants' contentions, a detailed statement of the facts surrounding the happening of the accident is not required. Suffice it to state that a milk truck driven by the defendant Vogel and bearing the name of the San Francisco Dairy Company struck the rear end of another automobile, which, in turn, struck a wooden barricade erected around an excavation. Some of the planks of the barricade were broken by the impact and one of said planks was thrown against respondent, thereby causing his injuries.

During the trial one of the jurors was excused. The parties stipulated that the trial might proceed with eleven jurors, and further stipulated that it should require nine of the eleven jurors to return a verdict. Upon the motion for a new trial appellants presented numerous affidavits for the purpose of showing misconduct. It appears therefrom that after nine of the jurors had agreed to return a verdict in favor of plaintiff, the question of the amount of the verdict was discussed at length. The amounts proposed ranged from $1,500 to $10,000, but the affidavits do not show what amounts were proposed between these two sums or how many jurors were agreed upon any particular sum. The affidavits of three of the jurors then continued as follows: "After considerable discussion the jurors could not agree upon a definite and certain sum as their verdict and it was apparent that it would be difficult to arrive at an amount upon which nine of the jurors would agree and that a deadlock might result; thereupon it was proposed and the jurors agreed that the jury would proceed and arrive at its verdict as follows: A single vote should be taken on two amounts, one for $5,000 and the other for $2,000, and the amount for which a majority of the jurors should vote would be considered and returned as the unanimous verdict of the jury. Thereafter, and pursuant to said agreement, a ballot on said two amounts was taken and

the vote recorded thereon was eight jurors for $5,000 and three jurors for $2,000. Thereupon, pursuant to said previous agreement and not otherwise, and without further deliberation, discussion, balloting or assent on the part of or by any of the jurors, said sum of $5,000 was entered by the foreman in the form of verdict prepared by the court, and no further ballot was taken or assent given to said verdict other than as hereinabove set forth. Thereupon said verdict for $5,000, without further discussion, ballot or assent, was returned to the court pursuant to said agreement and not otherwise as the unanimous verdict of the jury. Affiant is one of the jurors who voted for the sum of $2,000 and affiant did not thereafter change his said vote while in the jury room, and upon the poll of the jury in court after said verdict had been so returned affiant stated that said verdict was his verdict solely because of said agreement to abide by the vote of the majority."

The respondent offered counter affidavits made by some of the jurors, including some of the same jurors whose affidavits were offered by the defendants, which tended to show a discussion and acceptance of the $5,000 verdict before it was written and announced by the foreman.

[1] It is conceded that under section 657, subdivision 2, of the Code of Civil Procedure, misconduct of the jury may be shown by affidavits of the jurors only when "any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance." Unless an agreement to abide by the vote of a majority, which is less than the number of jurors required to reach a lawful verdict, constitutes a "resort to the determination of chance," the affidavits offered upon the motion for new trial were incompetent.

"Chance" is commonly understood to imply an absence of explainable or controllable causation, and has, moreover, been defined by this court as "hazard, risk, or the result or issue of uncertain and unknown conditions or forces." Dixon v. Pluns, 98 Cal. 384, 387, 33 P. 268, 269, 20 L. R. A. 698, 35 Am. St. Rep. 180. That case held the so-called quotient verdict to be a resort to the determination of chance, and is urged by appellants as determinative of the question here raised. We do not regard that case as controlling, for the reason that there there existed an additional unknown element not present in the case under consideration, the jury did not know the figures upon which it was voting. Here each juror accepted one of the two known figures as his first choice, and, by way of compromise and for the sake of coming to an agreement, agreed to accept the other as his verdict if it should be the first choice of the majority. To our minds there was no operation of any unknown force or unexplainable cause, but an exercise of the judgment of each juror. Each juror by an act of conscious volition participated in the determination of the amount of the verdict even though he may have reached his decision by other methods than by weighing the evidence and may have based his judgment upon considerations other than his own opinion of the proper amount of damages to be awarded. The agreement which appellants attempted to show was not an agreement to resort to the determination of chance.

[2] With regard to the second ground of appeal, we are satisfied that the disposition made by the District Court of Appeal is correct, and we hereby adopt the following portion of its opinion as the opinion of this court:

Appellant San Francisco Dairy Company makes the further contention that the evidence was insufficient to sustain the judgment against it. In our opinion this contention is without merit. It is based solely upon the claim that there was no evidence to show that appellant Vogel was the agent or employee of appellant San Francisco Dairy Company or that he was acting within the scope of his employment at the time of the accident. It may be noted that the name of appellant San Francisco Dairy Company indicated that said company was engaged in the dairy business. The truck in question was a milk truck which had been regularly used by Vogel for some time for the purpose of delivering milk over his route. His testimony relating to the time of the accident was: "I was driving on my route." The truck bore signs on both sides thereof with the name "San Francisco Dairy Company" thereon. It was kept with many other similar trucks bearing similar signs at the place where appellant San Francisco Dairy Company maintained its office. At this place the names "San Francisco Dairy Company" and "Riverdale Dairy Company" appeared at the entrance. Vogel reported there each morning, started from there on his route with said truck and returned there at the end of the day. There was other testimony in the nature of hearsay evidence relating to the ownership of the truck and the employment of

Vogel, but the parties are not agreed upon whether this particular testimony is available to respondent on this issue. We need not discuss this question, for we believe that the testimony above mentioned amply supported the inference that Vogel was acting for appellant San Francisco Dairy Company at the time the accident occurred. Hartig v. American Ice Co., 290 Pa. 21, 137 A. 867; Holzheimer v. Lit Bros., 262 Pa. 150, 105 A. 73; Williams v. Ludwig Floral Co., 252 Pa. 140, 97 A. 206; Klusman v. Harper, 221 Mo. App. 1110, 298 S. W. 121; Mann v. Stewart Sand Co., 211 Mo. App. 256, 243 S. W. 406; Fleishman v. Polar Wave Ice & Fuel Co., 148 Mo. App. 117, 127 S. W. 660; Robeson v. Greyhound Lines, 257 Ill. App. 278; Breen v. Dedham Water Co., 241 Mass. 217, 135 N. E. 130; Berry on Automobiles (6th Ed.) § 1360. The appellant corporation calls our attention to Vogel's testimony to the effect that he was not working for appellant San Francisco Dairy Company, but for the Dairy Delivery, Company. They also refer to the evidence to the effect that the truck was not owned by the appellant San Francisco Dairy Company, but by the Dairy Delivery Company, and the further evidence that Vogel was paid by the last-named company. We believe, however, that such testimony merely created a conflict with other testimony to which reference has been made. Furthermore, the president of appellant San Francisco Dairy Company, who was also the president of the Dairy Delivery Company, made the following statement in explanation of his testimony: "The San Francisco Dairy Company is a non-operating corporation. In other words, it is a part and subsidiary of the Dairy Delivery Company. The name of the San Francisco Dairy Company is used as a business name, and the corporation kept as is for that purpose, recognition of the name of the San Francisco Dairy." He did not deny having made the statement that "all these companies were one." It further appeared that the vice president of San Francisco Dairy Company was also the vice president of the Dairy Delivery Company. The same situation existed with respect to the office of secretary. Upon all the testimony taken together, the only logical conclusion to be drawn was that appellant San Francisco Dairy Company was merely the alter ego of the Dairy Delivery Company. We are therefore of the opinion that the evidence was sufficient to sustain the verdict against appellant San Francisco Dairy Company.

[3-5] The third point raised by appellants is that the damages are excessive. The injuries for which they were awarded as compensation were a splintered fracture of the first metatarsal bone of the right foot, which is the bone extending from the base of the great toe up to the instep, deep abrasions and lacerations on the back of the right foot, and nervous shock. The evidence as to the extent, seriousness, and probable permanence of the injuries is sharply conflicting but, resolving every conflict in favor of the respondent, and giving him the benefit of every inference that can reasonably be drawn in support of his claim, as we are bound to do in considering a question of this nature, we cannot say the damages are excessive. Plaintiff's mother and grandmother testified that he suffered great pain and discomfort, largely contributed to by the reaction from the antitetanus serum which he was given, and experienced severe nervous shock, that he was forced to wear a cast for three months, and used crutches for four months. It is not disputed that the great toe of the right foot is dorsiflexed or bent up due to injuries of the nerves in that region or irritation of the nerves crushed in the scar on the back of the right foot and that there is some limitation of movement of the toe. There is medical evidence in the record from which the jury might reasonably have concluded that the strength and usefulness of the foot are permanently impaired, that plaintiff is developing flat feet as a result of the injury to the right foot and the extra burden put on the left foot, or at least that an existing tendency to flat feet was aggravated by the injury, and that the flexion of the toe would probably be permanent and would interfere with any activity requiring the use of the feet, since it furnishes the main propulsive power of the foot. On this record it cannot be said that the award of $5,000 is so "grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment," which must be the case before a reviewing court may set aside a verdict as excessive. Ware v. McPherson, 213 Cal. 120, 1 P.(2d) 433; Hart v. Farris, 218 Cal. 69, 77, 21 P.(2d) 432. We are the less inclined to do so in a case such as the present, where the jury and the trial judge, who denied a motion for a new trial on this ground, among others, had before them demonstrative evidence of the injury to plaintiff's foot and the impairment of its function, and were able to judge for themselves the ex-

tent to which it fell short of being a normal foot. Plaintiff was present in the court, and was required to walk and run and jump. The medical witnesses used the foot itself to illustrate their testimony. These demonstrations were especially helpful in arriving at a conclusion on the facts.

The judgment is affirmed.

1 Cal.2d 347

GILMORE v. JORDAN, Secretary of State, et al.

S. F. 15219.

Supreme Court of California.

July 23, 1934.

Mandamus ⇐74(3)

Where fraud in procurement of candidacy papers was committed on electors, on signers to sponsorship certificate, and on other candidates for same office, peremptory writ of mandate was issued directing registrar of voters to omit name of candidate from list of candidates for office for which he was running, and from ballots.

In Bank.

Application by Joseph P. Gilmore against Frank C. Jordan, as Secretary of State, and Charles J. Collins, as registrar of voters of the city and county of San Francisco, and another, for writ of mandate to compel Charles J. Collins, as registrar of voters of the city and county of San Francisco, to omit a name from the list of candidates for the office of assemblyman in a certain assembly district.

Writ granted.

James D. Lucey, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Robert W. Harrison, Chief Deputy Atty. Gen., and John J. O'Toole, City Atty., of San Francisco, for respondents.

PER CURIAM.

In the procurement of the papers for the candidacy of Alexander Gillmor, referred to in the proceeding herein, fraud was committed upon the electors, upon the signers to the sponsorship certificate, and upon other candidates for the same office, as defined in the case of Power v. Jordan, S. F. No. 7077,[1] and upon the authority of that case a peremptory writ of mandate is hereby ordered to issue to the registrar of voters of the city and county of San Francisco commanding him to omit the name of Alexander Gillmor from the list of candidates for the office of assemblyman of the twenty-first assembly district, to be hereafter published by him, and from the ballots to be printed and prepared. Further ordered that a transcript of testimony be delivered to the deputy city attorney representing respondent Collins, to be by him referred to the district attorney of the city and county of San Francisco for presentation to the grand jury.

1 Cal.2d 486

BLAINE v. BOARD OF SUP'RS OF ALAMEDA COUNTY et al.

S. F. 15258.

Supreme Court of California.

Sept. 14, 1934.

1. Elections ⇐239

Votes invalid for any reason are not to be considered in determining number of votes cast.

2. Elections ⇐239

Votes cast for candidate known to be dead or disqualified or for fictitious person are ineffectual for any person, and cannot be counted in determining result of election.

3. Elections ⇐126(7)

In determining whether candidate for judicial office received majority of votes at primary election so as to become only candidate at ensuing election under state law, ballots cast for candidate generally known to have been murdered 13 days before election could not be counted (St. 1921, p. 1217, § 23; Const. art. 2, § 2¾).

In Bank.

Petition by James S. Blaine against the Board of Supervisors of Alameda County and others, for a writ of mandate to compel the respondent board to refuse to certify the election of Chris B. Fox to the office of justice of the peace of the city of Oakland, and to compel the county clerk of said county to refuse to issue to Chris B. Fox a certificate of his election, and to command the clerk to

[1] Unreported memorandum.

print on the ballot to be used at the ensuing general election the names of petitioner and Chris B. Fox as candidates for said office.

Petition denied.

J. E. Hood, of Oakland, for petitioner.

PER CURIAM.

Petition for writ of mandate to compel the respondent board of supervisors of Alameda county to refuse to certify the election of Chris B. Fox to the office of justice of the peace of the city of Oakland (police judge), designated as office "No. One," and to compel the county clerk of said county to refuse to issue to Chris B. Fox a certificate of his election to said office, and commanding the clerk to print on the ballot to be used at the ensuing general election the name of petitioner and the name of Chris B. Fox as candidates for said office.

Prior to the recent primary election, Howard L. Bacon, then the incumbent in said office, Chris B. Fox, and petitioner were candidates to be voted on at the primary election for said office. After the three persons named had qualified as candidates for the office, and after notice thereof was given and published, and the name of each had been printed on the sample and official ballots, as such candidates, as by law required, and thirteen days before the primary election, Judge Howard L. Bacon died from the effect of gunshot wounds inflicted by a disgruntled former client. The circumstances of the shooting and the death of Judge Bacon were given much publicity by and through the press. The fact of his death, therefore, was generally known throughout the city of Oakland.

At the primary election held in the city of Oakland, a total number of 69,152 votes was cast for the candidates for the office of justice of the peace of the city of Oakland (police judge) "No. One," of which total vote Judge Bacon, though dead, received 9,759, James S. Blaine, petitioner herein, 25,956, and Chris B. Fox 33,437. From these figures the petitioner contends that there was no election at the primary, in that Chris B. Fox did not receive a majority of the votes cast for all the candidates at the primary, and that he is therefore entitled to be placed on the November ballot as a candidate for the office opposed to said Chris B. Fox. The board of supervisors of Alameda county, unless compelled otherwise, is about to and will declare said Chris B. Fox elected to said office of justice of the peace, and would certify such fact to the respondent county clerk, who, it is alleged, will issue to Chris B. Fox a certificate of his election to the office, and will not print the names of any candidates for said office on the ballot for the general election in November.

[1-3] The Direct Primary Law (St. 1913, p. 1379, § 23 [as amended by St. 1921, p. 1217]), in so far as relevant here, provides that "in case there is but one person to be elected at the November election to any judicial * * * office, any candidate who receives at the August primary election a majority of the total number of votes cast for all the candidates for such office shall be the only candidate for such office" at the ensuing election. Section 2¾ of article 2 of the Constitution, so far as is here pertinent, reads as follows: "Any candidate for a judicial * * * office who at the primary election shall receive votes on a majority of all the ballots cast for candidates for the office for which such candidate seeks nomination, shall be elected to such office." The decision in this case, therefore, depends upon who may be considered a candidate and what ballots cast at the primary election may be counted.

It seems to be thoroughly settled that votes invalid for any reason are not to be considered in determining the number of votes cast. To this general effect see Murdoch v. Strange, 99 Md. 89, 57 A. 628, 629, 3 Ann. Cas. 66; Catlett v. Knoxville, etc., R. Co., 120 Tenn. 699, 112 S. W. 559, 562, 563; State ex rel. Short v. Clausen, 72 Wash. 409, 130 P. 479, 45 L. R. A. (N. S.) 714. In the first case cited, it was held that, if the ballot contains the name of one who is known to be ineligible, the ballot cannot be counted, because the object of the ballot then would be not to elect but to prevent the election. A case which seems to be squarely in point is Madden v. Board of Election Com'rs, 251 Mass. 95, 146 N. E. 280, 281. It was held in that case that "one who has died before election cannot be a candidate for an office or elected to an office. Valid votes for election to an office cannot be cast for one who is no longer alive. It is equivalent to throwing away a vote knowingly" to cast it for one who has died. "It is of no more effect than to deposit a blank ballot or one marked with a fictitious or historic name. This is not a doubtful question." This same thought is expressed in State v. Frear, 144 Wis. 79, 128 N. W. 1068, 1072, 140 Am. St. Rep. 992, where it is said that, in those cases in which "votes were cast for a candidate known to be dead or disqualified or for a fictitious person," the great current of authority is "to the effect that such ballots are ineffectual for any person, and cannot be counted in determining the result of the election"; and, further, that

"votes knowingly cast for a candidate who cannot possibly exercise the functions of the office if elected are thrown away, and it seems to us that this should be so."

For the foregoing reasons, the petition for the writ is denied.

1 Cal.2d 421

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. TOLL et al.

S. F. 15075.

Supreme Court of California.
Aug. 6, 1934.
As Modified Aug. 15, 1934.

1. Waters and water courses ⇐183½

Waterworks district building self-liquidating waterworks improvement had implied power to charge interest accruing during construction to capital account and pay such interest from proceeds of bonds, instead of resorting to taxation, though such procedure was later expressly authorized by statute, and though other improvement acts expressly provided therefor (St. 1927, p. 703, § 7 (a); § 7 (h), as amended by St. 1933, p. 1297, § 3; § 7 (j), as amended by St. 1931, p. 820, § 5; § 8 (b), as amended).

2. Waters and water courses ⇐183½

Amendment to waterworks district act providing that interest on bonds during construction period should be deemed construction cost payable from proceeds thereof *held* not legislative determination of denial of such power in original statute, meaning of which was not clear as to such effect (St. 1927, p. 703, § 7 (a); § 7 (h), as amended by St. 1933, p. 1297, § 3; § 7 (j), as amended by St. 1931, p. 820, § 5; § 8 (b), as amended).

3. Waters and water courses ⇐183½

Waterworks district building self-liquidating waterworks improvement *held* not without implied power to charge interest accruing during construction to capital account, and pay such interest from proceeds of bonds, because Bridge and Highway District Act provided specifically for such powers (St. 1927, p. 703, § 7 (a); § 7 (h), as amended by St. 1933, p. 1297, § 3; § 7 (j), as amended by St. 1931, p. 820, § 5; § 8 (b), as amended; St. 1923, p. 463, § 21).

4. Constitutional law ⇐143
Waters and water courses ⇐182

Amendment to waterworks district act providing that interest on bonds during construction period should be deemed construction cost payable from proceeds thereof *held* not to impair contract obligation on theory taxpayers have contractual right to be taxed immediately for payment of such interest, and should not be compelled to await uncertainty of having to be taxed later in event revenues were insufficient to retire bond issue (St. 1927, p. 703, § 7 (h), as amended by St. 1933, p. 1297, § 3; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

5. Constitutional law ⇐143
Waters and water courses ⇐182

Amendment to waterworks district act providing that interest on bonds during construction period should be deemed construction cost payable from proceeds thereof *held* not to impair contract obligation with bondholders as unauthorized diversion of principal, where such fund is used for construction of improvement and bondholder is secure in ultimate payment by taxation if revenues be insufficient (St. 1927, p. 703, § 7 (h), as amended by St. 1933, p. 1297, § 3; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

6. Constitutional law ⇐143
Waters and water courses ⇐182

Amendment to waterworks district act providing that interest on bonds during construction should be deemed construction cost payable from proceeds thereof *held* not to impair contract rights as changing obligation arising under original statute, wherein board had implied power to pay interest during construction from proceeds of such bonds (St. 1927, p. 703, § 7 (a); § 7 (h), as amended by St. 1933, p. 1297, § 3; § 7 (j), as amended by St. 1931, p. 820, § 5; § 8 (b), as amended; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

7. Constitutional law ⇐143
Waters and water courses ⇐182

Amendment to waterworks district act extending time for payment of interest on bonds from proceeds thereof for period of one year after completion, *held* not to impair obligation of contracts, since provision was reasonable considering magnitude of undertaking (St. 1927, p. 703, § 7 (h), as amended by St. 1933, p. 1297, § 3; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

In Bank.

Mandamus by the Metropolitan Water District of Southern California against Charles H. Toll, as treasurer of such district, and another. On a general demurrer to the petition.

Peremptory writ issued.

James H. Howard, Alan Patten, and Charles C. Cooper, Jr., all of Los Angeles, for petitioner.

Robert H. Dunlap and George R. Larwill, both of Los Angeles, for respondents.

SHENK, Justice.

Mandamus to compel the respondents, as treasurer and controller of the petitioner district, to transfer the sum of $352,800 from the "Colorado River Waterworks Bonds Election 1931 Fund" to the "Colorado River Waterworks Bonds Election 1931 Interest and Sinking Fund," pursuant to an ordinance of the board of directors of the district, adopted November 17, 1933, requiring them to do so. A general demurrer to the petition has been filed as a return to the alternative writ.

The district was organized and is functioning under the act of 1927. Stats. 1927, p. 694. On September 11, 1931, the board of directors of the district adopted an ordinance calling an election for the purpose of authorizing the issuance of $220,000,000 of bonds of the district for "acquisition and construction by said district of a certain public improvement, towit" (describing it in detail). The purpose was to construct works for conducting water from the Colorado river to and for the use of the inhabitants in the district. On September 29, 1931, the election was held and the issuance of bonds in the sum above stated was authorized. After proceedings regularly taken, the Reconstruction Finance Corporation of the United States offered to purchase $40,000,000 of such bonds bearing interest at the rate of 5 per cent. per annum, payable semiannually. Of this amount bonds in the sum of $6,048,000 had been issued and delivered at the time the petition herein was filed, to wit, December 28, 1933. Interest in the sum of $352,800 must be paid by a tax levy during the current year unless such interest may be paid from the proceeds of bonds sold.

Construction work is in progress, but the improvement has not reached the stage where it is revenue producing, and will not reach that stage in 1934 and probably not for several years to come. On November 17, 1933, the board of directors adopted an ordinance appropriating from the 1931 bond fund, being the proceeds from the sale of the bonds, said sum of $352,800 for the payment of said interest and authorizing and directing the respondents to transfer said sum from the 1931 bond fund to the 1931 interest and sinking fund for the purpose of making such payment from the latter fund. The respondents refused to make the transfer, assigning as the reason for their refusal the claim that such transfer is unauthorized and would be contrary to the laws governing the payment of interest on said bonds.

In 1931 when the bond issue was authorized by vote of the electors of the district, section 7 (a) of the act, pursuant to which the district was created, provided and now provides (St. 1927, p. 703, § 7 (a), amended by St. 1931, p. 820, § 5, and St. 1933, p. 1297, § 3) that the board of directors thereof, in initiating proceedings for the issuance of bonds of the district, shall by ordinance declare the necessity therefor and shall recite therein "the objects and purposes for which the indebtedness is proposed to be incurred." Section 7 (h) then provided (St. 1927, p. 703, § 7 (h), amended by St. 1931, p. 820, § 5) that the proceeds of the bond issue "excepting premium and accrued interest, shall be placed in the treasury of said district to the credit of the proper improvement fund, and shall be applied exclusively to the purposes and objects mentioned in said ordinance. Premium and accrued interest shall be placed in the fund to be applied to the payment of interest on, and the retirement of, the bonds so sold." Section 7 (j) then provided and now provides (St. 1927, p. 703, § 7 (j), as amended by St. 1931, p. 820, § 5, and St. 1933, p. 1297, § 3) as follows: "The board of directors shall fix such rate or rates for water furnished as will pay the operating expenses of the district, provide for repairs and depreciation * * * pay the interest on any bonded debt, and, so far as practicable, provide a sinking or other fund for the payment of the principal of such debt; * * * it being the intention of this section to require the district to pay the interest and principal of the bonded debt from the revenues of such district, so far as practicable. If, however, * * * the revenues * * * shall be inadequate to pay the interest or principal * * * the board of directors shall * * * levy and collect annually * * * a tax sufficient to pay the annual interest on such bonds, or such part thereof as shall not be met from revenues of the district. * * *" Section 8 (b) then provided (St. 1927, p. 707, § 8 (b), as amended by St. 1931, p. 826, § 6), and now provides (St. 1933, p. 1303, § 4): "On or before the twentieth day of August the board of directors of the district shall * * * determine the amount of money necessary to be raised by taxation during the fiscal year * * * and shall levy a tax accordingly:

(1) Sufficient to meet interest and sinking fund requirements on all outstanding bonded indebtedness of said district; and

(2) For all other district purposes."

In 1933 section 7 (h) was amended (St. 1927, p. 703, § 7 (h), as amended by St. 1933, p. 1297, § 3) by adding thereto the following: "Provided, that the interest on said bonds accruing during the construction period and for one year thereafter shall be deemed to be a construction cost within the meaning of the purposes and objects mentioned in said ordinance, and such interest may be paid from said proceeds of the sales of such bonds."

The question is whether proceeds from the sale of bonds issued for the acquisition and construction of the improvement may be used for the purpose of paying interest on such bonds during the period of construction.

As a problem of financing and accounting in the construction of buildings of a private nature it appears to be the accepted theory and practice to charge to the building account the interest paid to the mortgagee or bondholders during the period of construction. It is asserted by the petitioner, supported by appropriate references to text-books and writers on economics, finance, and accounting, and adjudicated cases in other jurisdictions, that in the public utility field generally, interest charges, while normally an unquestioned charge against revenue, may be and are now quite universally considered as capital expenditures. Such a concern borrows money with which to construct its plant, an enterprise which may require several years. During the period of construction and when no revenue is accruing, interest must be paid. To produce a plant or system ready for operation and the resulting revenue therefrom, there must be paid not only the cost of labor, materials, equipment, and supervision, but also interest on borrowed money in order to finance the building operations. This interest is considered a part of the cost of construction and may be paid from the capital account as a part of the cost of construction. In the field of eminent domain it has been said that a fair rate of interest "upon the money invested in the plant during construction, and before completion, is as much a part of the cost of construction, as is the money itself which is expended for materials and labor." Brunswick & Topsham Water District v. Maine Water Company, 99 Me. 371, 59 A. 537, 542. In the fixing of rates to be charged by public utilities, the practice of including interest during construction as a part of the cost of the property and therefore a capital expenditure has been recognized and approved. Des Moines Gas Company v. Des Moines, 238 U. S. 153, 35 S. Ct. 811, 59 L. Ed. 1244; Ohio Utilities Company v. Public Utilities Commission, 267 U. S. 359, 45 S. Ct. 259, 69 L. Ed. 656; Pioneer Telephone & Telegraph Co. v. Westenhaver, 29 Okl. 429, 118 P. 354, 38 L. R. A. (N. S.) 1209. Mr. John H. Bickley, engaged in financial and accounting work for the Pennsylvania Public Service Commission and a recognized authority on the subject, has said: "An examination of the uniform classification of accounts prescribed by the various state public service commissions, the Interstate Commerce Commission, the Federal Power Commission, and those recommended by national associations of utilities, reveals that they agree in charging to fixed capital interest paid on moneys borrowed for construction." See article in Journal of Land & Public Utility Economics, vol. 1, No. 4, October, 1925, pp. 414–424. The Railroad Commission of California is in accord with this practice. City of Los Angeles, 32 C. R. C. 579, 583; Los Angeles Gas & Electric Corp., 35 C. R. C. 442, 451, and note 6, 453 and note 8. This court has recognized the same rule in principle in Reclamation District No. 1500 v. Reclamation Board, 197 Cal. 482, 241 P. 552.

[1] No good reason has been advanced why the same rule should not apply generally to the construction of publicly owned revenue producing utilities financed by borrowed money. To follow the same accounting procedure would be within the necessarily implied powers of the district unless specifically or by necessary implication denied by the act of its creation or by some other statutory or constitutional limitation.

[2] It is contended by the respondents that the enabling act, at the time the bonds were voted, should be construed so as to deny the power, although it did not specifically do so, and that the amendment of 1933, definitely conferring such power, was a legislative determination that the power did not theretofore exist. The purpose of the act was to provide for the acquisition and construction of such an improvement as is now under construction; and considering the act as a whole it was unquestionably intended that it should be a self-sustaining revenue producing utility. It was found to be such by the federal government as a necessary condition in the purchase of the bonds from the federal treasury. It was contemplated that rates to be fixed by the board should provide sufficient revenue to pay the cost of the improvement, including all interest and principal on the bonds and that direct taxation of property in the district should be resorted to only in

the event such revenue shall be insufficient. Obviously, no revenue would be forthcoming until the improvement was completed and in condition to produce revenue. If interest paid on outstanding bonds during construction may, as we hold, be classed as a capital expenditure, then it would seem that resort to taxation to pay the same would be justified only in the event the statute clearly commanded it. When section 7 (j) of the act lays upon the board the duty to levy a tax to pay the bond obligations, such duty is imposed only when the revenue shall be inadequate to pay the same. The possibility of revenues permitting a reduction in the tax rate otherwise required was clearly contemplated. Since the district is still in its construction period and the system is not yet completed and no revenues are available, we do not at this time feel justified in declaring that a tax levy to pay interest is mandatory. This is especially true when the statute by its own terms and the entire bond proceedings indicate without question that the improvement was intended to be self-liquidating both as to the initial cost and the subsequent operation, and that the taxation features of the entire plan be a safeguard or insurance that the bond obligations will certainly be paid when due, by taxation if necessary.

The argument that the amendment of 1933 in providing that interest during the construction period shall be deemed a construction cost within the meaning of the purposes and objects mentioned in the ordinance and may be paid from the proceeds of the sale of the bonds, necessarily implied a legislative determination that the statute prior to the amendment foreclosed the consideration of interest during construction as a construction cost has been given due consideration. If the statute were clear to the effect that such interest could not be deemed a construction cost, the contention of the respondents might well be sustained; but the amendment of 1933 may as well be deemed a legislative determination that the meaning of the prior statute was uncertain or doubtful and the amendment adopted for the purpose of clarification.

[3] The respondents call attention to the fact that the Legislature in 1923, in adopting the Bridge and Highway District Act (Stats. 1923, p. 452), provided specifically in section 21 (page 463) that interest during construction might be paid from the principal obtained by the sale of the bonds; and the rule is invoked that where a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed. The rule is established, but its application here need not be recognized. This is so for the reason that while both statutes treat of related subjects, the specific right conferred and duty imposed by the one to pay such interest from capital should not be deemed a denial of the right necessarily implied by the other to follow the generally accepted practice.

We find nothing in Re Metropolitan Water District, 215 Cal. 582, 11 P.(2d) 1095, to compel a different conclusion. The statement there relied upon by the respondents is to the effect that current expenses of the district will have to be met by taxation, if necessary, before any revenue is produced from the new system. As has been seen, the paying of interest during construction is not a current expense as distinguished from a capital expenditure and resort to taxation is not necessary, when, as here, funds are available from the capital account. Other cases such as City of Oakland v. Williams, 107 Cal. App. 340, 290 P. 1044, and Murphy v. City of Spokane, 64 Wash. 681, 117 P. 476, are readily distinguishable on the facts and are not applicable here.

[4] It is further contended by the respondents that the amendment of 1933 is invalid as applied to the entire bond issue as in violation of the Federal and state Constitutions (Const. U. S. art. 1, § 10; Const. Cal. art. 1, § 16) against impairment of contract obligations. The first contract claimed to be violated is the alleged contract between the taxpayer and the district arising under the statute and the bond proceedings leading up to the election, citing the familiar cases of Merchants' Nat. Bank v. Escondido Irrigation District, 144 Cal. 329, 77 P. 937, Peery v. City of Los Angeles, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044, O'Farrell v. County of Sonoma, 189 Cal. 343, 208 P. 117, and others to like effect. The argument seems to be that the taxpayers have a contractual right to be taxed immediately for the payment of such interest and should not be compelled to await the uncertainty of having to be taxed later on in the event the revenues of the district be insufficient to retire the bond issue, both principal and interest. The novelty of such a claim suggests itself. The existence of a contract may not be questioned, but it would seem to be a benefit to the taxpayer to be relieved of present taxation with the prospect of relief altogether.

[5] The second contract claimed to be violated is that arising between the bondholder and the district. The argument in this behalf proceeds upon the theory that the use of principal to pay interest during construction is an unauthorized diversion of the principal fund, that a different method for securing funds to pay such interest is substituted and the value of the investment diminished. The right of the bondholder is to have his interest and principal paid when due and it would seem to be of little concern to him from what fund his obligation is currently paid so long as that fund is, as to him, used for the objects and purposes for which the bonds were voted, viz., the construction of the improvement and he is secure in the ultimate payment by resort to taxation if the revenues be insufficient.

[6] The whole argument as to the impairment of contract rights is based on the theory that under the original statute and proceedings thereunder certain contractual obligations arose and that under the amendment of 1933 a different contract is attempted to be evolved. Having in mind the conclusions first announced, namely, that the board had under the original statute the necessarily implied power to pay interest during construction from the proceeds of the sale of the bonds, then the contract before and after the amendment of 1933 was not materially different and consequently no impairment has taken place.

[7] It was settled in the case of Golden Gate Bridge & Highway District v. Filmer, 217 Cal. 754, 21 P.(2d) 112, 91 A. L. R. 1, that an amendment to the statute extending the time for the payment of interest during construction for a period of six months after the completion of the improvement did not impair the obligation of any contract arising under the statute and proceedings for the issuance and sale of the bonds prior to the amendment. No reason has been suggested why the same rule should not apply to the provisions of the 1933 amendment of the Metropolitan Water District Act extending such time for a period of one year. Considering the magnitude of the undertaking, we think the same rule should apply in the present case.

The foregoing disposes of all of the points made by the parties essential to a proper determination of the matter.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; IRA F. THOMPSON, J.

1 Cal.2d 385

DUNCAN v. STANDARD ACC. INS. CO.

S. F. 15090.

Supreme Court of California.

July 30, 1934.

1. Garnishment ⇐209

Third-party claim in form of affidavit filed in garnishment proceeding which began after name of the affiant with the words "being first duly sworn, deposes and says," and which then set forth a sufficient statement of facts upon which claim was based and wherein each claim bore signature of the affiant, followed by the jurat of the notary public, duly signed by such officer, *held* sufficient in form (Code Civ. Proc. § 689).

2. Garnishment ⇐209

Where plaintiff filing third-party claims in garnishment proceeding contended that money garnished had been released by sheriff by reason of third-party claims and judgment creditor's failure to furnish statutory undertaking, claims were necessary links in chain of plaintiff's evidence, and should not have been excluded (Code Civ. Proc. § 689).

3. Judgment ⇐875

Where execution issued under judgment in another case was levied on judgment debt owing by defendant, and plaintiff as assignee of another judgment filed a third-party claim, that defendant paid to sheriff amount of latter judgment under execution against assignor alone did not entitle defendant to satisfaction of judgment, where sheriff returned money paid by defendant in satisfaction of judgment and notified defendant that property levied upon had been released (Code Civ. Proc. § 689).

4. Payment ⇐34

Defendant accepting sheriff's check returning money paid by defendant to satisfy judgment without objection waived any objection to check as payment, where no claim was made that check would not have been paid had defendant presented it for payment to bank on which it was drawn (Civ. Code, § 1501).

5. Judgment ⇐875

Where defendant attempted to satisfy judgment, but sheriff later returned money by check, return of check by defendant to sheriff some time later *held* not satisfaction of judgment, where, before return of check, plaintiff filing third-party claim served upon defendant notice of assignment of judgment, and at time of return sheriff had no execution which would authorize him to receive the check, or to take possession of any other property in satisfaction of judgment in action out of which execution issued.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

6. Judgment ⊂875

Where execution issued on judgment entered in another case was levied on judgment debt owing by defendant, and assignee of another judgment filed purported third-party claim, that assignee acted as attorney for sheriff in mandamus proceeding instituted by holder of other judgment against sheriff did not estop assignee from claiming that his judgment had not been satisfied, where assignee was substituted out of the mandamus proceeding before judgment therein became final, and record failed to show that he had any control of proceeding therein.

In Bank.

Appeal from Superior Court, San Francisco County; Daniel C. Deasy, Judge.

Action was commenced by W. F. Dunn and others against the Standard Accident Insurance Company, wherein they recovered a judgment which they thereafter assigned to A. Don Duncan. An execution issued under a judgment entered in another case was levied on the judgment debt owing by defendant, and Duncan filed a purported third-party claim, and, from an order granting a motion for an order directing the clerk to enter satisfaction of judgment, Duncan appeals.

Reversed.

Prior opinion, 27 P.(2d) 431.

Percy A. Smith and A. Don Duncan, both of San Francisco, for appellant.

Myrick & Deering and Scott and Jas. J. Harrington, all of San Francisco, for respondent.

Everett W. Mattoon, Co. Counsel, of Los Angeles, amicus curiæ.

CURTIS, Justice.

The Dunn-Williams Company, a copartnership consisting of W. F. Dunn and J. A. Williams and one John A. Clecak, the original plaintiffs in this action, had claims against the defendant based upon two written undertakings executed by the defendant in an action in which said three original plaintiffs were parties. They instituted this action to recover on said undertakings. Thereafter, and before judgment, said John A. Clecak assigned all his interest in said claims to his two coplaintiffs. A default judgment was subsequently rendered against the defendant in this action which was set aside by the trial court, and the plaintiffs appealed. Pending the appeal, the said John A. Clecak assigned to his two coplaintiffs all his interest in and to said judgment. The District Court of Appeal reversed the order setting aside the default judgment. Thereafter, and before the return of the remittitur, Mrs. Nancy B. Fitzgerald, a judgment creditor and the former wife of said John A. Clecak, had an execution issued upon a judgment in her favor and against said John A. Clecak, and placed in the hands of the sheriff who levied upon the defendant in an attempt to garnishee any money in the defendant's possession belonging to said John A. Clecak. Immediately thereafter the Dunn-Williams Company served upon the sheriff a third-party claim. The next day they assigned their judgment to the plaintiff in this action, and he was substituted as plaintiff herein in the place of the Dunn-Williams Company. Plaintiff thereupon served a third-party claim upon the sheriff, claiming to be the sole owner of said judgment and entitled to the money due thereunder. The sheriff, after the service of these third-party claims, notified Nancy B. Fitzgerald, the said judgment creditor, of the service upon him of said third-party claims, and demanded in writing that said judgment creditor indemnify or secure him by the execution of the undertaking provided for by the terms of section 689 of the Code of Civil Procedure. The said Nancy B. Fitzgerald neglected and refused to comply with said demand, whereupon the sheriff returned to defendant the money paid to him by the defendant and notified the defendant that the same was released from the levy of said execution and returned said execution. The defendant retained said check of the sheriff for a period of fifteen days, and then returned said check to the sheriff. Thereupon defendant upon notice to the plaintiff moved the court for a satisfaction of said judgment, which motion was granted, and the plaintiff has taken an appeal from the order granting said motion, and the same is now before us for decision.

[1] Upon the hearing of said motion, the court sustained an objection to plaintiff's offer in evidence of the two third-party claims above referred to. In support of the action of the trial court in denying admission in evidence of said third-party claim, the respondent contends that said claims were not, nor was either of them, verified by the oath of the claimant as required by section 689 of the Code of Civil Procedure, but were merely acknowledged before a notary public. The claims are before us, and an inspection of them shows the fallacy of this contention of respondent. It is true that the form of verification used by the claimants is not that usually employed in the verification of plead-

ings. However, it has none of the characteristics of an acknowledgment. The claims themselves are in the form of affidavits; each of them beginning after the name of the affiant with the words "being first duly sworn, deposes and says." The facts upon which the claim is based are then set forth in a proper and sufficient statement. Each claim bears the signature of the affiant, followed by the jurat of the notary public, duly signed by such officer. The section of the Code above referred to prescribes no set form either of the claim or of its verification. The claims were in due form, and should have been admitted in evidence, if material. McCaffey Canning Co. v. Bank of America, 109 Cal. App. 415, 420, 294 P. 45.

[2] We will now proceed to a discussion of the materiality of said claims. It was the appellant's contention that the money garnished by the sheriff had been released by him by reason of these third-party claims and the judgment creditor's failure to furnish the undertaking required by said section 689. The claims, therefore, were necessary links in the chain of appellant's evidence. In our opinion, they were material evidence in the proceeding before the court, and respondent's objection to their admission should have been overruled.

[3, 4] Respondent contends, however, that, notwithstanding the refusal of the trial court to admit these claims in evidence, it is entitled to have said judgment satisfied for the reason that it had paid said judgment in full. In other words, the respondent claims that it paid to the sheriff under a valid execution against one of the judgment creditors, John A. Clecak, the full amount of the judgment in this action without any notice or knowledge that Clecak had assigned his interest in said judgment to his coplaintiffs, or to any other person, and therefore respondent was entitled to have said judgment satisfied of record. Appellant claims that defendant through its attorney had knowledge and notice that Clecak had no interest in said judgment, and that said judgment was in its entirety owned by his coplaintiffs. We will not, however, discuss that phase of the case nor rest in any manner our decision thereon. While respondent did in the first instance pay to the sheriff the amount of said judgment under an execution against John A. Clecak alone, yet the record conclusively shows that the sheriff returned the money paid him by the defendant, and notified the defendant that the property levied upon had been released. In this proceeding the sheriff acted in strict compliance with the terms of section 689, Code of Civil Procedure, which provides that, when property levied upon is claimed by a third party, the sheriff must release the property if the judgment creditor, after notice and demand, fails to give to the sheriff an undertaking with two good and sufficient sureties in double the value of the property levied on. The property having been released from the levy of said execution, and the money collected thereon having been returned to the respondent with written notice of such release, the respondent was restored to the condition in which it was before the levy upon it of said execution. The judgment against it was still unpaid. Some question is raised by respondent as to the repayment of said money to it by the check of the sheriff. No objection was made at the time said check was received by respondent, or at any other time, to the sheriff's check, or to the payment by means of said check. No claim is made that said check would not have been paid in full had respondent presented it for payment to the bank on which it was drawn. Respondent, therefore, waived any objection which it might have had to accepting said check, by its failure to make an objection at the time it received the check, or at a reasonable time thereafter. Section 1501, Civ. Code; Stevens v. Hines, 63 Cal. App. 80, 84, 218 P. 57; Conde v. Dreisam Gold Min. Co., 3 Cal. App. 583, 588, 86 P. 825; Western Pacific Land Co. v. Wilson, 19 Cal. App. 338, 343, 125 P. 1076.

[5] No claim is made by respondent that the judgment was paid by it when it returned to the sheriff his check some fifteen days after its receipt by the respondent. This return of the check to the sheriff could not have the effect of satisfying the judgment for two reasons. In the first place, after its receipt of said check and before the return of said check to the sheriff, the plaintiff served upon respondent notice of the assignment of the judgment herein to the plaintiff and that John A. Clecak had no interest in said judgment or any money due thereon. After the receipt of such notice by the respondent, any attempt to pay the money due on said judgment to any person other than the plaintiff would be at the peril and risk of the respondent. In the second place, the sheriff had returned the execution against John A. Clecak, and, at the time said check was returned to him, the sheriff had no execution which would authorize him to receive said check, or to take possession of any other property in satisfaction of the judgment in the action out of which the execution issued. The power and authority of the sheriff under said execution terminated

with the return of said execution to the office of the clerk issuing the same.

[6] Finally, respondent contends that appellant is bound by the decision of the trial court in a mandamus proceeding instituted by Mrs. Fitzgerald against said sheriff, in which the court directed said sheriff to pay over to Mrs. Fitzgerald the money in his hands collected pursuant to the levy of execution against respondent. While it is true that the plaintiff did act as one of the attorneys for the sheriff in said action, it further appears that he was substituted out of the case before the judgment therein became final. The record fails to show that plaintiff had any right to control or direct the defense in the mandamus action, and, unless he had practical control of the whole case on the part of the sheriff, he is not estopped by the judgment in said action.

"The mere fact that a third person took part in the conduct of a case or in the trial or hearing through an agent or attorney in fact, or through counsel is not generally enough to connect him with the litigation in such manner as to make the judgment an estoppel against him, unless his interference amounted to assuming practical control of the whole prosecution or defense of the action." 34 Cor. Jur., § 1429, p. 1009. To the same effect is Freeman on Judgments (5th Ed.) vol. 1, p. 943. Plaintiff, therefore, is not estopped by the judgment in the mandamus action from prosecuting his appeal in this case, or from asserting his rights to the judgment in this case.

From the foregoing we are firmly of the conclusion that, had the trial court admitted in evidence the two third-party claims, as in our opinion it should have done, the appellant would have made out a conclusive defense to respondent's motion to satisfy said judgment. With these two third-party claims before the trial court, in addition to the other evidence admitted on said hearing, appellant's proof would have shown that the money which it claims it paid in satisfaction of the judgment herein had been returned to it, and was not applied on the satisfaction of said judgment or any part thereof. Its motion, therefore, should have been denied. This disposition of the matter may result in the double payment of the judgment by the respondent. If it has that effect, the respondent has only itself to blame for the predicament in which it now finds itself. It had every opportunity to protect itself by cashing the sheriff's check and awaiting further proceedings under the judgment in this case. Instead of taking such action, it deliberately, and after receiving notice that plaintiff claimed to be the owner of said judgment, returned said check to the sheriff with the statement that the judgment had been satisfied "as far as the Standard Accident Insurance Company was concerned." In this conclusion we cannot agree.

The order satisfying said judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.

1 Cal.2d 435

WOOD v. PENDOLA et al.

Sac. 4782.

Supreme Court of California.

Aug. 21, 1934.

Rehearing Denied Sept. 19, 1934.

1. Judgment ⇐203

Last judgment involving same parties and subject-matter controls.

2. Constitutional law ⇐80(2)
Statutes ⇐85(4)

Statutory provisions that certified copy of water commission's order dividing water rights and transcript of testimony shall be filed in superior court in county in which any part of stream system is situated and that after notices of exceptions and hearing final decree shall be entered by superior court *held* not invalid as local or special law regulating court practice, nor contrary to constitutional provisions lodging judicial power in specified tribunals, prohibiting exercise by one department of powers belonging to other departments and limiting superior court's appellate jurisdiction (St. 1913, p. 1012, §§ 36a, 36b, as added by St. 1917, pp. 236, 237; Const. art. 3; art. 4, § 25; art. 6, §§ 1, 5).

3. Waters and water courses ⇐133

In division of water rights and performance of other duties, water commission exercises only administrative functions (St. 1913, p. 1028, as amended by St. 1917, p. 231; St. 1913, pp. 1028–1031, §§ 26–36, as amended; Const. art. 3; art. 6, § 1).

4. Constitutional law ⇐306

Statutory provisions that certified copy of water commission's order dividing water

rights and transcript of testimony shall be filed with superior court clerk in county in which any part of stream system is situated and that after notices of exceptions and hearing final decree shall be entered by superior court *held* not invalid as violative of due process clause of Constitution (St. 1913, p. 1012, §§ 36a, 36b, as added by St. 1917, pp. 236, 237; Const. art. 1, § 13).

5. Judgment ⇐677

Where record owner of property contested adverse water claims before water commission through her son and secret grantee, who testified, but did not have deed recorded until after commission's order and service of superior court's notice, both were bound by decree duly entered by superior court on water commission's order dividing water rights though they did not enter appearance in superior court (St. 1913, p. 1012, §§ 36a, 36b, 36e, as added by St. 1917, pp. 236, 237).

6. Constitutional law ⇐305

Mere procedure by which jurisdiction of courts is to be exercised may be prescribed by Legislature without infringement of due process clause of Constitution (Const. art. 1, § 13).

7. Statutes ⇐85(4)
Venue ⇐3

Filing in superior court of San Joaquin county pursuant to statute of water commission's order dividing water rights in Coyote creek, no part of which lies in such county, though it is a tributary of Stanislaus river forming part of the county's southern boundary, as well as water rights in such river, did not invalidate superior court's decree thereon as violation of constitutional provisions that certain actions relating to real estate shall be commenced in county where it or part thereof is situated and that no local or special laws changing venue in civil actions shall be passed (St. 1913, p. 1012, §§ 36a, 36b, as added by St. 1917, pp. 236, 237; Const. art. 4, § 25, subd. 4; art. 6, § 5).

8. Eminent domain ⇐2(10)

Provisions that certified copy of water commission's order dividing water rights and transcript of testimony shall be filed in superior court in county in which any part of stream system is situated and that after notices of exceptions and hearing final decree shall be entered by superior court *held* not invalid as permitting taking of private property for public use without compensation (St. 1913, p. 1012, §§ 36a, 36b, as added by St. 1917, pp. 236, 237).

9. Judgment ⇐681

Where predecessor in interest contested adverse claims to water rights before water commission but did not appear in superior court which entered final decree on commission's order dividing water rights, such decree controlled and could not be attacked by successor in interest on ground that it was contrary to prior judgment adjudicating same claims between same parties (St. 1913, p. 1012, §§ 36a, 36b, 36e, as added by St. 1917, pp. 236, 237).

In Bank.

Appeal from Superior Court, Calaveras County; J. T. B. Warne, Judge.

Action to quiet title by Percy F. Wood against Agnes Pendola and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Virgil M. Airola, of San Andreas, for appellants.

Joseph R. Huberty, of San Andreas, and Huston & Huberty, of Woodland, for respondent.

SHENK, Justice.

The plaintiff sued to quiet his title to an alleged appropriation right in the waters of Coyote creek in Calaveras county, and for injunctive relief to enjoin the defendants' interference with the right alleged. The defendants appeal from a judgment for the plaintiff.

The plaintiff based his right to recovery on a judgment for the plaintiff rendered on September 21, 1887, in an action commenced in the superior court, in and for the county of Calaveras, by Marinda Wood, the predecessor of the plaintiff, against Lorenzo Pendola, the defendants' predecessor in interest, and which was affirmed on appeal. Wood v. Pendola, 78 Cal. 287, 20 P. 678. By that judgment the title of the plaintiff therein to the same right involved in the present action was decreed and the defendant there perpetually enjoined from interfering with that right. The defendants in the present action founded their claim of right on a final judgment of the superior court in and for San Joaquin county rendered on November 14, 1929, which established and determined the several priorities, quantities and points of diversion and use by the parties hereto to the waters of Coyote creek, following an order of determination by the division of water rights, department of public works, pursuant to the provisions of the Water Commission Act. St. 1913, p. 1012, as amended. The order of the division of water rights established the right of Mrs. Marinda Wood to divert 0.875 cubic feet per second, priority, 1886, in the natural flow of Coyote creek. The same order determined

that Mrs. M. Pendola is entitled to divert 0.270 cubic feet per second priority, 1868, and 0.355 cubic feet per second, priority, 1885, from the natural flow of Coyote creek. The trial court in the present action found, and no showing is made that its finding is unsupported, that the right established in favor of Mrs. Pendola by the order of determination is the right involved in the present action, and by the judgment of 1887 decreed to be the property of the mother of the plaintiff herein.

[1] The ground of the appeal is that the court erred in basing its decree herein on the judgment of 1887 rather than on the judgment of the superior court in San Joaquin county rendered on November 14, 1929. The defendants rely on the rule that the last judgment in point of time involving the same parties and the same subject-matter controls and determines the rights of the parties. If the judgment of November 14, 1929, entered in the proceedings in San Joaquin county, is conclusive and enforceable as against the plaintiff herein, the rule stated governs to effect a reversal of the present judgment. California Bank v. Traeger, 215 Cal. 346, 10 P.(2d) 51; 15 Cal. Jur. 104, 105, and cases cited.

In opposing the effect of the rule relied upon by the defendants the plaintiff urges that sections 36a and 36b of the Water Commission Act (St. 1913, p. 1012, §§ 36a, 36b, as added by St. 1917, pp. 236, 237) are in violation of sections 1 and 5 of article 6, section 13 of article 1, article 3, and section 25 of article 4 of the California Constitution.

The Water Commission Act was approved by the voters, pursuant to a referendum petition, at the general election held in November, 1914, and became effective in the same year. The main purpose of the act is to regulate the right to appropriate and the issuance of permits for the appropriation of unappropriated waters of the state, through the administrative offices of a state water commission thereby created. The act defines what are or may become unappropriated waters subject to appropriation. Section 11 (St. 1913, p. 1017, as amended by St. 1923, p. 126) and section 20a (as added by St. 1917, p. 748). By section 25 (St. 1913, p. 1028, as amended by St. 1917, p. 231) the commission is given power upon its own initiative or upon petition signed by one or more claimants to water of any stream system to proceed to determine the rights based on prior appropriation of all claimants on the stream system. Provisions for notice of the order granting the petition, investigation, and compiling of data and information, execution of surveys, preparation of maps, etc., notice of hearing, and hearing of all claims and contests which may arise out of conflicting claims, and the making of an order establishing the several rights by appropriation of the waters of the stream system by the water commission are provided in sections 26 to 36 of the act (St. 1913, pp. 1028–1031, as amended). Section 25 of the act refers to a stream, stream system, lake or other body of water as a "stream system."

In August, 1917, the state water commission on the joint petition of the Oakdale Irrigation District and the South San Joaquin Irrigation District granted an order for the investigation and determination of the rights of claimants to the use of waters of the Stanislaus river and its tributaries based upon prior appropriation. After investigation, notice, and hearing on the claims of some sixty persons, including the claims of the parties hereto, to appropriation rights in said stream and its tributaries, the division of water rights, the successor of the state water commission, on September 21, 1922, made and entered its order.

Section 36a of the Water Commission Act provides for the filing of a certified copy of such order, together with the original evidence and transcript of testimony, duly certified, with the clerk of the superior court of the county in which said stream system or any part of it is situated. Pursuant to this provision there was filed with the clerk of the superior court in and for the county of San Joaquin, a certified copy of the division's order of September 21, 1922, together with the evidence and transcript. An order of the court setting a time for hearing was procured and served as therein provided.

Section 36b provides for the filing of notices of exceptions to the order by parties in interest who are aggrieved or dissatisfied with it, which notices shall be served in the manner provided on the state water commission and on adverse claimants. The section continues: "The order of determination by the state water commission and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings but the court may allow such additional or amended pleadings as may be necessary to a final determination of the proceeding. If no exceptions shall have been filed with the clerk of the court as aforesaid, then on the day set for the hearing, on motion of the state water commission, or its attorney, the court shall enter a decree affirming said order of determination. On the day set for

hearing all parties in interest who have filed notices of exceptions as aforesaid shall appear in person, or by counsel, and it shall be the duty of the court to hear the same or set the time for hearing, until such exceptions are disposed of, and all proceedings thereunder shall be as nearly as may be in accordance with the rules governing civil actions. * * *"

By section 36c (as added by St. 1917, p. 237) the court may employ experts to investigate and report and may take additional evidence or refer the case back to the commission for that purpose. After the hearing the court is directed to enter a decree determining the right of all persons involved in the proceeding, including the extent, priority, amount, purpose of use, point of diversion, and place of use, and the tracts of land to which the use is appurtenant and other necessary conditions, and may assess the costs. The section also provides for appeals as in civil cases. Section 36d (as added by St. 1917, p. 237) requires that a certified copy of the decree shall be filed for record in each county in which any part of the stream system is located and in the office of the state water commission. Pursuant thereto the commission issues a certificate to each claimant setting forth the right decreed to belong to him. Section 36e (as added by St. 1917, p. 237) makes the decree of the court conclusive as to the rights by appropriation of all existing claimants upon the stream system lawfully embraced in the determination.

A certified copy of the order of determination of September 21, 1922, was filed with the clerk of the superior court in San Joaquin county with the matter and transcript required by section 36a, including also a certified copy of the judgment of the superior court in and for the county of Calaveras entered in 1887. The record shows that Mrs. Marinda Wood, represented by her son, the plaintiff herein, and the defendants or their representatives contested the claim herein before the state water commission. The evidence on that contest, including the judgment of 1887, was also before the court of San Joaquin county. Although many of the claimants involved in the proceeding before the water commission filed exceptions to said order of determination with the clerk of San Joaquin county, and a hearing thereon was duly had by the court, neither the plaintiff herein nor his mother, Mrs. Marinda Wood, nor the defendants herein nor their predecessor, filed any exception to the order of the division of water rights. After an extended hearing the court in San Joaquin county, on November 14, 1929, entered its order and decree adjudging and defining in detail as required the rights of each of the claimants who appeared and contested the order of determination, and of the other claimants who made no appearance in said proceeding. As to said latter claimants, including the parties hereto, their appropriative rights were adjudged and described as in said order of determination with the exception that the right as described therein was amended to include the right of the parties hereto among other claimants to the use of the water for domestic and stock-watering purposes throughout the year unlimited by the period specified for irrigation purposes. Neither of the parties hereto or their predecessors in interest prosecuted an appeal from the judgment of the superior court of San Joaquin county, and that judgment has become final. The question presented here is whether it is conclusive upon the plaintiff herein.

[2, 3] The question of the constitutionality of sections 36a and 36b of the Water Commission Act was litigated and decided adversely to the contentions of the plaintiff in the case of Bray v. Superior Court, 92 Cal. App. 428, 268 P. 374, 1081. In that case it was held that section 36b was not a local law nor a special law regulating the practice of courts of justice in violation of section 25 of article 4 of the Constitution. It was pointed out in that case that the proceedings in the superior court conducted upon the filing therein of the order of determination are not in the nature of a review of nor an appeal from that order, but constitute a trial of the issues presented by the order and the objections thereto which may be filed as in ordinary civil cases, and as in other civil cases that an appeal lies from the judgment of the superior court. The sections involved do not, therefore, violate section 1 of article 6 of the Constitution lodging the entire judicial power of the state in the tribunals therein specified, nor article 3 prohibiting the exercise by one department of the state government of powers properly belonging to either of the other departments. It has long been settled that the water commission exercises only administrative functions. Tulare Water Co. v. State Water Com., 187 Cal. 533, 202 P. 874; Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076. That this conclusion, as held in Bray v. Superior Court, supra, governs in respect to the functions performed by the commission pursuant to sections 25 to 36 of the act becomes apparent when it is considered that

there is no finality to its order establishing the appropriative rights of claimants in the stream system. In respect to those functions it becomes an administrative arm of the superior court where proceedings in the nature of a civil action in which the trial of the rights of claimants established by the commission's order must be had before any order becomes binding on the parties interested. The foregoing also disposes of the contention that the section violates article 6 section 5, of the Constitution prescribing the limits of the appellate jurisdiction of the superior court, and the plaintiff's reliance on the case of Mojave River Irr. Dist. v. Superior Court, 202 Cal. 717, 262 P. 724, which was fully discussed and distinguished in the case of Bray v. Superior Court, supra. No appellate jurisdiction is vested in the superior court by section 36b of the act. The mere fact that the superior court is directed to affirm the order of determination when no objections thereto are filed does not affect to change the conclusion in this respect. The proceeding where no objection is filed is in no substantial respect different from an entry of judgment on evidence before the court upon the default of a party who has been served with summons or other appropriate prescribed process.

[4-6] A further contention is made that the sections involved violate the due process clause (article 1, § 13, California Constitution). The plaintiff contends that "due process of law" means law in its regular administration through courts of justice according to those rules and principles which have been established by our system of jurisprudence for the enforcement and protection of private rights. That the opportunity for a trial governed by the same established rules of evidence and procedure as are applied in other cases under similar conditions was given to the parties in the proceeding in the superior court in San Joaquin county was also decided by the case of Bray v. Superior Court, supra, at page 435 of 92 Cal. App., 268 P. 374. It is unnecessary to add to the remarks contained in the opinion in that case, where it is pointed out that the fact that the process prescribed for the purpose of obtaining jurisdiction of the parties is not a summons does not invalidate the proceedings so long as the court acquires jurisdiction of the parties and the cause. No claim is made that the plaintiff or his predecessor was not named in said order of determination as a party interested or that he was not served with notice as required by the provisions of the act, or that he was in any manner deprived of the opportunity afforded by the act of appearing in said proceedings in San Joaquin county and entering his objections to the order of determination filed therein. Thus the contention that the plaintiff or his ancestor was not a party to the proceeding in San Joaquin county and that no valid judgment was rendered as against him because in fact neither he nor his ancestor made an appearance therein cannot avail him on the record presented here. That the mere procedure by which jurisdiction is to be exercised may be prescribed by the legislature has been long recognized. Ex parte Harker, 49 Cal. 465; In re Jessup, 81 Cal. 408, 470, 21 P. 976, 22 P. 742, 1028, 6 L. R. A. 594. The sections involved herein regulate procedure merely, and do not have the effect to impair the constitutional power of the court or to defeat the exercise of its jurisdiction, nor do they attempt to regulate what jurisdiction it shall possess. This is the distinction between section 36b (as added by St. 1917, p. 237) and section 1b of the act (as added by St. 1923, p. 162) pointed out by the court in the case of Bray v. Superior Court, supra.

[7] The plaintiff contends that by the commencement of the proceeding in the superior court in San Joaquin county there occurred a violation of the proviso of section 5 of article 6 of the California Constitution that all actions for the recovery of the possession of, quieting the title to or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated, and of subdivision 4 of section 25 of article 4 prohibiting the Legislature from passing local or special laws providing for changing the venue in civil or criminal actions. The Legislature obviously had in mind those sections of the Constitution when it provided by section 36a of the act that the order of determination of the water commission, transcript and evidence shall be filed in the county in which the stream system, or some part thereof, is situated. No reason is presented, and none is perceived, why the Stanislaus river and all of its tributaries may not constitute a stream system within the meaning of the act. The joint petition initiating the proceeding before the water commission claimed appropriative rights in the waters of the Stanislaus river. The claims of all of the upper appropriators, including the parties hereto, on that river or its tributaries, formed the proper subject of an action or proceeding to determine the respective rights of the petitioners and such other users. No contention is made that such an action or pro-

ceeding could not have been commenced by the same petitioners in the superior court in San Joaquin county, a portion of the southern boundary of which is formed by the Stanislaus river, to determine the same rights as are determined by the judgment of the superior court in San Joaquin county in the present case. See E. C. Horst Co. v. New Blue Pt. Mg. Co., 177 Cal. 631, 171 P. 417; Last Chance Water Ditch Co. v. Emigrant Ditch Co., 129 Cal. 277, 61 P. 960; Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co., 60 Cal. 408; Sutter-Butte Canal Co. v. Great Western Power Co., 65 Cal. App. 597, 224 P. 768; Yolo County Cons. Water Co. v. Adamson, 22 Cal. App. 493, 135 P. 48. Coyote creek is an upper tributary of the Stanislaus river, and flows entirely in Calaveras county. The fact, however, that no part of Coyote creek lies in San Joaquin county does not invalidate the judgment rendered by the superior court in San Joaquin county determining the respective appropriative rights in and to the waters of that creek of the parties hereto.

[8] Further, it is urged that the proceeding in the superior court in and for San Joaquin county permits a taking of private property for public use without compensation. The proceeding was brought merely to determine and establish conflicting private rights. No taking or public right or use was involved.

[9] The contention of the plaintiff that the Calaveras county judgment of 1887 could not be attacked collaterally in the proceedings before the state water commission is not available to him in the present action. It might have formed the basis of an objection in the proceedings before the superior court in San Joaquin county. The contention now made amounts to a collateral attack upon the judgment of the latter court. Because of the finality of that judgment the plaintiff is now in the position where he is unable to attack collaterally such a judgment, which is valid on its face.

Finally it is stated that the rights of Percy F. Wood, the plaintiff here, were not adjudicated by the judgment of the superior court in and for San Joaquin county. It is shown that by a deed dated December 11, 1916, Mrs. Marinda Wood conveyed all of her right and interest in and to the subject of the present action to her three children, one of whom is the plaintiff. The proceedings before the state water commission were commenced on August 14, 1917. The order of determination was made and entered in its office on September 21, 1922, and thereupon the court proceeding was duly commenced in the county of San Joaquin. The deed from Mrs. Marinda Wood to her children was recorded subsequently on the 10th day of July, 1923, and after the order setting the time for hearing had been made by the superior court and notice had been served in accordance with the provisions of the act. So far as the public records showed at the time of the proceedings before the commission and the commencement of the proceeding in the superior court the plaintiff's mother owned the title to the property. Furthermore, the plaintiff testified on the trial of the present action that he gave evidence before the state water commission and submitted the proof of claim in his mother's name in those proceedings. We fail to see, therefore, how he is not a claimant whose right was lawfully embraced within the determination and as to which the decree of the superior court is conclusive pursuant to the provisions of section 36e of the act.

The foregoing views compel a conclusion that the judgment in favor of the plaintiff herein should be, and it is hereby, reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; PLUMMER, Justice pro tem.

1 Cal.2d 466

VELA v. HUBERTY, Registrar of Voters, et al.

S. F. 15235.

Supreme Court of California.

Sept. 7, 1934.

1. Mandamus ⇐168(2)

Presentation of petition for writ of mandate made out prima facie case for issuance, throwing burden of refuting showing made upon respondents.

2. Elections ⇐126(1)

Act prohibiting consolidation of other elections with primary elections is mandatory (St. 1931, p. 2196, § 1).

3. Evidence ⇐10(5)

Supreme Court would take judicial notice that much of territory included in Ama

dor county is mountainous and sparsely settled.

4. Mandamus ⊂⇒143(2)

Petitioners filing at eleventh hour mandamus to stop election for recall of superior court judge as violating statute prohibiting consolidation of elections *held* barred by laches, where much of territory in county was mountainous and sparsely settled, election proclamation was given due notice, and people were prepared to go to polls next day and vote.

In Bank.

Petition by W. H. Vela against Leotta M. Huberty, Registrar of Voters of Amador County, and others for a peremptory writ of mandate requiring respondents to refrain from conducting an election for the recall of the Judge of the Superior Court in the County of Amador.

Writ denied, and alternative writ discharged.

Cooley, Crowley & Supple, of San Francisco, for petitioner.

A. L. Pierovich, of Jackson, for respondents C. P. Vicini and Ralph McGee.

Ralph McGee, Dist. Atty., of San Francisco, and T. P. Wittschen, Special Counsel, of Oakland, for respondent Leotta M. Huberty.

PER CURIAM.

Petition for a peremptory writ of mandate directed to the respondents requiring them to refrain from conducting an election for the recall of the judge of the superior court in the county of Amador.

The election was called for Tuesday, August 28, 1934, the date for the holding of the general primary election throughout the state. It is the contention of petitioner that it has been and is the intention of the board of supervisors of the county that the recall election should be regarded as consolidated with the general primary election to be held throughout the county on that date, in violation of section 1 of the act to permit the consolidation of elections and providing for procedure therefor approved June 11, 1913 (St. 1913, p. 698), as amended (St. 1931, p. 2196). As originally enacted section 1 of the act provided that any two or more elections called to be held on the same day in the same territory might be consolidated. As amended in 1931 the act, section 1 provides: "That no such election shall be consolidated with the primary election held throughout the state in August of each even numbered year."

At the conclusion of the argument the Chief Justice announced the decision from the bench:

[1, 2] The court is of the view that the petition for the peremptory writ must be denied. Upon the presentation of the petition we were of the view that a prima facie case for issuance of the writ was made out. Consequently the burden of refuting that view was thrown upon the respondents. While the provision of the act (St. 1931, p. 2196) prohibiting the consolidation of other elections with primary elections appears to be mandatory, the question is in a somewhat hazy condition, in view of the decisions of this court as to circumstances and conditions determining what is and what is not a consolidated election. This case narrows itself to the proposition whether the two elections have been actually consolidated. Under the showing made by the return, which is not challenged, the case seems to be governed by the decisions in the cases cited by the respondents in the argument. Mead v. City of Los Angeles, 185 Cal. 422, 197 P. 65; City and County of San Francisco v. Collins, 216 Cal. 187, 13 P.(2d) 912.

The case is of that class, each one of which must be determined by the particular facts involved. We deem it unnecessary to enlarge further the facts presented by the return and not challenged.

[3, 4] The question of laches, raised by the respondents, has also received the consideration of the court. The petition for the writ was filed at the eleventh hour. The election is called for to-morrow. We take judicial notice of the fact that much of the territory included in Amador county is mountainous and sparsely settled. The election proclamation appears to have been given due notice, through publication in the papers and otherwise, and we take it the people of the county are now prepared to go to the polls tomorrow and vote.

For the foregoing reasons the petition for the writ is denied, and the alternative writ is discharged.

⊂⇒For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

1 Cal.2d 468

BOYD v. JORDAN.

S. F. 15243.

Supreme Court of California.

Sept. 8, 1934.

1. Constitutional law ⇐9(1)

Where sole purpose of proposed constitutional amendment under initiative provisions of Constitution was to provide for the levy of a "syncrotax," or a tax on basis of gross receipts in lieu of all other state taxes, so-called petition with a short title reading "Initiative Measure Providing for Adoption of Gross Receipts Act" *held* fatally defective under statute requiring that every initiative petition have a short title showing nature of petition and subject to which it relates (Pol. Code, § 1197b; Const. art. 4, § 1).

2. Statutes ⇐35½

Statute providing that initiative petition shall have a short title not to exceed twenty words showing nature of petition and subject to which it relates *held* mandatory (Pol. Code, § 1197b; Const. art. 4, § 1).

In Bank.

Original petition by Harold J. Boyd for a writ of mandate directed to Frank C. Jordan, Secretary of State of California, commanding respondent to refrain from submitting a certain purported initiative measure to the electors or certifying such measure to registrars of voters and county clerks.

Peremptory writ ordered to issue.

Pillsbury, Madison & Sutro, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

Curtis Hillyer, of San Diego (Irve C. Boldman and Patrick Francis O'Rourke, both of San Diego, of counsel), amici curiæ.

CURTIS, Justice.

Petition for writ of mandate directed to the secretary of state commanding him to refrain from submitting a certain purported initiative measure to the electors of the state, and not to certify said measure to the registrars of voters and county clerks of the state. Upon the filing of the petition this court issued an alternative writ directed to said officer, commanding him to refrain from committing any of the acts in the petition complained of, or to show cause to the contrary at a specified time before this court designated in said order. At the appointed time the respondent appeared and filed as an answer and return to the alternative writ a general demurrer to the petition.

The document filed with the secretary of state purports to be a petition for the submission to the electors of the state for their approval of a proposed constitutional amendment under the initiative provisions of the Constitution of the state. It is signed by the requisite number of qualified electors of the state and has been filed with the secretary of state within the time entitling it to be submitted for adoption at the coming state election, if it is otherwise found to be sufficient. The proposed amendment to the Constitution is set forth in full in the purported petition. The petitioner herein, a qualified elector and taxpayer of the state, objects to the submission of the proposed measure to the electors of the state upon the following grounds:

1. No petition for the submission of the measure has been presented to the secretary of state as required by article 4, section 1, of the Constitution.

2. The words, "Initiative Measure Providing for Adoption of Gross Receipts Act" which appear at the top of each page after page 1 of the purported petition, do not constitute "a short title * * * showing the nature of the petition and the subject to which it relates."

The purported petition which the petitioner attacks and contends is not a petition in any sense of the word contains no formal petition whatever. It is not addressed to the secretary of state and contains no request or prayer that the measure set forth therein be submitted to the electors of the state for their approval. At the top of this document, in twelve-point black-face type are printed, as required by said section of the Constitution, the words "Initiative Measure to be Submitted Directly to the Electors." These words are followed by a summarization of the proposed measure by the Attorney General, and then the proposed measure itself. Aside from the signatures of the electors, and the verification by the solicitor or circulator of the document, the foregoing constitutes the entire contents of the purported petition. The question as to the sufficiency of such document to meet the requirements of the Constitution might present an interesting subject for discussion. But we find it unnecessary to pass upon that question as we are of the opinion that the document is fatally defective in respect to the short title printed across the top of each page after the first page. We will,

however, refer to the document before us as the petition.

Section 1197b of the Political Code provides that, "across the top of each page after the first page of every initiative * * * petition or section thereof which may be prepared and circulated in accordance with law there shall be printed in eighteen-point gothic type a short title, in not to exceed twenty words, showing the nature of the petition and the subject to which it relates." As we have seen, the short title used in the present instance is in the following words: "Initiative Measure Providing for Adoption of Gross Receipts Act."

In the case of California Teachers' Association v. Collins, 34 P.(2d) 134, we held that a substantial compliance with this provision of said section of the Code was all that was required. We further held, in considering the requirements of the Constitution and the Code sections respecting these headlines at the top of the pages of an initiative petition, that "the requirement of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the initiative petitions."

In determining whether the short title used in the present petition meets the requirements of the statute, it is necessary to ascertain the subject of the amendment to the Constitution which it is proposed to submit to the electorate of the state by means of said initiative petition. A fair statement of the nature of this proposed amendment to the Constitution may be gained from the summarization or title thereof prepared by the Attorney General which reads as follows: "Gross Receipts Tax. Initiative Constitutional Amendment Provides for taxing all money and value received, including the value of commodities when produced and/or processed, at a percentage thereof sufficient to balance state and local budgets, excepting therefrom bank deposits and principal of loans. Requires public utilities pay state tax plus average of all local taxes on gross receipts. Prohibits all other state and local taxes. Limits budget increases to five per cent annually. Prohibits exemptions. Provides for elective State Administration Board and elective County Administrators. Authorizes enforcement legislation; prescribes penalties for violation." This title briefly states the subject of the proposed amendment. From it, and also from an examination of the petition as a whole, it appears that the proposed amendment to the Constitution provides for a tax to be levied upon gross receipts of money from all sources, with certain exceptions therein specified, sufficient in amount to meet and pay the expenses of maintaining the state government and all political subdivisions of the state; all existing tax laws are repealed, an entirely new set of officers are provided for the levy and assessment of the proposed tax; and the offices of assessor and tax collector of every county in the state are abolished. This tax, while it is not so designated in the petition, is commonly called and known as the syncrotax.

[1] It clearly appears, therefore, that the subject to which the proposed amendment to the Constitution relates is a tax on gross receipts for the purpose of meeting the expense of government. And in this connection, it will be observed that gross receipts are considered and dealt with in the proposed amendment for no other purpose than that of fixing the basis upon which said tax is to be computed. The essential features, therefore, and the sole purpose of the proposed measure, is to levy a tax to maintain the state and its political subdivisions. Does the short title which we have set out above comply with the requirements of said section 1197b, which directs that it shall show the nature of the petition and the subject to which it relates? The petition before us asks that an amendment to the Constitution be submitted to the people, which amendment has for its sole purpose the raising of revenue for the support of the state government. The short title used in this petition makes no reference to a tax or to the fact that the proposed amendment is a revenue measure. We think it is clear that the short title neither shows the nature of the petition, nor does it show the subject to which it relates. There is nothing in this short title which informed the elector who was asked to sign it that the proposed measure provided for the levy of any tax whatever. He was informed that the petition provided for the adoption of a gross receipt act, but no information was given him as to the character of the proposed legislation regarding that subject. He was as much in the dark regarding the real purpose of the proposed measure after reading the short title as he was before he had read it. The short title did not bring to his mind any idea or suggestion whatever that the amendment proposed related to taxation in any form whatever. It, therefore, gave him no information upon the very subject with which he was then concerned, and as to which the law gave him the right to be informed. In our opinion, this vital defect in the short title vitiates the whole petition and renders it inadequate for any purpose. This contention finds support in the decision rendered by this court in the case of Fatjo v.

Pfister, 117 Cal. 83, 48 P. 1012, 1013, where the court held an act of the Legislature, which in effect levied a tax, was invalid under the section of the Constitution which provided that "every act shall embrace but one subject, which subject shall be expressed in its title," for the reason, among others, that the title to the act did not indicate that the act provided for a tax.

Respondent has called to our attention a number of statutes of the state which he contends bear short titles similar to the short title used in the present petition. These statutes, with their alleged "short titles," are: "The School Code of the State of California," "The Transportation District Act," "Warehouse Receipts Act," "Water Commission Act," "California Water District Act," "Weights and Measures Act," and "State Housing Act." An examination of these statutes, however, will show that the real title of each of these acts sets out in full the subject to which the act relates. In some of these statutes the title is lengthy and hundreds of words are used to express the subject to which it relates. It is, however, provided in each of said acts, as well as many others enacted by our state in different but similar phraseology, and evidently for the sake of convenience, that the particular act may be known or referred to or cited by a brief designation or short title, such as, for instance, "The State Housing Act," the title to which act contains more than four hundred words. To repeat this lengthy title every time the act is cited or referred to would be unnecessarily burdensome, and it was to avoid this repetition of the lengthy title that the Legislature provided that the particular act might be referred to and cited in a brief and much simpler form. This brief form was not in any sense the title of the act, although in some of the statutes permitting its use it is so referred to. Yet even in those cases where it is expressly designated as a "short title," it plainly appears that the sense in which these words are used, and the purpose of their use, are far different from those set forth in section 1197b of the Political Code. In one case the short title is permitted as a mere matter of convenience, while in the other it is required in order to inform the elector of the nature of the petition which he is asked to sign.

Assuming for the sake of argument that a brief or short title may in some instances show the subject to which the statutes relate, that is no argument that every short title, or the short title used in the petition herein involved, meets the requirements of section 1197b of the Political Code, or that it expresses the subject of the proposed measure set out in the petition herein. As we have seen, the subject of this proposed measure is a tax on gross sales, and the short title used in said petition gives no inkling that such is the purpose of the proposed measure. We might illustrate the insufficiency of this short title by recalling the proposed constitutional amendment which at different times during the past few years has been submitted to the voters of the state providing for the so-called single tax system for raising state revenues. This proposed measure provided that all governmental revenues should be raised by a tax on land. Would a short title simply stating that the proposed measure was an "Initiative Measure Providing for Adoption of Land Act," have given to the electors any information that the proposed constitutional amendment was to wipe out all existing laws relative to taxation and to substitute in their place an entirely new system placing the entire burden of maintaining our state and its subdivisions upon the land of the state? To ask this question is to answer it in the negative. A further illustration might be had from our present law respecting the gasoline tax. Had the statute creating this tax been entitled, "Gasoline Act" or "A Measure Providing for Adoption of Gasoline Act," would any one contend that this title expressed the subject to which the act related, or gave any information to anybody that the proposed measure contemplated a tax on gasoline sold throughout the state? We hardly think any one would care to risk his professional reputation by answering this question in the affirmative. So with the short title used in the present petition. It makes no reference directly or indirectly to the subject of taxation concerning which the proposed measure primarily and exclusively deals. It does not, therefore, show the nature of the petition nor the subject to which the petition relates. It does not, in our opinion, amount to even a substantial compliance with the requirements of section 1197b of the Political Code, and for that reason we are constrained to hold that the proposed measure set out in the said petition is not entitled to be submitted to the electors of the state.

[2] Respondent further contends that the Constitution contains a complete scheme for proposing a law or constitutional amendment and that section 1197b of the Political Code, being an act of the Legislature passed for the purpose of facilitating the operation of the Constitution, must be held to be merely directory. The Constitution itself gives to the

Legislature the power to enact legislation to facilitate the operation of said section of the Constitution providing for the adoption of laws or the amendment of the Constitution through the power of the initiative. Section 1197b of the Political Code was enacted in pursuance of this authority. Its purpose is to throw additional safeguards around the operation of the initiative law. Its design is to give to the elector additional information other than that afforded by the Constitution as to the nature of the petition which he is asked to sign. No elector can intelligently exercise his rights under the initiative law without a knowledge of the petition which he is asked to sign, and any legislation which will increase the facilities of the elector to acquire such information is well within the terms of the Constitution permitting the enactment of legislation to facilitate the operation of this provision of the Constitution. There is nothing to indicate from the language of the Constitution that such legislation is directory only. Like all statutes of a similar nature, the section of the code here involved is mandatory in its nature.

Let the peremptory writ issue as prayed for.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; IRA F. THOMPSON, J.

1 Cal.2d 447

CALLAHAN v. HAHNEMANN HOSPITAL et al.

Civ. 8813.

S. F. 15076.

Supreme Court of California.

Aug. 29, 1934.

Rehearing Denied Sept. 27, 1934.

1. Physicians and surgeons ⇐18(9)

In action for malpractice against surgeons based on subcutaneous injection of saline solution containing glucose after operation for ruptured appendix when plaintiff was suffering from peritonitis, causing sloughing of tissues, evidence of surgeon's negligence *held* insufficient for jury.

2. Physicians and surgeons ⇐14(1)

Physician is required to possess only ordinary skill in profession and to use best judgment in exercising that skill.

3. Evidence ⇐574

In action for malpractice against surgeons, testimony of expert witnesses as to best treatment under particular circumstances is conclusive as against testimony of lay witnesses.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Josephine N. S. Callahan against the Hahnemann Hospital and others. A nonsuit was granted as to the defendant A. Walter, and a verdict was returned in favor of the defendants Hahnemann Hospital and C. J. Burnham. From a judgment in favor of the plaintiff and against the defendants Thomas H. McGavack and James W. Ward, they appeal.

Judgment reversed, with directions.

For prior opinion, see 26 P.(2d) 506.

Rehearing denied; SPENCE, J., being disqualified did not participate.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Garton D. Keyston, Grove J. Fink, and M. Mitchell Bourquin, all of San Francisco, for respondent.

PER CURIAM.

This cause was ordered transferred to this court after decision by the District Court of Appeal for the reason that we desired to give further consideration to some of the questions presented on the appeal and determined by said decision. After a careful study of the briefs and arguments of the parties hereto, we are of the conclusion that the opinion of the District Court of Appeal, with the deletion of certain portions not necessary to said decision, correctly determines all questions both of law and fact in issue between said parties. The opinion, written by Mr. Justice Spence, as modified, we approve and adopt as the opinion of this court. It is as follows:

Plaintiff sought to recover damages for alleged malpractice. The defendants were the Hahnemann Hospital, at which plaintiff was treated; C. J. Burnham, now Dr. Burnham, who was then an externe at the hospital and who administered to plaintiff certain injections; A. Walter, a nurse who assisted Mr. Burnham; and Drs. Thomas H. McGavack and James W. Ward, the doctors in

charge of the treatment of plaintiff. A nonsuit was granted as to the defendant A. Walter, and the jury returned a verdict in favor of the defendant hospital and the defendant Burnham. From a judgment on the verdict in favor of plaintiff and against the defendants Dr. McGavack and Dr. Ward, said defendants appeal.

The main questions involved on this appeal relate to the sufficiency of the evidence to sustain the verdict and judgment. We shall therefore proceed to set forth the evidence in some detail. In doing so we are mindful of the general rules controlling the action of appellate courts where the claim is made that the evidence is insufficient, but, before testing the sufficiency of the evidence offered on behalf of plaintiff, we believe it proper under the circumstances before us to set forth some of the evidence of the attending physicians who were the only experts who saw plaintiff at or near the time of the treatment.

Plaintiff's claims arise out of the treatment given her following an operation necessitated by a ruptured appendix. The results of the operation appear to have been entirely satisfactory, and it is apparently conceded that said operation was skillfully performed. The subsequent treatment complained of consisted of the subcutaneous injection of a saline solution containing glucose.

Plaintiff was a woman approximately 65 years of age. As early as 1890 she had experienced trouble with her appendix, but, after being taken to a hospital, she had jumped off the operating table. In July, 1928, the condition of her appendix became acute, and she consulted Dr. McGavack. With plaintiff's consent, Dr. Ward, a surgeon of 49 years' experience and a specialist who had performed some 4,000 abdominal operations, was called into consultation. The doctors recommended immediate operation, and plaintiff was taken to the hospital. All preparations for the operation were made, but plaintiff changed her mind and left the hospital in an ambulance against the advice of the doctors. Her condition finally became very critical, and she again consulted the doctors, and agreed to undergo the necessary operation. On July 27, 1928, she was rushed to Hahnemann Hospital in an ambulance, and was operated upon without delay. The anesthetic was administered by Dr. McGavack, while the operative work was performed by Dr. Ward with the assistance of Dr. Cookingham. The operation revealed that the appendix had ruptured and that plaintiff was in the last throes of peritonitis.

Before describing the treatment which followed, we will quote some of the testimony relating to plaintiff's condition before and immediately after the operation. Dr. McGavack testified:

"A. We found conditions again worse, evidently with an appendix that had already ruptured, as her pain had become general through the entire abdomen, and she ceased to breathe with the abdominal muscles at all, and her temperature was somewhere around 102 and 102½, her pulse was much weaker, and at times intermittent, in contrast to what it had been on July 19th. She was beginning to show the type of face that we find with peritonitis, which is a pinched drawn expression, more or less of shock and fear, with cold extremities, and at that time some failing of the extremities in the hands and feet. Needless to say, at this time hospitalization seemed imperative, and every measure was attempted which might help her, even though she refused hospitalization. I might add that another feature, of course, was the onset by this time of marked dehydration, inasmuch as from July 19th until July 24th she had taken practically no fluid, and what fluid had been taken had been vomited, so that we were dealing with a very much dehydrated and toxic individual.

"Q. Dehydrated means what, Doctor? A. Decreased water in the tissues; removal of necessary fluids from the tissues. Those that are necessary for proper circulation.

"Q. And that she was very toxic means what? A. That she was very toxic means somewhat the picture I described, that she was absorbing poisons through an area in her abdomen, which was affecting her whole system, paralyzing the circulation, and paralyzing almost every function of the body.

"Q. And if that condition is not changed what is the ultimate result? A. The ultimate result could only be one thing.

"Q. What is that? A. Death."

Dr. Ward testified as to her condition at the hospital just before the operation as follows:

"A. Very bad; she had gone from bad to worse; she was in the throes of general peritonitis; the abdomen was distended and very tender; she was mentally dull and the lips blue and the fingernails blue and the nose pinched; the temperature was about 102 or 103—I don't exactly recall; the pulse accelerated and intermittent—only a certain number of beats coming through to the wrist. In all, a very bad picture.

"Q. You mean that the chance to save life seemed slim? A. Very slim. It was with a good deal of courage that I undertook to do for her, but I wanted to save her if I could.

"Q. You had a fear that she would die on the table? A. A very great fear."

Plaintiff's condition immediately after the operation was described by Dr. McGavack as follows:

"A. When she returned from the surgery her condition was even more critical, owing to the necessary shock of an operative procedure. She returned to her room with cold extremities, blue cyanosed extremities; her heart beats were much more weakened than before; her pulse was very rapid, running from 140 to 150 at the heart, and at the pulse the circulation was so weak the patient would not come through to the pulse, the wrist, and it was possibly only about 30 or 40 beats each minute. The pinched and drawn toxic expression of the face was present, and all the tissues were dehydrated. In other words, she was suffering from the shock of an operation, plus the most toxic type of absorption from the appendix that had been ruptured at least eight days.

"Q. Was she dying? A. Yes."

Dr. Cookingham gave the following answers to questions relating to plaintiff's condition at that time:

"Q. What opinion did you have—did you have following the operation—of the chances for the lady to live or die? A. That she would not recover.

"Q. You thought she would die? A. I did."

Dr. Ward stated that during all of his experience with cases involving abdominal surgery he had never encountered a worse case than plaintiff's in which the patient had recovered.

Following the operation, the doctors were confronted with the problem of sustaining the life of the patient. Dr. McGavack, Dr. Ward, and Dr. Cookingham held a consultation, and formed the judgment that it was essential to inject a saline solution containing 10 per cent. of glucose in order to save plaintiff's life. The soundness of their judgment in this regard is not questioned. It further appears that the use of such solutions containing up to 50 per cent. glucose is a recognized and approved method of treatment. Having arrived at the above-mentioned conclusion, the three doctors then discussed the question of the method of injecting the necessary fluid and nourishment. It appears that there are two recognized and approved methods of making such injections: First, into the veins, which is called the intravenous method; and, second, under the skin, which is called the subcutaneous method. There is a third method referred to in the testimony as the "Murphy Drip," but it appears that this method is merely used as an auxiliary of the two principal methods of injection above mentioned. It further appears that such solutions containing a high percentage of glucose are not ordinarily injected by the subcutaneous method because of the likelihood of the sloughing of the tissue at the places where the injections are made. The doctors concluded, however, that, due to the toxic condition of plaintiff, the intravenous method could not be used as plaintiff's circulation was failing, and such injections would overload "the already poisoned heart." They therefore ordered the injections containing 10 per cent. glucose to be given subcutaneously. Pursuant to the doctors' directions, the injections were given subcutaneously in plaintiff's thighs by the externe at the hospital. Plaintiff's life was saved, but there was a sloughing of the tissues at the places where the injections were made. This action was brought to recover for the alleged damage sustained by reason of such sloughing.

We will repeat here some of the testimony of the attending physicians. A portion of the testimony of Dr. McGavack was as follows:

"Q. Now, Doctor, how did you determine upon the 10 per cent. solution of glucose in 2 per cent. saline? Will you tell us how and why that conclusion was reached? A. Yes, surely. Here was a patient who was extremely toxic; here was a patient who needed fluid extremely badly; here was a patient who had a failing—almost completely failing circulation. It was necessary to give this patient nourishment. It was necessary to give this patient fluid. It was impossible to give this patient nourishment or fluid through the most readily accessible channel, that is, the veins. Within 24 seconds anything going into the veins has gone entirely through your body, It was absolutely out of the question to give it by this route, because the circulation was failing, and as I say, almost stopped. Had we done so we would have given this patient a quart or more of fluid for a failing, weakened, practically moribund heart, to pass through the circulation.

"Q. Moribund means what? A. Dying. It was necessary that both nourishment and fluid go in. The next most readily accessible means of absorption is by giving the fluids under the skin, and consequently we resorted to

this route. We utilized the strength of the solution, as mentioned, because we wanted her to have the maximum amount we could possibly put into this particular area at one time. This was followed by the third most readily accessible method of giving fluid, and that was the Murphy Drip, or the fluid per rectum.

"Q. Now, Doctor, at the time that you prescribed the 10 per cent. solution for the hypodermoclysis, did you know at that time the possibility that it might cause sores? A. Yes.

"Q. And knowing that it might cause sores on her leg why did you do it? A. We would much rather have a chance of having our patients live than have them die with clear legs.

"Q. In other words, it was a case of saving her life? A. It certainly was.

"Q. And before you actually did it did you take consultation with Dr. Ward? A. I did.

"Q. And did he share your view? A. He did.

"Q. If the situation had not been so critical would you have used 10 per cent.? A. Probably not.

"Q. Probably not. But it was because of the crisis? A. That is right."

Dr. Cookingham testified:

"Q. * * * From the condition that you found there, would you say that she was toxic? A. Very.

"Q. What does that mean? A. Poisoned by absorptions.

"Q. And if, under this condition, some outside material had been put in the blood stream—say glucose intravenously—what effect would it have? A. It would have overloaded the already poisoned heart and possibly have resulted seriously.

"Q. It has been testified in this case there was a prescription of ten per cent. of glucose—1,000 centimeters—and two per cent. of saline, given subcutaneously. As a medical man, in your judgment, was that good medical practice? A. It was."

Dr. Ward testified:

"A. The situation was one of sustaining the patient's vitality, which was very low, and she had but a single thread to hang on. Her toxemia was very great, and it was thought if we could assist her over twenty-four hours that vitality might return, and we concluded to not give any stimulation through the veins because of her weakened heart and because of the very small collapsed veins that could be seen, and she was rather stout and the tissues flabby, and she was so thoroughly dehydrated—lost so much blood by not having received or regained any that she did receive—it was thought best to use the hypodermoclysis method which is the installation of saline beneath the skin. It was accordingly decided we should give her as much glucose as her body could burn up, the intention being to sustain and overcome the toxemia by supplying her blood stream with glucose, for glucose had helped, and she needed as much help as possible, and a ten per cent. solution was decided on—at least we knew it was a little more than the average, yet we thought that the emergency of the hour moved us to do that.

"Q. Did you accomplish the purpose and save her life by the treatment? A. Yes. The possible injuries to the legs were so infinitesimal compared with the great fact of saving her life, that it was a matter of simple practice to do that.

"Q. You knew at the time that the ten per cent. solution was given that there might be a sloughing of the legs and scars afterwards? A. Yes. It very often occurs when we use a simple saline, and sometimes it follows a simple hypodermic syringe.

"Q. Having in mind the condition that confronted you at the time, and having in mind the practice of medicine in San Francisco, in your opinion was the treatment administered in accord with good medical practice in San Francisco at that time? A. Yes. And it saved her life.

"Q. And that was what you were after? A. Absolutely."

We may mention the fact that not only the defendant doctors but other medical men were called by defendants to establish the fact that the procedure adopted by the defendant doctors in the situation which confronted them was in accordance with recognized and approved medical practice. Among those called were Dr. W. B. Coffey, surgeon of 43 years' experience, and the chief surgeon for the Southern Pacific Company and other companies, with 600 doctors working under his direction. He testified that under the conditions it certainly would be good medical practice to inject subcutaneously a solution containing 10 per cent. glucose and would be wrong not to do it. He testified further:

"A. I frequently give it in the Southern Pacific Hospital. I have given 25 per cent. in one case. I took a desperate chance, but took it and saved the life.

"Q. What else did it do? A. It was absorbed in this case. We do not get a breaking down in all cases. It depends on the individ-

ual and the sensitiveness of the skin. That varies. We do not know it will break down. If it does we are not a bit alarmed about it, as long as we save the life."

Dr. Leo Eloessor, a surgeon of 25 years' experience, and professor of clinical surgery at Stanford University, testified that the defendant doctors followed the recognized medical practice under the circumstances.

The sloughing of tissue referred to in the testimony occurred shortly after the injections were administered. Plaintiff nevertheless wrote a letter to Dr. Ward about one month later which read in part as follows: "Dear Loved Doctor Ward:—I owe my life to your skill. This will remain with me to the end. * * * Affectionately and Ever Yours with Deepest Gratitude, N. C. Callahan."

This action was commenced in 1929 against all of the defendants mentioned above. In support of her claims against the defendants, plaintiff produced but one medical witness, Dr. Nathan S. Housman, who first saw plaintiff in February, 1929. Dr. Housman had practiced surgery since 1921, but the testimony does not show that he had ever performed an operation in abdominal surgery or treated a case comparable to plaintiff's. Dr. Housman was on the stand on three separate occasions during the course of the trial. On the first occasion he testified that when he first saw plaintiff her limbs showed a loss of tissue and scars at the two points on her thighs. In answer to a hypothetical question he gave his opinion that this was caused by "something wrong with your solution"; that "there was too high a content of glucose in the solution." At the close of plaintiff's testimony a motion for nonsuit was argued on behalf of the defendant hospital and its attendants upon the ground that the testimony merely showed that they had carried out the instructions of the defendant doctors. Plaintiff asked and was granted leave to recall Dr. Housman. He then testified that it was recognized by the medical profession in this locality that 5 per cent. glucose in such solutions was the high safe limit for use subcutaneously because of the possibility of sloughing of the tissue. He further testified that in his opinion the percentage used in the present case "was well over 10 per cent. I would imagine around 20 and maybe 50 per cent. was used in the leg." When asked how he determined this he said, "In some cases 5 per cent. up to 10 per cent. have been given subcutaneously and it is a marked reaction without sloughing. That is why I determined that." He further stated: "There are other things that might come into this thing along with it. I did not prepare the solution or the needles. If you have a dirty needle you may get an infection causing a sloughing." A reading of the testimony of this witness on that occasion shows that it was mainly directed at the defendants other than the defendant doctors in an attempt to prove that the sloughing was caused by the injection of a solution with a higher content of glucose than that prescribed by the doctors or that it was possibly caused by the use of a dirty needle. This witness was again recalled after the defendant doctors' motion for nonsuit had been denied and after defendants had presented their testimony. He was asked: "Doctor, would there be any benefit to be expected from giving a person, if that person was in extreme shock and dehydrated, would there be any benefit to be expected in giving that person more than 5 per cent. glucose under the skin?" He answered in the negative. He was further asked: "If a person was actually in dire need of food, would there be anything surrounding such an extreme condition which would prohibit giving that glucose in the veins?" He again answered in the negative. It will be noted that the first question embodied only the elements of shock and dehydration, while the second question embodied only the element of need of food. Neither question covered the condition of plaintiff at the time the injections were prescribed when she was suffering, not only from shock, dehydration, and need of food, but was in a dying condition with failing circulation and toxemia resulting from the peritonitis.

[1] The main question before us is whether the evidence was sufficient to sustain the verdict against the defendant doctors. Appellants contend that it was not, and in our opinion this contention must be sustained. The evidence with respect to respondent's condition has been set forth above. There is no evidence to show that the diagnosis made by the attending physicians was not entirely correct. The paramount duty of the doctors under the circumstances was to endeavor to save the life of the patient. There is no evidence to challenge the judgment of the doctors in determining that an injection of a solution containing 10 per cent. glucose was essential to accomplish that purpose. There is no evidence to show that in the condition in which they found respondent a 10 per cent. solution could have been injected in the veins without defeating that purpose. In other words, it does not appear that respondent's life could have been saved by any method of treatment other than the one prescribed by the defendant doctors. Under these cir-

cumstances, it certainly was not malpractice to save the patient's life, even though this was accomplished by the subcutaneous injection of a solution containing a higher percentage of glucose than is ordinarily so injected, and even though sloughing resulted at the points of injection. While appellants make the further claim that the testimony of Dr. Housman is self-destructive and inherently improbable, we deem it unnecessary to comment thereon for, even when taken at its full face value, we believe it is insufficient to sustain the verdict.

[2] Numerous authorities have been cited in the briefs of the parties to this appeal. It appears from these and other authorities that there are three main classes of cases in which malpractice has been charged: First, those charging unskillfulness in diagnosis; second, those charging unskillfulness in the selection of a method of treatment; and, third, those charging unskillfulness in some act or omission on the part of the physician in administering the treatment. We are concerned on this appeal only with a charge of unskillfulness on the part of appellants in the selection of the method of treatment. It is a matter of common knowledge that such selection is a matter of judgment and opinion upon which the most skillful members of the medical profession will often honestly differ. It has therefore been stated that "a physician is required to possess only ordinary skill in his profession and to use his best judgment in the exercise of that skill, and, if he complies with these requirements, he is not liable for the nonsuccess of his treatment." Linn v. Piersol, 37 Cal. App. 171, 173, 173 P. 763, 764. This rule, with certain limitations, has been quite generally followed in cases involving the charge of unskillfulness in the selection of a method of treatment. 48 Cor. Jur. 1127, 1128 and cases cited; Dahl v. Wagner, 87 Wash. 492, 151 P. 1079; Dishman v. Northern Pac. Beneficial Ass'n, 96 Wash. 182, 164 P. 943; Loudon v. Scott, 58 Mont. 645, 194 P. 488, 12 A. L. R. 1487; Luka v. Lowrie, 171 Mich. 122, 136 N. W. 1106, 41 L. R. A. (N. S.) 290; Staloch v. Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. (N. S.) 712; Delahunt v. Finton, 244 Mich. 226, 221 N. W. 168; see, also, Markart v. Zeimer, 67 Cal. App. 363, 371, 227 P. 683.

There is no suggestion that appellants did not possess the requisite skill nor that they did not exercise their best judgment. It is urged by respondent, however, that in the selection of the method of treatment they were required to keep within "recognized and approved methods." This may be conceded, but we have already pointed out that there is no evidence to show that they did not keep within recognized and approved methods under the extraordinary conditions which confronted them. The evidence offered by respondent was not related to the condition in which appellants found respondent at the time the subcutaneous injection was prescribed, and no witness for respondent stated what was the recognized or approved method for the treatment of that condition. * * *

[3] Counsel for respondent claims that there is a conflict in the evidence relating to respondent's condition at the time in question. The only evidence referred to is that of lay witnesses. We find no material conflict in this evidence, but, in any event, the testimony of the expert witnesses was conclusive on this subject. Johnson v. Clarke, 98 Cal. App. 358, 276 P. 1052. Respondent makes the further point that Dr. Housman testified that there was no condition of a patient which would justify the subcutaneous injection of a solution containing more than 5 per cent. glucose. We have above indicated that Dr. Housman's testimony was general in its nature and was not related to the condition of the patient at the time in question. He did not dispute the conclusion of appellants that an injection of a solution containing 10 per cent. glucose was essential to save respondent's life, nor did he dispute the conclusion of appellants that the intravenous injection of such a solution in a patient in respondent's condition would have endangered her life. It is therefore apparent that his testimony was inadequate to show what was the recognized and approved method to be selected for the treatment of respondent's condition or to show that appellants had in any manner violated any duty owing to respondent.

Appellants raise numerous other points relating to the pleadings, the amount of damages awarded, the rulings on instructions, and other rulings of the trial court. The conclusions which we reached make it unnecessary to discuss these questions. When the cause was submitted to the jury, the trial court should have directed a verdict in favor of appellants, and we believe that the trial court should now be directed to enter judgment in their favor.

The judgment is reversed, with directions to the trial court to enter judgment in favor of appellants.

We concur: NOURSE, P. J.; DOOLING, Justice pro tem.

HOLMES INV. CO. v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15244.

Supreme Court of California.

Sept. 13, 1934.

Rehearing Denied Oct. 11, 1934.

Counties ⇨191

"Expenditures," as used in constitutional provision relating to allowable increase of taxation over preceding fiscal year, *held* not to include proceeds of relief bonds, borrowings from state loan relief fund, and subventions consisting of orphans' aid, widows' pensions, tuberculosis patients' aid, old age pensions, one-half of cost of fire boats, pensions to the blind, and gasoline and motor vehicle tax (Const. art. 11, § 20, adopted in 1933).

[Ed. Note.—For other definitions of "Expenditure," see Words & Phrases.]

In Bank.

Mandamus proceeding by the Holmes Investment Company, a corporation, against the Board of Supervisors of the City and County of San Francisco, State of California, and others.

Peremptory writ of mandamus issued.

Robert M. Searls, Jesse H. Steinhart, J. S. Lamson, and Francis V. Keesling, all of San Francisco, for petitioner.

John J. O'Toole, City Atty., and Leo C. Lennon, both of San Francisco, for respondents.

PRESTON, Justice.

Mandamus proceeding presented by a petition and general demurrer thereto. The issue involved is the proper scope to be accorded the word "expenditures" found in article 11, § 20, of the Constitution, this section being a part of the so-called Riley-Stewart tax plan voted into the Constitution and made effective June 27, 1933.

The proper construction of this word will disclose the ingredient items which shall go to make up the net sum or "base" upon which the permitted increase of revenues for a given year over the preceding year or years is to be calculated. Petitioner is a taxpayer and asserts that respondent board is now, by its proposed tax levy for the year 1934–1935, about to exceed the allowable sum by $1,866,696. Petitioner, in reaching the above amount of excess, strips from the gross budget the items specially mentioned in said constitutional provision and also the following items: "Proceeds of 1932 relief bonds," "borrowings from the state loan relief fund," and all so-called subventions, consisting of such items received from the state as orphans' aid, widows' pensions, tuberculosis patients, one-half of cost of fire boats, pensions to the blind, old age pensions, and gasoline and motor vehicle tax. The amount so arrived at is called the net base and it is then compared with the corresponding figures for the years 1932–1933 and 1933–1934. Thus comes into being the proper base for the calculation of the increase allowable according to petitioner. But it is further disclosed that the decrease in such base figure of the year 1933–1934, over the year 1932–1933, is in excess of the figure obtained by taking 5 per cent. of the base figure of 1933–1934.

Petitioner allows the city the benefit of the larger of the two items and deduces the conclusion that the corresponding base figure for the year 1932–1933 becomes the limit of revenue allowable to the city and county for the year 1934–1935. This limit is less than the proposed limit set by respondents by the said sum of $1,866,696. Respondents insist that not only should the proceeds of said relief bonds be an ingredient of said net base but also the sums borrowed from the state relief fund and the so-called subvention items as well.

The provision of the Constitution, paraphrased to show the provisions here pertinent, reads as follows (article 11, § 20): "The expenditures, other than expenditures to pay interest and redemption charges on bonds heretofore or hereafter issued * * * shall not in any year exceed by more than five per centum the expenditures, other than expenditures to pay interest and redemption charges on bonds heretofore or hereafter issued; * * * provided * * * that any county * * * that decreases the amount of its expenditures in any year or years may increase, in any subsequent year or years, the amount of its expenditures by the amount, or any fraction thereof, so reduced, or by an amount not more than five per centum of the amount expended in the year immediately preceding; * * * provided, however, that the limitation upon expenditures imposed or authorized by this section shall not apply to expenditures by or on behalf of publicly owned public utilities * * * or to expenditures arising out of any gift, bequest or donation. * * *"

We are unable to respect the limits imposed by the section and at the same time sustain the contentions of respondents. The clear in-

tent of the provision is to limit the amount to be raised by taxation to a stipulated increase over the corresponding amount for the next preceding year. The section is a part of the deliberate plan to relieve real property from the excessive burden of taxation under which it was suffering, transfer it to the state, and to forbid any arbitrary or unregulated increase of it thereafter. The whole scheme would be of little consequence if this were not its purpose. The section in question expressly forbids a place in said base amount for such items as expenditures to pay interest, redemption charges on bonds, sums spent on publicly owned utilities, and sums received from bequests, gifts or donations.

Now to allow the proceeds of any bond sale of whatsoever type to enter into said base would be to insert therein a false factor which would be pyramided from year to year thereafter. Nor could the proceeds of bonds of one class be included without including the proceeds of bonds of all classes. The argument that the relief fund could have been raised by taxation and therefore should be allowed cannot be followed as this would necessarily include all other bonds for which the power of taxation might have been substituted. Besides the taxing power is being curbed, so why should it be allowed to feed upon a fund raised by a two-thirds vote of the people and unrelated to the question of taxation for current expenditures? Moreover, why exclude the levy for payment of bond interest and redemption charges and include in the base the proceeds of the bonds themselves? The bonds and their retirement are fixed items and should be expressly excluded from this plan for retrenchment.

It seems, generally speaking, that fixed obligations are excluded and obligations of varying amounts for current items are affected by the restriction. The loan from the state and the subventions seem clearly to be excluded as gifts, bequests or donations. We can see no logical place for them as ingredient items of said base. These views are in substantial accord with the holding of the District Court of Appeal, Third District, opinion by Mr. Justice Plummer, in the case of Crow v. Board of Supervisors, 135 Cal. App. 451, 463, 27 P.(2d) 655, 659, 28 P.(2d) 906, where it is said: "Observing the first rule, the word 'expenditures' is broad enough to include every item of payment and every dollar of money paid out by the county, irrespective of the source from which the money is obtained. The proviso in the section under the third rule, excluding interest and redemption charges on bonds, would fall under the expression that the exclusion of one item of expenditure would include all other items of expenditure. Thus, the base established following this rule for determining the 5 per cent. increase would include moneys received from the state derived from the gasoline tax, and apportioned to the respective counties according to the method provided by the Legislature for use upon county roads. However, we think that both the general language used in the section and the rule relating to the proviso must give way to the enforcement of the intent or purpose sought to be accomplished, to wit: The lessening of the burden of taxation upon the respective counties and its assumption by the state, and therefore that the section relates only to moneys derived from county taxation, and not from gasoline money distributed by the state. Gasoline taxes are in no sense of the word county taxes."

We understand it to be conceded by both parties that the San Francisco School District is to be considered a separate entity within the operation of said section of the Constitution and there is no intent on the part of respondents to exceed the limitation imposed upon the school revenues. If hardships should arise from the enforcement of this restriction, the section provides a method of relief through the board of equalization or a vote of the people and, moreover, without further legislation the restriction will expire June 30, 1935. The petition must therefore be sustained.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SPENCE, Justice pro tem.

QUIGLEY v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 9789.

District Court of Appeal, Second District, Division 2, California.

Aug. 30, 1934.

Hearing Denied by Supreme Court Oct. 29, 1934.

1. Master and servant ⇐417(7)

Appellate court will not review finding of Industrial Accident Commission, where evidence on substantial matters is conflicting.

2. Evidence ⇐570

In compensation cases, conclusions of an expert based upon incorrect or faulty history are worthless.

3. Master and servant ⇐405(4)

Industrial Accident Commission's finding that spontaneous pneumothorax sustained by employee was due to tuberculosis and not to lifting of heavy desk in performance of duties as janitor *held* not sustained by evidence (St. 1917, p. 877, § 69).

Proceeding under Workmen's Compensation Act by Eugene Debs Quigley, claimant, opposed by the Ward Chandler Building Company, employer, and the Pacific Indemnity Company, insurance carrier. Finding and order by the Industrial Accident Commission denying claimant compensation, and claimant petitions for a writ of review.

Finding and order denying compensation annulled, and case remanded, with instructions.

Ethel H. Harradine, of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent commission.

ARCHBALD, Justice pro tem.

Proceeding to review a decision of respondent commission denying petitioner's application for compensation for an injury which he claims to have sustained in the course of his employment.

Petitioner was employed as a janitor by respondent Ward Chandler Building Company. On the afternoon of July 21, 1933, he was moving a desk, and, as he was down on his hands and knees, quoting herein from petitioner's testimony before the commissioner, "and kind of twisted," he "tried to lift the end of the desk" to put some wires under it, "and as I did so I felt something, felt like it gave way in my chest, and I fell back on my hands. I said at the time to Miss White (his superior) it felt like something broke inside." He said it "felt like something pulled loose, more than anything else," and "for about five or ten minutes kind of a dull pain in there." He continued with his janitor work, but did no more lifting on the desk, and felt "no more pain until about twenty-four hours or less—on Saturday shortly after noon," when, as he was stooping over cleaning out a washbasin, he found that he could not straighten up. He then felt "a very severe pain * * * like a rib doubling over the other." He stayed on the job until about five o'clock p. m., but "didn't do work." The pain continued "the rest of the day and all night Saturday night." He went back to work Sunday night at 7 o'clock, as a night watchman, but all he did "was run the elevator." Monday morning petitioner went to the office of Dr. Flamson, who was employed by the insurance carrier of petitioner's employer, and, in the absence of the doctor, the nurse gave him some attention and told him to go home and put hot compacts on his side. He reported that at the office of his employer and went home. Tuesday another doctor was called in by petitioner's family, who sent him to the Santa Fé hospital, in Los Angeles, immediately. Petitioner was there nine days at the expense of the employer's insurance carrier, the latter then apparently on the report of the attending physicians disclaiming liability. He was then taken to the county hospital, where he remained twenty days, after which he was made an "out-patient," and was being so treated at the time of the hearing before respondent commission.

The commission found, and the evidence supports it without conflict, that petitioner "sustained a spontaneous pneumothorax," but it also found that it was not caused by injury arising out of and occurring in the course of the applicant's employment. The sole question presented by the petition is whether there is any substantial evidence in the record to support this latter finding.

Two of the doctors whose testimony was apparently given favorable consideration by the commission were not specialists in lung diseases, but were physicians and surgeons who cared for the applicant, apparently at the request of respondent insurance carrier, while he was in the Santa Fé hospital. Another was a specialist in chest diseases, who investigated the case at the request of such insurance carrier approximately six and one-half

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 43 P.2d 289.

months after petitioner left the county hospital and about a month after the rehearing but before decision; and the fourth, at the request of the commission, made a report after examining the statements made by the others, as well as the testimony given at the rehearing by the doctors favorable to petitioner's claims. Two of the latter were specialists in chest diseases on the staff of the county hospital, who examined and treated petitioner after he was admitted there. A third doctor, whose conclusions were favorable to petitioner, made an examination and report apparently at the request of petitioner's attorney, about two weeks after report was made by the doctor appointed by the commission, such report being largely the result of examinations and tests made as to the presence of tuberculosis. Petitioner urges that the conclusions of the doctors whose opinions are the sole support of the questioned finding and award are based on conjecture and not on facts; that such doctors arbitrarily ruled out the industrial accident as the cause of the injury, and based their conclusions on a false premise to wit, the existence of tuberculosis, "which they admit they cannot find present," and that there is no substantial conflict with the evidence showing that the disabling injury had its origin in an industrial accident.

[1, 2] An appellate court will not review the findings of the commission, any more than it will the finding of a jury, where the evidence is conflicting upon substantial matters, (Smith v. Belshaw, 89 Cal. 427, 26 P. 834; Gamberg v. Industrial Acc. Comm. (Cal. App.) 32 P.(2d) 413, 466); and the conclusions of an expert based upon an incorrect or faulty history are of no practical value (Gamberg v. I. A. C., supra.)

One of the two doctors who treated petitioner in the Santa Fé hospital, in his history of such occurrence, says: "He (petitioner) felt a sensation in the lower chest well in front and he described it as a *'heavy pressure,'* and it felt like *'two objects* rubbing together.' (Italics ours.) There was no sharp pain; it lasted only momentarily and he paid no further attention to it. No discomfort followed. He continued with his usual activities." The doctor then describes the occurrences of the second day, and concludes that the inception of the pneumothorax "was apparently while he tried to arise from a stooping position while cleaning a wash basin on July 22d. I do not believe there was anything unusual about arising from a stooping position" while cleaning a basin. "This condition, the hæmo-pneumothorax, is in a great majority of cases a complication of old or active tuberculosis."

The other doctor who treated petitioner in the Santa Fé hospital gives practically the same history. He says: "Because of patient's critical condition a complete physical examination was not made." Under "Original Injury," he says: "There is no definite history of injury." The statement then recites the occurrence on the 21st as heretofore given and what occurred on the 22d, adding: "At that time (the 22d) he did not slip or fall and no external object struck him," and concludes: "I find no evidence in this case that patient's left lung collapsed as a result of his employment. I believe this is a classical spontaneous left pneumothorax unassociated with patient's employment."

The chest specialist who concurred with the conclusions of such doctors gives practically the same history. Under "Discussion," he says statistics show that 90 per cent. of these cases are due to tuberculosis, and that in approximately 98 per cent. there are "immediate and acute symptoms, excruciating pain comparable to the pain of an angina pectoris, and there is always that fear of impending dissolution. I have never known this condition to develop in a patient whose lungs were normal and healthy." The report shows that this specialist, from the physical build and characteristics of petitioner and the X-ray indications of "old healed pleural thickening at the left apex, considerable searing in the right lung and the tension in the left shoulder group of muscles which is indicative of activity," had "grave suspicions" of the presence of tuberculosis, although "the information at hand from the physical findings is not sufficient to definitely state that this boy has an active tuberculosis at this time. * * * It is the most probable conclusion that tuberculosis is the underlying cause."

The doctor appointed by the commission, as heretofore stated, examined the reports of the other doctors, but did not examine the patient. He says: "As physicians, we are all aware that generally the condition is precipitated by a tuberculosis lesion, active or quiescent, in the lung. I do not believe that the lifting act of July 21, 1933, was the precipitating cause of the development of a spontaneous pneumothorax, with the acute symptoms not manifesting themselves until 24 hours after this particular physical effort."

It will be seen that the facts upon which said four doctors predicated their conclusions are approximately the same, and that they

agree that the lifting on the 21st did not originate the disabling injury but that its origin was on the 22d, when petitioner cleaned the washbasin, at which time the symptoms of great pain exhibited themselves; and they exclude such effort as the cause, apparently because, either inferentially or expressly, they are of the opinion that tuberculosis was the active provoking cause of the lesion and not the physical effort exerted at that time.

In the first history shown above it is evident that the doctor ascribes the sensation described as a "heavy pressure" and "two objects rubbing together" as occurring on the lifting of the desk. Such descriptions apply more closely to petitioner's description of the sensation occurring on the second day, at the time fixed by such doctor as the beginning of the pneumothorax; and, in addition to the facts set forth in the history upon which the four doctors based their conclusions, petitioner testified that on the lifting of the desk on July 21st it "felt like it gave way in my chest"; that he told Miss White at the time that "it felt like something broke inside," "like something pulled loose more than anything else"—"with a kind of dull pain" for a few minutes; that the desk weighed about 400 pounds, and that he may have had one leg of it off the floor; that he had never had pains in that region before; that he very seldom worked in the afternoon "because I do my work in the morning and get it all done"; that the pain on the 22d continued "the rest of the day and all night Saturday night"; that all he did Sunday night was to "run the elevator"; that another fellow "did all my work for me"; that he was not able to go back to work Monday, "on account of pain in my left chest." Additional facts upon which the two specialists in the county hospital based their conclusions are as follows: That petitioner "was in normal physical health up to the time at which he lifted the desk, and at that time he experienced pain in his left chest"; that "there is no history and no evidence of tuberculosis in repeated examinations and X-rays."

It is interesting to note that even in the case of the two chest specialists at the county hospital, notwithstanding the history of no tuberculosis, and in view of the apparently well-known fact that most of such cases have their origin in such a pathology, they checked the history by many examinations and tests until they found that it was corroborated; and tuberculosis was excluded by not only the history but by such examinations and tests.

Two of the four doctors who, on the sketchy and incomplete history before them and the apparently very superficial examinations made by them, ruled out industrial accident as the cause of injury, were examined on the stand in the rehearing before the referee. One was the physician and surgeon petitioner first tried to see and who treated him in the Santa Fé hospital; the other was the chest specialist. It is significant that the physician and surgeon testified that a spontaneous pneumothorax "can happen under most any circumstances, walking, sitting in a chair, *lifting*," apparently excluding the lifting here, because the pain did not persist from that time. "They (the patients) know when it starts because they feel it, and it does not stop hurting, it keeps on hurting."

In view of such testimony it is equally significant that the chest specialist, who also ruled out the industrial accident as the cause of injury, testified on cross-examination as follows:

"Q. As to these delayed symptoms, would not the size of the tear or rupture which occurred at his first strain on July 21 have some effect upon the amount of pain he experienced at the time? A. It is usually a large tear; *usually provokes symptoms more rapidly than a small one.*

"Q. *And the amount of seepage of air or blood into the pleural cavity determines the length of time it takes before fully developing all disabling symptoms?* A. *Until your compression symptoms become great enough to incapacitate—yes.*"

He also said that statistics on pneumothorax show that in 98 per cent. of the cases the symptoms develop at once; that he had "never seen a case otherwise"; that he "could not say definitely" that "*this* did not occur on the day he (petitioner) was lifting the desk," although he had never seen a case "provoked by an effort syndrome," and that in his opinion "it (spontaneous pneumothorax) never occurs in a well lung."

"Q. In medicine we are always finding things that are always happening that never happened before? A. Yes.

"Q. So you could not say as a scientific man that it could not happen, or did not happen? A. I could not be certain that it could not happen.

"Q. Or that it did not happen? A. I have to quote my own conclusions and findings.

"Q. And you are basing your conclusions as to the possibility of tuberculosis causing this

condition in Mr. Quigley upon the statistics which you have? A. 90 per cent of cases of spontaneous pneumothorax is due to tuberculosis. I am basing my conclusion upon this, upon the physical make-up of the boy, the spare, lean individual, flat chested, red headed; red headed people are notoriously tuberculous. The scar in the left chest, tension of the shoulder girdle muscles in the left side lead me to my *suspicions*." (Italics ours.) In his filed statement such specialist says: "If tuberculosis is ruled out we must then think of a ruptured bleb from an emphysema, subdiaphragmatic inflammation or a rupture of the esophagus. The above-mentioned are all causative factors but the patient's history rules out the latter so we must almost necessarily fall back on tuberculosis as the underlying cause. * * * It is the most probable conclusion that tuberculosis is the underlying cause. * * * There must be a lesion before man can have a pneumothorax. * * * A scientific conclusion cannot be drawn that the effort in moving a desk, which was made by this patient, increased the air pressure to an extent which caused his pneumothorax."

The specialist's frank statement that there must be a lesion before man can have a pneumothorax, that a large tear provokes symptoms more rapidly than a small one, and that the amount of seepage of air or blood into the pleural cavity determines the length of time it takes before developing all disabling symptoms, has great significance when considered in connection with the evidence of the two specialists who had petitioner under their care for a long period of time, who had a complete history of the case, and apparently made thorough and many examinations that seemed to exclude the idea of a tubercular pathology. Their finding in that regard is supported by the statement of the doctor who reported the result of his tests to petitioner's attorney. His conclusion after apparently very thorough tests was: "There is no evidence in any way, shape or manner of tuberculosis, open or concealed, in Mr. Quigley."

The following statement by one of the specialists from the county hospital who testified at the rehearing, filed in answer to the report of the doctor appointed by the commission, shows the position of the two specialists who found in the lifting effort of petitioner the cause of the pneumothorax: "The conclusion of Dr. Jones that he does not believe the lifting act of July 21, 1933, was the precipitating cause of the development of spontaneous pneumothorax, with the acute symptoms not manifesting themselves until twenty-four hours later is not well founded. As brought out in the testimony of the undersigned, it is not a question of belief or opinion, but it is a matter of fact that Quigley was in normal physical health up to the time at which he lifted the desk, and that at that particular time he experienced pain in his left chest. This is shown by the testimony and by the history taken at the General Hospital. It is not a question of opinion, but it is the fact that delayed symptoms do occur and not infrequently, following spontaneous pneumothorax. It is also a fact that spontaneous pneumothorax at times is not recognized until delayed symptoms appear, causing the patient to go to a physician and have an X-ray examination of his chest. In the case of Quigley, tuberculosis is not to be considered because there is no history and no evidence of tuberculosis in repeated examinations and X-rays. It is a known fact, and not a mere opinion, that spontaneous pneumothorax does develop without the previous existence of pulmonary tuberculosis. Dr. Jones states that he finds no explanation of a twenty-four hour period elapsing before the onset of acute disabling symptoms. In the testimony of the undersigned, under cross-examination, the reason for such delayed symptoms was fully gone into. In brief, the reason for these delayed symptoms is that a minimal tear existed in the damaged lung, and the seepage of blood was so small in amount, and protracted over a period of time, that no symptoms manifested themselves until twenty-four hours later, when the amount of blood in the pleural cavity had accumulated to such an extent as to produce compression symptoms. This was shown in the history of the case and the X-rays taken shortly after Quigley was admitted to the General Hospital. It is reasonable to assume that if an X-ray had been taken within the chest a few hours after the tear of the lung tissue took place, no fluid would have been discernible, but a pneumothorax would have been present. It is obvious, from experience in the use of artificial pneumothorax, that the entire lobe or lobes of one side of the chest and a partial collapse of the lung on the opposite side of the chest can be present in the patient without the patient manifesting any untoward symptoms. Experience teaches that in the type of cases here under consideration, acute symptoms do not develop immediately afterward, but over a period of time, and this is due, first to the loss of blood in the pleural cavity, and secondly, to compression symptoms interfering with circulation. This type of case (as the Quigley case is) is not the unusual one, and it is obvious

that the symptoms, or the acuteness of the symptoms, and the disability, depend entirely upon the size of the tear in the lung tissue and the ensuing hemorrhage producing secondary anæmia." The language of the last two sentences is directly in accord with the statement, in different language, of the specialist whose conclusions were different.

In our opinion, the two specialists who fixed the origin of petitioner's pneumothorax as of July 21st had before them evidence which was not before the physicians who came to a different conclusion, and had a better opportunity to study the patient and form their conclusions and that there is no conflict between the differing conclusions.

[3] It is not disputed that the pneumothorax completely incapacitated petitioner from working on and after the 24th day of July, 1933, that he was so incapacitated at the time of the rehearing, and that such condition would continue for some time thereafter. Neither was there any question as to the amount charged for hospital and other services rendered him up to that time, nor as to his salary being $75 per month.

Giving the statute (Stats. 1917, p. 877) the liberal construction required of the courts under section 69 thereof, we are of the opinion that petitioner is entitled to compensation.

The finding and order denying compensation are annulled, and the case is remanded, with instructions to the commission for further action on the record before them in accordance with the views herein expressed.

We concur: STEPHENS, P. J.; CRAIG, J.

140 Cal.App. 458

HAMMETT v. CHAMBERLAIN.

Civ. 9349.

District Court of Appeal, First District, Division 2, California.

Aug. 20, 1934.

Hearing Denied by Supreme Court Oct. 18, 1934.

Trusts ⇐44(1)

In action to declare trust and for accounting, evidence *held* insufficient to show execution by defendant of purported written agreement.

Appeal from Superior Court, City and County of Los Angeles; Charles D. Ballard, Judge.

Action by Charles A. Hammett against Ollie C. Chamberlain. Judgment for defendant, and plaintiff appeals.

Affirmed.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellant.

W. I. Gilbert, Earl D. Killion, and George D. Blair, all of Los Angeles, for respondent.

SPENCE, Justice.

This is an appeal by plaintiff from a judgment in favor of defendant in an action to declare a trust and for an accounting.

Plaintiff's action was filed in 1931 and was predicated upon an alleged written agreement dated February 15, 1912. The answer denied the allegations of the complaint including the allegations relating to the execution of said agreement. The trial court found against plaintiff on the material issues and entered its judgment accordingly.

On this appeal it is contended that several of the findings are not supported by the evidence, but as the findings against appellant on the issue of the execution of the alleged written agreement find ample support, we need not consider the other points raised.

In support of his claim appellant produced what purported to be a carbon copy of a written agreement signed by appellant and respondent on February 15, 1912. He testified that the original agreement was signed by the parties on that date and that the carbon copy was left in the possession of respondent; that the original which he had retained had been burned about 1920; that thereafter and while he was at the home of respondent at Los Angeles he took the carbon copy from her handbag without her knowledge, put said carbon copy in a beer bottle, sealed it with wax, and thereafter buried it in a sand dune in the Imperial valley, where it remained until he dug it up in 1931. In an attempt to corroborate his testimony regarding the execution of the instrument by respondent, appellant produced a handwriting expert who had compared the carbon impression of what purported to be respondent's signature with certain exemplars containing respondent's signature. The witness testified: "The best I can state then is, my best judgment is that the person who wrote the exemplars is the same person who wrote the original of which the Ollie C. Chamberlain on Exhibit 2 is a carbon impression.

The carbon impression is, in some particulars, indefinite and the carbon impression is not the best basis upon which to arrive at a positive conclusion, in my judgment."

On the other hand, respondent testified that she had not signed the purported agreement or any such agreement and that she had never seen or heard of it until the complaint was filed. Appellant contends that respondent's "mere statement that she did not sign the contract does not raise a conflict in the evidence" for "a party's mere statement cannot stand as against the positive and unassailable evidence against it." This contention assumes that the testimony tending to support appellant's claims was both positive and unassailable while that tending to support respondent's claims consisted of nothing more than respondent's statement. This court cannot accept either assumption as correct. There are many facts and circumstances in evidence tending to corroborate respondent's testimony, some of which facts and circumstances are found in the testimony of appellant himself. In the last analysis this is a case in which there was a substantial conflict in the evidence and the findings of the trial court based upon such conflicting evidence may not be disturbed on appeal.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

PEOPLE v. MILLER. *

Cr. 1385.

District Court of Appeal, Third District, California.

Aug. 31, 1934.

Rehearing Denied Sept. 15, 1934.

Hearing Granted by Supreme Court Sept. 28, 1934.

1. Homicide ⇐140

Amended information charging accused with willfully, unlawfully, and feloniously attempting to murder named person in named county on designated day *held* sufficient, in absence of demurrer or motion to quash information (Pen. Code, §§ 217, 950–952, 1008, and § 952 as amended by St. 1929, p. 303).

2. Homicide ⇐256

Evidence that accused who had threatened to kill negro approached negro working in field and stopped to load rifle, and would have fired had not rifle been taken from him, *held* sufficient to sustain conviction for attempt to murder as distinguished from mere preparation therefor, notwithstanding accused did not raise gun to fire though within 200 yards of negro and gave up gun without resistance (Pen. Code, §§ 21, 217).

3. Homicide ⇐286(1)

In prosecution for attempt to commit murder, instructions *held* not erroneous as failing to state that conviction required affirmative proof of actual intent of accused to commit murder (Pen. Code, § 217).

4. Homicide ⇐286(1)

In prosecution for attempt to murder, instruction that law presumes malicious and guilty intent from deliberate commission of unlawful act for purpose of injuring another, given as part of instructions defining murder, premeditation and malice, and before instruction on attempt to murder, *held* not prejudicially erroneous, notwithstanding that intent to commit murder though inferable from circumstances must be affirmatively proved (Pen. Code, §§ 21, 217; Const. art. 6, § 4½).

5. Criminal law ⇐829(3)

Refusal of accused's requested instruction that mere procuring of gun with threat to shoot another was insufficient to establish overt acts necessary for conviction for attempt to murder unless accused made some further affirmative movement to use weapon *held* not error, where instruction was substantially covered by instructions given (Pen. Code, § 217).

6. Criminal law ⇐834(3)

In prosecution for attempt to commit murder, where evidence showed that accused was prevented from raising gun to fire upon victim, modification of accused's requested instruction that accused was not guilty if he procured and loaded gun intending to murder but made no movement to use loaded gun, by stating that accused would not be guilty if he did nothing further toward carrying out such intention, *held* not error (Pen. Code, § 217).

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Charles Miller was convicted of an attempt to commit murder, and he appeals.

Affirmed.

Wayne P. Burke, of Ukiah, for appellant.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 42 P.2d 308.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of conviction of an attempt to commit murder and from an order denying his motion for a new trial.

The information was first filed against the defendant charging him with an *assault* to commit murder under the provisions of section 217 of the Penal Code. Prior to the acceptance of the defendant's plea, the information was amended under section 1008 of the same Code to charge the defendant with a mere attempt to commit murder as distinguished from an assault to commit that same crime. The amended information "accuses Charles Miller of a felony, to-wit: Attempt to Commit Murder, in that on or about the 17th day of March, 1934, in the County of Mendocino, State of California, he did, then and there, wilfully, unlawfully and feloniously, attempt to murder one Albert Jeans." The defendant failed to demur to the amended information, but he did object to the introduction of evidence at the trial on the ground that the pleading fails to state facts sufficient to constitute a public offense. The objection to the evidence was overruled. At the close of the testimony adduced by the prosecution, the cause was submitted without the introduction of evidence on the part of the defendant. The jury returned a verdict of guilty as charged. A judgment of conviction was accordingly rendered. From this judgment and from an order denying defendant's motion for a new trial he has appealed.

Appellant contends that the information is fatally defective for the reason that it fails to allege facts constituting an overt act or specifying the instrument or means by which the attempt to murder was made. It is further asserted the verdict and judgment are not supported by the evidence chiefly because it fails to furnish proof of facts which constitute an overt act as distinguished from mere preparation to carry out his threat to murder Albert Jeans, and that the court erred in giving and in refusing to give to the jury certain instructions.

The record shows that the defendant and Albert Jeans, who is a negro, had been friends and had associated together prior to the difficulty which led to the alleged assault. Jeans also had a brother who lived with him. The defendant is married and lives on a farm near Boonville in Mendocino county. Jeans had often eaten meals with the defendant at his home. Miller sometimes drank to excess. He complained to friends that the negro had "bothered" his wife, although it does not appear that he had ever complained to Jeans or to any officer on that account. Just prior to the alleged assault, Jeans, who had lived in that community most of his life, was taken into custody by the officers for drunkenness. All that appears in regard to that charge is that Mr. Ornbaun testified the officers took him into court and asked him if he had been drinking. Upon admitting that he had been drinking, he was asked if he thought he could keep sober. He assured them that he could keep sober, and the officer then said, "You go home and keep sober or we will send you to the asylum." Thereupon Jeans was discharged from custody.

About 3 o'clock on the day of the alleged assault the defendant met Ornbaun in company with several other persons at the post office in the town of Boonville. The defendant was somewhat under the influence of liquor. Addressing Ornbaun with relation to the previous discharge of Jeans from custody, under the circumstances above related, the defendant said: "If the people here look at things like that, I am going to take the law in my hands; * * * I am going to kill the G——d d——ed nigger. * * * I am going to kill both of them; I am going to kill George (the brother of Jeans) too." This threat was repeated several times. Four disinterested witnesses testified to that fact. He was warned against making the felonious threats. At noon that day the defendant appeared to be under the influence of liquor; Mr. Tolman testified that "he appeared to be well liquored up."

About 4 o'clock that afternoon, while Mr. Ginochio, in company with Mr. Jeans and three other men, was engaged in planting hops on his ranch a mile and a quarter from Boonville, he observed the defendant coming from the highway through the field armed with a rifle. Ginochio was a constable in that township. He was well acquainted with the defendant, but had not heard of his previous threats to kill Jeans. When he first saw the defendant approaching, he was 250 or 300 yards away, and Jeans was working at a point about 30 yards beyond him. He testified in that regard: "Q. Was he (Jeans) nearer the defendant than you were? A. No, I was the closest." The defendant came straight across the field on a direct line toward Ginochio and Jeans. When the defendant reached a point 100 yards away he stopped and appeared to load his rifle. Ginochio said in that regard, "Looked to me like he

was loading a gun." A witness by the name of Jack who was working in the field corroborated that fact in the following language:

"He came along and stopped and looked at his gun like doing something before he came up. * * *

"Q. Looked like he was loading the gun? A. Yes."

The defendant had a handful of loaded cartridges. When the negro saw the defendant approaching with a gun at a distance of 200 yards, he fled in the opposite direction. Ginochio testified:

"I kept my eye out on him and when he came up I got up and grabbed the gun.

"Q. And you took hold of the gun? A. Yes.

"Q. Grabbed it with both hands? A. No, one hand.

"Q. Did Mr. Miller offer any resistance or attempt to hold onto the gun? A. He did not.

"Q. He turned it loose? A. Yes."

The defendant then claimed the gun was not loaded. Ginochio opened the breach and took out a loaded 22-caliber long cartridge, which he exhibited to the defendant who said, "he just changed shells because when he shot a nigger, or when he shot a black s——n of a b——ch he wanted something that would go through him." Other witnesses corroborated the evidence of his threat to shoot the colored man, and also the fact that the officer took the gun away from him. Miller then left the field and an hour or so later was arrested at his home and taken in custody by the constable and Mr. Tolman. On the way to the county jail at Ukiah the defendant said to the officers "he didn't give a G——d d——n—that if the Judge turned him (the defendant) loose he would kill two niggers—two black s——ns of b——ches." Later he sent by his wife a note to the officers demanding the return of his rifle. The note read: "I want you to give my gun to May. Tomorrow there will be two niggers less in this valley."

[1] We are of the opinion that in the absence of a demurrer, the amended information conforms to the provisions of sections 950–952 of the Penal Code and sufficiently alleges facts constituting the public offense of an attempt to commit murder. In other words, the information does state a public offense, and the defendant by failing to demur waived his objection to the omission to allege specific acts constituting the overt act and to the failure to mention the instrument or means by which the alleged attempt to murder was sought to be accomplished.

Section 952 of the Penal Code was amended in 1929 (St. 1929, p. 303) to dispense with technical forms of criminal complaints and to authorize the use of simpler pleadings. Prior to that amendment the section required the charge to be "direct and certain." It was then necessary to allege "the *particular circumstances* of the offense charged, when they are necessary to constitute a complete offense." Since the amendment of that section, it is specifically provided therein that the charge "shall be sufficient if it contains in substance, a statement that the accused *has committed some public offense therein specified.* * * * It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." It has been held that the allegations of an information are adequate which merely charge an accused of willfully, unlawfully and feloniously murdering another. People v. Magsaysay, 210 Cal. 301, 281 P. 582. On the same principle it is sufficient that the defendant was charged in the present case with the willful, unlawful, and felonious attempt to murder Albert Jeans.

Assuming, without so deciding, that the information in the present case might have properly included a statement describing the overt act or designating the instrument or means by which the attempt to commit murder was accomplished, those specifications were waived by failure of the defendant to demur or move to quash the information. People v. Perfetti, 88 Cal. App. 609, 616, 264 P. 318; People v. Mead, 145 Cal. 500, 78 P. 1047.

It is true that under particular statutes in other jurisdictions it has been held that indictments for attempts to commit prohibited offenses should allege the overt act or the specific means by which the attempt is sought to be accomplished (1 Wharton's Criminal Law [11th Ed.] p. 302, § 231; 31 C. J. 742, § 292), although it is said in the authority last cited: "However, in many cases based upon statutes punishing attempts, it is held sufficient to follow the language of the statute without an averment of the particular manner in which the attempt was made."

In 14 Ruling Case Law, p. 185, § 31, it is said in opposition to the general rule above mentioned: "There are decisions to the effect that as an attempt implies both an intent and an actual effort to consummate the intent, an indictment charging an attempt is sufficient without alleging the particular acts constituting the attempt."

Some authorities distinguish between an *assault* with intent to commit a specified crime and a mere attempt to commit the offense. In 2 Wharton's Criminal Law (11th Ed.) p. 1060, § 843, it is said: "In an indictment for an assault with intent to murder, at common law, or under a statute which does not specify the instrument, it has been held unnecessary to state the instrument or means made use of by the assailant to effectuate the murderous intent. * * * The details of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered matters of evidence to the jury to establish the intent, and not necessary to be incorporated in the indictment."

In the Matter of Hughes, 159 Cal. 360, 113 P. 684, 685, an information was upheld which charged that the defendant "did willfully, unlawfully, and feloniously and with malice aforethought assault one Caesar Vervoort, a human being, with a deadly weapon, with intent then and there him, the said Caesar Vervoort to kill and murder." The court said: "This was a sufficient description of the offense of assault with intent to commit murder. It was not necessary to further describe the weapon alleged to be 'deadly.' * * * *The use of a weapon need not have been mentioned at all.*"

The amended information in the present case, in the absence of a demurrer thereto, sufficiently charges the defendant with the public offense of an attempt to commit murder.

[2] The record contains sufficient evidence of overt acts on the part of the defendant to prove his intent to murder Albert Jeans, as distinguished from mere preparation therefor. The defendant repeatedly threatened to kill the negro. Within an hour or two thereafter he armed himself with a rifle and walked more than a mile to the field where the negro was working. He left the highway and went directly through the field towards the point where Jeans was plainly visible. He stopped on his way through the field to load the rifle with a 22-caliber long cartridge, saying, "when he shot a black s——n of a b——ch, he wanted something that would go through him." He approached to within a distance of 200 yards from the negro. Mr. Jack testified in that regard:

"Q. Was Jeans out in sight where he could shoot him if he wanted to? A. Yes. * *

"Q. How far would you say it was between Mr. Miller and Mr. Jeans when Mr. Jeans was going down towards the Hogan field? A. Must be about couple of hundred yards, I think."

As the defendant approached towards the negro, Mr. Ginochio, who occupied a position in line between them, was bending over planting hop vines. He continued in that position, keeping an eye on the defendant, until he reached the point where he stood, then he arose and seized the gun. In the meantime the negro fled in the opposite direction towards the Hogan field. It is true that the defendant did not raise his gun to fire upon Jeans, nor did he resist the officer when the gun was seized, although he did demand the return of the rifle and he asked the officer if he was taking possession of the gun as a deputy sheriff. Having been frustrated in his pursuit of the negro, the defendant then left the field and went away. He did, however, subsequently threaten to kill Jeans. It is claimed this conduct consists merely of preparation to kill as distinguished from an actual attempt to do so. It is asserted that the fact that the defendant was within 200 yards of the negro where he might have killed him and that he did not raise his rifle or fire upon him, proves that he had no intention of murdering him. The intention with which one performs an act is manifested by the surrounding circumstances. Section 21, Pen. Code. It was the province of the jury to determine from the facts and circumstances of the case the intention with which the defendant threatened and pursued the negro. It seems quite likely that the defendant would have fired his rifle except for the fact that Jeans fled from the field when he saw him load the gun and approach directly toward him to within a distance of 200 yards, and that the officer then took possession of the gun. The jury was warranted in believing that the reason he did not fire upon the negro was that he was waiting for a better opportunity when he had arrived close enough to make more certain of his aim. The jury may also have assumed that the defendant did not observe Ginochio as he stooped over in the field, or that he did not recognize him as an officer until he came upon him when the gun was seized. It is not inconsistent with his purpose to kill the negro that the defendant did not resist the officer when Ginochio took the gun away from him.

It is necessary that evidence of some overt act on the part of the accused as distinguished from acts of mere preparation therefor be adduced in support of the charge of an assault to murder. But when the intent to kill is satisfactorily proved, a court should not be extremely technical in distinguishing be-

tween acts in furtherance of the crime and those which may be deemed to be merely preparatory therefor. We are convinced that the conduct of the defendant in the present case constitutes overt acts performed in the actual process of carrying out his threat to kill Albert Jeans, and that the charge of an attempt to commit murder is satisfactorily supported by the evidence. The circumstances which may be deemed to constitute overt acts towards the commission of a crime depend largely upon the facts of a particular case. It is said in 8 Ruling Case Law, p. 279, § 297, in that regard:

"In order to constitute an attempt it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the consummation of the offense after the preparations are made. Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common sense administration of the law with subtleties as to what constitutes preparation and what an act done toward the commission of a crime.

"It would be useless to attempt to lay down any rule by which an act might be characterized as overt or otherwise in a particular case, and the general principles of law concerning attempts must be applied in each case as nearly as can be with a view to working substantial justice."

[3] The appellant contends that the court erred in giving to the jury certain instructions to the effect that the attempted murder with which he was charged is sufficiently established by proof of overt acts which would make him guilty of murder if they had resulted in the death of Albert Jeans. In other words, it is asserted these challenged instructions fail to inform the jury that an attempt to murder may be sustained only upon affirmative proof of the actual intent of the accused to murder his victim. It is true that one may be guilty of murder of the second degree without having actually intended to kill his victim. On the contrary, to sustain a charge of attempt to murder, it is necessary to prove that the accused actually intended to murder the person assailed. People v. Mize, 80 Cal. 41, 22 P. 80; 7 Cal. Jur. 875, § 31; 1 Wharton's Criminal Law (11th Ed.) p. 305, § 234. We are of the opinion the challenged instructions are not prejudicially erroneous. The jury was repeatedly and clearly instructed that an intention to murder is a necessary element of the crime of attempting to murder. In half a dozen instructions the principle of law was announced to the effect that the guilt of the defendant depends upon proof that he "intended to murder Albert Jeans." It seems incredible to assume that the jury could have misunderstood these instructions in that regard. The jury was not charged directly or otherwise that the mere proof of overt acts on the part of the defendant which would have rendered him guilty of murder in the event of the death of Jeans was sufficient upon which to warrant a conviction of an attempt to commit murder. It is true that the jury was instructed specifically regarding the elements constituting both the first and the second degrees of murder, together with definitions of premeditation, deliberation and malice. The jury was not specifically told that an accused might perform certain acts which would render him guilty of murder of the second degree provided they resulted in death even though he did not intend to kill his victim. The defendant failed to offer any instruction on that subject. Acts which would amount to the commission of murder in the event of death were necessary elements of the crime of an attempt to murder. It was essential and proper to instruct the jury on that subject. The challenged instructions merely purport to charge the jury in general terms as to what constitutes murder of the first and second degree, together with the essential elements thereof. Those particular instructions do not purport to define the crime of attempting to commit murder. They begin, "Murder is defined by our law to be the unlawful killing of a human being with malice aforethought." These definitions were absolutely necessary to an intelligent understanding of the nature of the offense with which the defendant was charged. They were neither prejudicial nor erroneous.

After the jury was instructed with respect to murder, together with justifiable and excusable homicide, the court charged the jury that the defendant was accused of "an attempt to murder," and that they could not

find him guilty of that charge unless it was proved beyond a reasonable doubt that his acts amounted to more than a mere preparation to commit the crime of murder. They were then told that if it appears that the defendant procured a gun "and loaded the same *intending* to murder Albert Jeans, but that he did nothing further *toward carrying out such intention*," they should find the defendant not guilty. Then follows a particular instruction which is challenged by the appellant as erroneous. It reads as follows: "I instruct you, members of the jury, that an attempt to commit a crime is an endeavor carried beyond mere preparation but falling short of execution *of the ultimate design*. It is an act immediately and directly tending to the execution of the principal crime and committed by a person under such circumstances that he had the power *of carrying his intention* into execution, and would have done so but for some intervening cause."

The preceding instruction refers directly to the necessary element of an attempt to murder. It is predicated on the assumption that the defendant loaded the gun "intending to murder Albert Jeans." The jury must have so understood this instruction. It clearly infers that the attempt to murder is not sustained unless the intention to kill is established. This necessity is again inferred by reference to "the ultimate design" to murder. This construction is supported by the further statement therein contained to the effect that it must also appear that the accused "had the power *of carrying his intention* (to murder) into execution." We are of the opinion this instruction is not prejudicially erroneous. The following instruction with reference to the distinction between overt acts which may be deemed to be in furtherance of the crime as distinguished from those which are merely preparatory thereof, refers twice to the "intended crime." The next instruction is unambiguous and proper. It asserts that the overt acts which must be proved shall "reach far enough toward the accomplishment *of the intended offense*" to become a part of its consummation. The following instruction informs the jury that the mere procuring and loading of a gun does not constitute sufficient proof of an attempt to murder, but that if in addition thereto "in furtherance of the design" the accused so "armed himself *and started on a mission to kill*," and that he would have succeeded in doing so if he had not been "prevented *from carrying out his design* by being arrested," these circumstances would furnish evidence of overt acts performed in the execution of an attempt to murder. In the four succeeding instructions relating to the necessary proof of overt acts, each one is predicated on the conditions expressed therein to the effect that the jury finds the "defendant did make up his mind to kill," that he "set forth on a mission to kill," and that he intended to murder Albert Jeans. These instructions are not erroneous.

[4] The only given instruction which is not applicable to the issues of this case, and which should not have been given, follows the definitions of murder, premeditation and malice. It reads: "The law presumes a malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another."

Clearly this instruction was intended to apply only to the ordinary definitions with respect to murder. It was given in connection with those definitions. It was removed from the subsequent instructions regarding the issues which are involved in a charge of an attempt to murder. It is true that the intent is not presumed in a charge of an attempt to murder, but must be affirmatively proved. People v. Mize, 80 Cal. 42, 22 P. 80. But it is also true that the intent or purpose with which an act is performed may be inferred from the facts and circumstances which are proved. Section 21, Pen. Code; 1 Wharton's Criminal Law (11th Ed.) p. 305, § 234. We are of the opinion the jury was not misled by the last-quoted instruction. Assuming that it is erroneous and that it should not have been given to the jury, we are of the opinion it is not reversible error, for the reason that there was no miscarriage of justice in the conviction of the defendant. Const. art. 6, § 4½.

[5] The appellant complains of the court's refusal to give to the jury one instruction, and of the modification of another instruction, which were offered by him. The refused instruction was substantially covered by another one which was given by the court. In effect, the refused instruction charges the jury that the mere procuring of a gun by the defendant with a threat to shoot Jeans, was insufficient to establish the necessary overt acts upon which the jury would be warranted in finding him guilty of an attempt to murder; that it was necessary to also find that he had made some further affirmative movement to use the weapon before he could be found guilty of the crime with which he was charged. This instruction was substantially covered by the one which was given to the jury from which we have heretofore quoted. There was therefore no error in refusing to give this instruction.

[6] Finally, the appellant assigns as erroneous the giving of the following instruction as modified. The court substituted the portion which appears in italics for the following language which was eliminated therefrom, to wit, "made no movement to use the loaded gun upon the person of Albert Jeans." The instruction, as given by the court, reads: "You are instructed that if you find from the evidence in this case that the defendant, Charles Miller, procured a gun and loaded the same intending to murder Albert Jeans, but that he *did nothing further toward carrying out such intention*, then it will be your duty to find the defendant not guilty."

The instruction as modified correctly states the law. As it was originally proposed it was misleading. It carried the inference that even if the defendant loaded his gun and pursued Jeans with the intention of killing him, that he could not be lawfully convicted unless he actually raised the gun or made a "movement" with it to fire at his victim. The defendant was within 200 yards of Jeans and might have fired upon him except for the fact that the officer took the gun from him. By the amendment of the proffered instruction, the court properly left with the jury the question as to whether his intention to fire the gun was not prevented by the interference of the officer. If he was so intercepted in the execution of his avowed purpose, he would be guilty in spite of the fact that he did not actually make a "movement" to raise the gun or fire upon his victim.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

SMITH v. BOARD OF POLICE COM'RS OF CITY OF LOS ANGELES et al.*

Civ. 8654.

District Court of Appeal, Second District, Division 2, California.

Sept. 12, 1934.

Rehearing Granted Sept. 13, 1934.

1. Certiorari ⇐28(2)

Court cannot annul inferior tribunal's order or judgment on certiorari, unless it affirmatively appears from record that such tribunal exceeded its jurisdiction (Code Civ. Proc. § 1074).

2. Certiorari ⇐64(2)

Evidence adduced on hearing before inferior board or tribunal having limited jurisdiction may be brought up to reviewing court on certiorari for sole purpose of determining whether it sustains such board's or tribunal's finding of jurisdictional fact.

3. Certiorari ⇐64(1)

Court's inquiry on certiorari to review order of inferior board or tribunal is strictly limited to facts before board and acted on thereby.

4. Certiorari ⇐70(5)

Superior court's judgment on certiorari, annulling city police commissioners' order suspending used-car dealer's permit, *held* not sustainable on appeal, where evidence was not declared insufficient to support order, nor in fact so inadequate as to render order void for want of jurisdiction (Code Civ. Proc. § 1074).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Certiorari proceeding by W. C. Smith to review an order of the Board of Police Commissioners of the city of Los Angeles and the members thereof, suspending petitioner's used-car dealer's permit. From a judgment annulling the order and enjoining enforcement thereof, respondents appeal.

Reversed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for appellants.

Sparling & Teel, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Respondent, a used-car dealer, sold a used automobile to a customer under circumstances which caused appellants to conduct a hearing and make an order under Los Angeles city ordinance No. 69,620 suspending respondent's permit for thirty days. On certiorari to the superior court judgment was there rendered which, after reciting the fact that there had been a hearing in that court, continues: "The court having considered said petition and return and the facts and issues thereunder and thereby established and raised, and the law applicable thereto, the court being of the opinion that the ordinance is valid, but that the judgt is misrepresented by the order," and thereupon it annulled the said order of the board and enjoined it from taking any steps in the enforcement thereof.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 36 P.2d 670.

[1-4] The judgment of the said court is ambiguous and uncertain. It contains nothing upon which its order could be predicated annulling the order of the board. The petition filed by respondent asking for the issuance of the writ contains no language which would explain the portion of the judgment above quoted, even if this court were to resort to it in search of such an explanation. Unless it affirmatively appears from the record that the inferior tribunal (in this case the board of police commissioners) exceeded its jurisdiction, a higher court may not annul its order or judgment on certiorari. Code Civ. Proc. § 1074; 4 Cal. Jur. 1105, art. VIII. Evidence adduced upon the hearing before an inferior board or tribunal having limited jurisdiction may be brought up to the reviewing court upon certiorari for the sole purpose of determining whether or not from such evidence before it the finding of a jurisdictional fact by such inferior board or tribunal is sustainable; and if there be no evidence to sustain such decision it must be annulled. In such a case the inquiry is strictly limited to the facts which were before the board and on which it acted in making its orders. Security-First National Bank v. Board of Supervisors, 135 Cal. App. 208, 26 P.(2d) 862. But in this case, it does not appear that the court undertook to declare the evidence insufficient to support the order of the board, nor that it was in fact so inadequate as to render the order of the board void for want of jurisdiction. An order of the reviewing court which, without legal basis therefor, undertakes to annul the action of the inferior board or tribunal cannot be upheld on appeal.

Judgment appealed from reversed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

GONZALES v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. *

Civ. 9824.

District Court of Appeal, Second District, Division 2, California.

Aug. 16, 1934.

Hearing Granted by Supreme Court Oct. 15, 1934.

Criminal law ⇐1104(6)

Defendant attempting to appeal from conviction and filing notice within time and requesting transcript, but failing to comply with rule requiring statement of grounds of appeal and portions of reporter's notes to be transcribed to present points relied on *held* entitled to move under section of Code of Civil Procedure for relief from default, since such section applies also to criminal cases (Code Civ. Proc. § 473; Rules of the Supreme Court and of the District Courts of Appeal, rule 2, § 7).

Petition by Pedro Gonzales against the Superior Court in and for Los Angeles County and another, for a writ of mandate to compel respondents to take jurisdiction of petitioner's motion to be relieved from default on appeal for failure to file application mentioning grounds of appeal and designated portions of transcript required.

Peremptory writ ordered.

F. Paul Hornaday and H. Huntington, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and Beach Vasey, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This is a petition for the issuance of the writ of mandate in the following circumstances: Petitioner was convicted of a felony and sentence was pronounced. Within due time and acting under section 1239 of the Penal Code he filed his notice of appeal. He failed, however, to conform to the italicized part of the following requirement of section 7 of rule 2, Rules of the Supreme Court and of the District Courts of Appeal: "* * * The appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms *the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon.*" He did, however, in due time request a transcript of all of the proceedings had in the case, and the same was duly made and is now on file in the appeal of the cause. It will be seen that the whole case was brought up in the appeal, and that the only defect was the failure to mention the grounds of appeal and to designate the portions of the transcript required, although petitioner did request and did receive the full transcript. Thereafter it appears that petitioner discovered the error and petitioned the trial court to be allowed to show, pursuant to section 473 of the Code of

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 44 P.2d 320.

Civil Procedure, that the omission was due to clerical error, inadvertence, and excusable neglect. The motion came on for hearing and the court ruled that it was without jurisdiction to entertain it. Upon this state of fact we issued the alternative writ of mandate herein. Respondents demurred to the petition on the ground that no cause for a writ had been therein stated and stipulated that the whole question presented by the petition should be considered as being before us for decision without a formal return.

The whole question is: Does section 473 of the Code of Civil Procedure apply to the case? If it does, this court should issue its peremptory writ commanding the respondent court to entertain the motion and to decide it upon its merits. There are many cases wherein motions were made and granted to dismiss the appeal in circumstances similar to the instant case. They are authority for the point that in such circumstances a motion made in the appellate court to dismiss must be granted. But this, as has been pointed out, is not the question presently before us. Of course, if petitioner's default is relieved under section 473 by the trial court, no cause for dismissal would remain.

It may be mentioned in the approach to our problem that the law contemplates the right of review of felony cases and abhors its deprivation to an individual through a technical oversight of his counsel, in whom he has reason to rely for the reason that the latter is a duly admitted and licensed attorney through the high dignity of the state. On the other hand, there must be enforceable rules of procedure. The people, through their legislative deputation, have enacted section 1239 of the Penal Code, and by it have declared that upon its provisions being conformed to an appeal has been taken. It is clear that the real "dead line" as to time of appeal is contained in this section, and that in the interests of certainty it is beyond the power of any court to extend it. People v. Lewis, 219 Cal. 410, 27 P.(2d) 73. But notwithstanding the appeal in the instant case, it is claimed by respondents that it is irremedially impotent because of the failure to follow a rule of court within a specified time, as to certain details designed to assist in the consideration of the appeal; and this notwithstanding the claim by petitioner that the failure arose from some excusable mishap. Here there is no question of intention to appeal or to perfect the appeal, and the fateful question confronts us: Shall this incidental excusable omission on the part of the accused's lawyer deprive the accused of his right of appeal? The beneficent purpose of section 473 of the Code of Civil Procedure would seem to be of far greater import in criminal matters than in civil matters, and the claim of respondents that this remedial section is not applicable to criminal cases is not borne out in principle or in authority.

In People v. Soto, 8 Cal. App. 322, 96 P. 913, 915, where the time had expired to present defendant's draft of his bill of exceptions for settlement under the statutory requirement of section 1174 of the Penal Code, the trial court relieved him from his default under the principles provided for by section 473 of the Code of Civil Procedure, and this met with approval in both the main and concurring opinions on appeal. The alternative writ of prohibition issued against the trial judge's proceeding to settle the bill. The main opinion closes with the following paragraph: "We are asked to presume that the court will proceed to settle the bill, even though the making of a formal order of relief under section 473 be first required, without making this prerequisite order. We cannot assume that the court will do this, for the purpose of prohibiting it from settling the bill. Rather must we assume that it will take such action on the application for relief as will make it competent for it to settle the bill without error, and, if necessary, make its formal order granting relief under section 473 before settling the bill." This case is commented upon in People v. Everett, 8 Cal. App. 430, 97 P. 175. In the case of People v. Southern, 118 Cal. 359, 50 P. 545, a criminal case, the use of section 473, Code of Civil Procedure, to correct a mistake in a bill of exceptions was approved.

We see no reason why the provisions of section 473 of the Code of Civil Procedure should not be available to petitioner herein.

The peremptory writ of mandate is ordered to issue commanding respondent superior court to take jurisdiction of petitioner's motion to be relieved from the default herein detailed and to hear and determine the same upon its merits.

We concur: CRAIG, J.; DESMOND, J.

LOS ANGELES & S. L. R. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 9105.

District Court of Appeal, Second District, Division 1, California.

July 16, 1934.

Hearing Granted by Supreme Court Sept. 13, 1934.

Commerce ⇐27(8)

Employee of interstate railroad injured while engaged in stringing cable from block signals on main line carrying interstate traffic to power line carried on new poles which formed a detour in existing pole line which kept signal system in operation *held* employed in "interstate commerce" and not subject to jurisdiction of Industrial Accident Commission (St. 1917, p. 831, as amended; Federal Employers' Liability Act [45 USCA §§ 51–59]).

[Ed. Note.—For other definitions of "Interstate Commerce," see Words & Phrases.]

YORK, J., dissenting.

Proceeding under the Workmen's Compensation Act by Vernon C. Peeples, claimant, opposed by the Los Angeles & Salt Lake Railroad Company, employer. Award of compensation to the claimant by the Industrial Accident Commission, and the employer petitions for a writ of review.

Award annulled.

E. E. Bennett, Malcolm Davis, and Edward C. Renwick, all of Los Angeles, for petitioner.

Arthur I. Townsend, of San Francisco, for respondents.

CONREY, Presiding Justice.

Review of an award of respondent commission in favor of respondent Peeples, an employee of the petitioner. There is no controversy here concerning the fact that respondent was injured by reason of an accident which arose out of his employment and occurred in the course thereof. The principal question presented rises out of petitioner's contention that the commission has no jurisdiction to allow the claim; that the injured man was engaged in interstate commerce at the time of the injury, and therefore the compensation could only be awarded under the Federal Employers' Liability Act (45 USCA §§ 51–59). Hines v. Ind. Acc. Com., 184 Cal. 1, 192 P. 859, 14 A. L. R. 720. The commission in its decision and award found that at the time of the injury said employee was not engaged in interstate commerce, and that both employer and employee were subject to the provisions of the Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 831, as amended). If this finding is not sustained by the evidence, the commission was without jurisdiction to make the award.

It appears from the record that respondent Peeples, on or about December 15, 1930, near Elgin, Nev., was engaged in stringing a line of cable from a block signal, so as to connect it with a power line which was being carried on new poles recently set up; the new poles forming a detour in an existing pole line. The detour was installed in order to give a free working space around the entrance to a tunnel, in connection with the widening of the tunnel. The cable had been laid on the ground in a straight line, and it was thereafter determined to move it up hill a short distance, so as to give more room around the mouth of the tunnel. While moving the cable on the ground, it caught in some brush, the brush snapped, a portion flew into respondent's eye, and caused a permanent injury thereto. The pole line ran from Los Angeles to Salt Lake City, and carried wires to operate signals along the main line of the railroad, as well as telegraph and telephone wires. While the changes were being made, the block signal was kept in constant operation through a temporary wire laid along the ground. The block signal and communication wires were necessary to the operation of petitioner's line of railroad between Los Angeles, Cal., and Salt Lake City, Utah. The line was being used in that business all the time while the described work was being done. With reference to the nature of the employment, petitioner here has directed attention to the facts, shown by the record, that the employee with others was engaged in moving the signal line controlling the block signals on petitioner's main line carrying interstate traffic, in order to allow room for tunnel construction. "The process of removal was to set up four or five new poles in the altered location, to string wire on those poles, connect this wire to the wire already in use, then to remove the intervening wire and poles. On the day of the accident the work had progressed to such point that the new poles were in position and it merely remained to stretch the wires thereon and connect

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 43 P.2d 282.

them up. At the time of his injury, applicant was pulling the wire into position to be placed on the poles, when the wire traversed a piece of brush which snapped and flew into his eye."

Both in the federal courts and in state courts there have been numerous decisions attempting to state the rules by which the scope of the Federal Employers' Liability Act may be determined in its application to disputes about the nature of the work being done by injured employees, and particularly as to whether or not at the time of the injury the employee was engaged in interstate commerce. In Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 33 S. Ct. 648, 649, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, the plaintiff was injured while working in the employ of a railroad company engaged in both interstate and intrastate commerce. He was injured while carrying from a tool car to a bridge some bolts and rivets which were to be used in repairing the bridge, the repairing to consist in taking out an existing girder and inserting a new one. The bridge was regularly being used in both interstate and intrastate commerce. This bridge could be reached only by passing over an intervening temporary bridge, which likewise was being used in such commerce. While the plaintiff was carrying a sack of bolts or rivets over the temporary bridge on his way to the permanent bridge, he was run down and injured by an intrastate passenger train, of the approach of which its engineer failed to give any warning.

In the action brought by Pedersen to obtain compensation for his injuries, the proceedings led to an appeal which was decided by the Supreme Court of the United States in favor of the plaintiff. In the course of its decision the court made a very clear statement of what seems to be settled law on the subject now under consideration. The Supreme Court said: "That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

In the case at bar we may paraphrase a part of the foregoing quotation and say that in modern railway transportation block signals, or some equivalent therefor, are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. The work in which the employee Peeples was engaged at the time of the injury was so closely related to the existing interstate transportation of the employer as to be practically a part of it.

By way of contrast, reference may be made to the case of Raymond v. Chicago, Milwaukee & St. Paul Ry. Co., 243 U. S. 43, 37 S. Ct. 268, 61 L. Ed. 583, where the plaintiff sought to recover damages resulting from injuries sustained by him as a laborer in a tunnel. It was stated that the defendant operated an interstate commerce railroad between Chicago and Seattle, and that, for the purpose of shortening its main line and making more efficient and expeditious its freight and passenger service, the defendant was engaged in cutting a tunnel through a mountain. The tunnel was only partially bored, and hence was not in use as an instrumentality of interstate commerce. The Supreme Court held that upon the facts stated plaintiff and defendant were not engaged in interstate commerce at the time the injury was suffered, and consequently no cause of action was alleged under the Federal Employers' Liability Act. But in the case at bar it is an undisputed fact that, while the

tunnel was being widened, it continued, as theretofore it had been, in operation as an instrumentality of interstate traffic, and that the changing of the block signal was merely an incident in the performance of the railroad company's duty to keep the line in operation while the improvement of the tunnel was going on.

Since we are of the opinion, for the reasons above stated, that respondent commission was without jurisdiction over the subject-matter of the proceeding, it is not necessary to state or discuss the other grounds upon which petitioner contends that the commission was without jurisdiction.

The award is annulled.

I concur: HOUSER, J.

YORK, Justice.

I dissent.

The only fault I have with the statement of facts in the main opinion is that it does not appear therefrom that the wire upon which the injured employee was working at the time of his injury was not, and never had been, used in interstate commerce. At the time of the injury, the signals were being operated by a wire, which is referred to in the main opinion as being a wire lying upon the ground, and this wire was not connected in any way with the wire which the injured employee was attempting to stretch into place. Said ground wire was not even lying in the same direction as the wire which the injured employee was engaged in attempting to place in position, and there is no evidence that this wire upon which the injured employee was working was ever used in connection with the operation of the block signal.

To my mind, the most convincing argument against the foregoing opinion of this court is found in the case of Texas & P. Ry. Co. v. Kelly (Tex. Com. App. 1932) 51 S.W.(2d) 299, at page 303, where it is said: "The testimony shows that the railroad company had installed for its use at the crossing certain devices which were operated by the trainmen to permit the trains to cross the intersecting tracks. * * * It is undisputed that at the time of the injury to Kelly the system was not complete. The wires which were necessary for the operation of the new system had not been connected. It had never been used as an instrumentality of interstate transportation prior to the time of Kelly's injury. The system was completed and put in operation about two weeks after Kelly was injured. It is undisputed that the interlocking system would not be used in any way for the operation of trains until the wires were connected and it was complete. If Kelly had been at work on the track, which was being used by trains in the transportation of interstate commerce, or if he had been at work upon a bridge likewise used in interstate transportation, or if he had been working upon the levers and parts of the device used by the railroad company in the operation of its tracks, he would come within the provisions of the Federal Employers' Liability Act. In other words, as we construe the opinions of the Supreme Court of the United States, it is held that the Federal Employers' Liability Act protects only those employed in interstate transportation. Those employed to work upon roadbeds, rails, ties, cars, engines, and other instrumentalities, which are intended for use in interstate transportation, but which have never been and are not in use therein, are not protected by that act. A distinction has been drawn between construction work and repair work, and it is held that an employee engaged in repairs on an appliance which is an integral part of interstate transportation is within the provisions of the act, but if the employee is employed at the time of his injury in the making of new appliances to be used in the future, is not so engaged and will not be protected by the act. In view of the foregoing authorities and the undisputed facts involved in this case, we are constrained to hold that Kelly was not protected by the provisions of the Federal Employers' Liability Act and therefore not entitled to recover by reason of this suit." (A petition for writ of certiorari in the cited case addressed to the Supreme Court of the United States was by that court denied on October 17, 1932, 287 U. S. 644, 53 S. Ct. 90, 77 L. Ed. 557.)

In the case of Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, cited in the main opinion, the injured employee was injured when directly upon the line of railway which was being used in interstate commerce, although the train which hit him was an intrastate train.

140 Cal.App. 475

PEOPLE v. LEWIS.

Cr. 2562.

District Court of Appeal, Second District, Division 1, California.

Aug. 24, 1934.

Hearing Denied by Supreme Court Sept. 19, 1934.

Criminal law ⇐982
Robbery ⇐11

Accused, who waited outside tearoom in automobile while accomplice committed robbery with loaded revolver, and who later drove accomplice away pursuant to agreement, *held* guilty of robbery with deadly weapon in first degree, and hence court lacked jurisdiction to grant him probation (Pen. Code, § 1203).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

William H. Lewis was convicted of robbery in the first degree, and he filed an application for probation. From a judgment denying the application, the defendant appeals.

Affirmed.

Pace, Smith & Purdue, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem.

Defendant, after entering a plea of guilty to a charge of robbery and having the degree fixed by the court as robbery in the first degree, was permitted to file an application for probation. Upon the hearing of his petition, the court denied his application on the ground that, under the provisions of section 1203 of the Penal Code, the court had no jurisdiction to grant him probation. Upon his appeal from the judgment, the only question raised is as to the correctness of the court's ruling, that it was without jurisdiction to grant defendant probation.

According to defendant's own story, he entered into an agreement with one Frank Cotton to assist him in robbing a tearoom in Los Angeles City. Defendant had known Cotton for some time, and knew him as one engaged in criminal activities. On the day of the robbery, defendant met Cotton and drove with him in a stolen car to the place where the robbery was committed. Arriving there, Cotton, armed with a loaded revolver, left the car and entered the tearoom, where, with the use of the revolver, he held up and robbed one Vera Brunner of $20. Defendant remained in the car, from which he witnessed Cotton with a drawn revolver commit the robbery. When Cotton secured the money from his victim, he hurried out to the waiting car and was driven away by defendant. As they left, they were pursued by a police car; Cotton engaging in an exchange of shots with the officers as they sped away.

Section 1203 of the Penal Code, which authorizes the court to grant probation in certain cases and under certain conditions, contains this mandatory provision: "Provided, however, that probation shall not be granted to any defendant who shall have been convicted of robbery, * * * and who at the time of the perpetration of said crime * * * was armed with a deadly weapon * * * [or] who used or attempted to use a deadly weapon in connection with the perpetration of the crime of which he was convicted."

That appellant was in the eyes of the law guilty of robbery and in the same degree as Cotton, even though he was not himself armed with a deadly weapon, is too well established to permit of controversy. Discussing this question, the court in the case of People v. Jones, 114 Cal. App. 91, 93, 299 P. 559, 560, makes the following declaration: "The distinction between principals in the first and second degrees, in cases of felony, has been abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid or abet its commission, may be prosecuted and punished as principals. The information in the present case contains sufficient allegations to charge the defendant (sections 31 and 971, Pen. Code), and, while he did not use the gun, appellant is properly prosecuted, tried, and punished to the fullest extent for the acts of his accomplice which he aided and abetted; and whether the gun was used by him or by his accomplice would make no legal difference. People v. Yeager, 194 Cal. 452, 460, 229 P. 40."

Under a state of facts somewhat similar to those here involved, the trial court in the case of People v. Gillstarr, 132 Cal. App. 267, 22 P.(2d) 549, refused to permit the defendant, after being found guilty of the crime of robbery which the jury fixed in the first degree, to file an application for probation, holding that, under section 1203 of the Penal Code, the court had no jurisdiction to permit the filing of such a petition. This division

of the Court of Appeal sustained the court's ruling stating that, even though it be conceded that under the law the defendant had a right to file his application, inasmuch as the court had no right to grant it, the filing of the petition would have been an idle act.

In the instant case the court permitted the defendant to file his petition for probation, but denied his application. That, under the undisputed facts in the case, the court was bound to fix the crime to which appellant plead guilty, as robbery in the first degree, cannot well be disputed. Upon such a finding and legal conclusion, it is clear that, under section 1203 of the Penal Code, the court was without jurisdiction to grant appellant probation.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

140 Cal.App. 351

GARDNER v. CITY COUNCIL OF CITY OF TUJUNGA et al. (two cases).

Civ. 8515, 8542.

District Court of Appeal, Second District, Division 2, California.

Aug. 7, 1934.

Hearing Denied by Supreme Court Oct. 4, 1934.

1. Appeal and error ⇐78(4)

Order denying motion to dismiss was not appealable (Code Civ. Proc. § 963).

2. Municipal corporations ⇐33(8)

Determination of city council that petition for consolidation to contiguous city contained signatures of one-fourth of qualified electors was not "judicial act" but "ministerial act," and hence nature and extent of proof to which council resorted could not be questioned by petition to review consolidation proceedings (Gen. Laws 1931, Act 5166, § 2).

[Ed. Note.—For other definitions of "Judicial Act" and "Ministerial Act," see Words & Phrases.]

3. Evidence ⇐10(2)

City council determining that city was contiguous with another city could take judicial notice of boundary lines of two cities, authorizing finding that cities were contiguous so as to permit their consolidation (Gen. Laws 1931, Act 5166, § 2).

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Petition by Ralph Q. Gardner against the City Council of the City of Tujunga and others to review certain proceedings consolidating the City of Tujunga with the City of Los Angeles, in which the City of Los Angeles appeared as successor of the City of Tujunga. From a judgment for defendants, the petitioner appeals; and from an order denying its motion to dismiss, made before trial, the City of Los Angeles appeals.

Judgment affirmed as to appeal of petitioner, and appeal of the City of Los Angeles dismissed.

Biby & Biby and John E. Biby, all of Los Angeles, for Gardner.

Erwin P. Werner, Frederick Von Schrader, and Robert J. Stahl, all of Los Angeles, for City of Los Angeles.

SCOTT, Justice pro tem.

In September, 1931, a petition for consolidation of the city of Tujunga with the city of Los Angeles was presented to the city council of Tujunga. The names were checked over and declared sufficient. A special election was called and held on January 5, 1932, and said city council thereafter declared that a majority of the votes cast favored consolidation and that said proposition was adopted. On February 26, 1932, the city council of Los Angeles adopted an ordinance approving such consolidation, which was published February 29th. March 2d appellant Gardner filed his petition for a writ of review in the superior court. A demurrer was interposed and overruled and the writ was issued returnable March 17th. On that date city of Los Angeles appeared as successor to city of Tujunga and moved to dismiss. Its motion was denied, and from the order denying that motion city of Los Angeles has appealed (case Civ. 8542). The case was tried on March 30, being submitted on a stipulation of facts, and judgment for respondents was rendered on April 22d. From this judgment petitioner appeals (case Civ. 8515).

[1] The order of the trial court denying motion of city of Los Angeles to dismiss not being an appealable order, such appeal must be dismissed. Code Civ. Proc. § 963.

Appellant Gardner contends that the consolidation proceedings are invalid because the city council of Tujunga was exercising judicial functions when it determined the sufficiency of the petition requesting the election

and declared that the two cities were contiguous; that the proof of those matters was legally insufficient and that therefore the city council exceeded its jurisdiction in so determining them.

The statute under which this proceeding was instituted (Act 5166, Deering's Gen. Laws 1931) requires that the petition requesting the election be "signed by not less than one-fourth in number of the qualified electors of any municipal corporation, as shown by the registration of electors of the county in which such municipal corporation is situated" (section 2); and further requires that such municipal corporations be contiguous. Appellant concedes that it was sufficiently proved that the petition was properly signed by 620 qualified electors. He does not contend that as a matter of fact that number of signers was not one-fourth of the qualified electors, but he urges that proof of that fact was required and was not presented. Similarly, appellant does not contend that as a matter of fact the two cities were not at that time contiguous, but he urges that proof of the fact that they were contiguous was required and was not presented.

[2, 3] The determination by the city council of Tujunga that the petition contained signatures of one-fourth of the qualified electors of that city was not a judicial act. It was the doing of a merely ministerial act, and the nature and extent of the proof to which they resorted cannot be questioned in this proceeding. Wolfskill v. City Council of Los Angeles, 178 Cal. 610, 174 P. 45. If it be conceded that the determination by such city council that the two cities were contiguous was the exercise of a judicial function, it would appear that they were permitted, if not required, to take judicial notice of the boundary lines of their city and of another municipality adjacent thereto (Rich v. McClure, 78 Cal. App. 209, 248 P. 275); and ample support was thus afforded for the finding that the two cities were contiguous within the meaning of the act.

It appears that on March 7, 1932, and prior to the issuance of the writ in case Civil 8515, papers had been filed with the secretary of state setting out that the acts necessary to consolidate the two cities had been completed. City of Los Angeles, taking the view that by reason thereof the city council of Tujunga had ceased to exist and the members thereof were no longer officials, proceeded to defend the validity of said council's acts on the assumption that it was the successor in interest to the city of Tujunga and responsible therefor.

In case Civil 8515 the judgment is affirmed. In case Civil 8542 the appeal is dismissed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 348

HUTCHINS v. COUNTY CLERK OF MERCED COUNTY et al.

Civ. 5217.

District Court of Appeal, Third District, California.

Aug. 6, 1934.

1. Time ⇐10(1)

"Special holidays," in statute stating rule for computing time when an act was provided or required by law to be performed within specified period of time and holiday intervened, *held* to refer to bank holidays declared by President, and special holidays proclaimed by Governor, and statute, except for provision in reference to special holidays, did not otherwise change existing law (Code Civ. Proc. § 12a, as added by St. 1933, p. 304, § 1).

2. Time ⇐10(1)

In computing time, if act is required to be performed "prior" to a certain day, and that day is a holiday, act must be done day before holiday; and if act is to be performed "within" certain time and last day is a holiday, act can be performed day after holiday.

[Ed. Note.—For other definitions of "Prior" and "Within," see Words & Phrases.]

3. Courts ⇐89

Opinions of Attorney General are not of same weight or authority as those of court, yet, if his opinion coincides with opinion of court, court can properly adopt it.

4. Records ⇐7

Paper in order to be filed must be presented to proper officer at his office, not on street.

5. Time ⇐10(1)

Where nomination papers were required to be filed prior to 24th day of June and that day was Sunday, papers *held* required to be filed before that day.

Appeal from Superior Court, Merced County; K. Van Zante, Judge.

Proceeding by Luther Quintin Hutchins against the County Clerk of Merced County, California, and another. Judgment for respondents, and petitioner appeals.

Affirmed.

L. M. Linneman, of Dos Palos, for appellant.

S. P. Galvin, Dist. Atty., of Merced, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

Knowing an immediate decision was necessary in this case, attention has been given to it by the members of the court and we are prepared to render an opinion immediately.

[1-3] So far as section 12a, Code Civ. Proc., adopted by the Legislature March 10, 1933 (St. 1933, p. 304, § 1), is concerned, the court differs decidedly with the argument of counsel. We do not think counsel on either side presented the true meaning and intent of that section. If you will just read it carefully you will find the exception enclosed in parentheses was intended to apply to holidays—bank holidays and special holidays—proclaimed by the Governor, and was passed as an emergency measure to cover that particular condition. National bank holidays had been declared by the President and required holidays by the Governors of the different states, and in order to cover that situation the Legislature passed an act known as section 12a of the Code of Civil Procedure and then provided it should apply to certain acts. We have taken occasion to read every one of these sections, and every one of these sections read "within," not "before." Section 12a as amended does not change the law, in the opinion of the court, as laid down in the case of Griffin v. Dingley, 114 Cal. 481, 46 P. 457. It makes no change and cannot be applied to anything except those special holidays. Again, the reading of section 12a, as amended, shows that exactly the same words are used as were passed upon in the opinion in the case of Griffin v. Dingley, where it provided that an act must be done *within* a certain time. Now, there is a difference in law between the meaning of the words "within" and "prior." If you have to do a thing before a certain day, that day is not included; in other words, if you have to do a certain thing before the 24th day of June, the 24th of June is not included, because it must be before. According to the rule laid down for computing time when the nomination papers must be filed, and I may state as construed by the Attorney General of this state (while his opinions are not of the same weight or authority as those of the court, yet if his opinion coincides with the opinion of the court we can properly adopt it; we did not see all of his opinion, but the substance of it, a memorandum of it), 27 days in August would be excluded, 31 days in July would be excluded, and 7 days in June would be excluded, leaving the last day the 23d day of June. We have seen no reason for attempting to alter the opinion of the Supreme Court, because the word "prior" has been left unchanged by any of the amendments.

[4] So far as the filing is concerned, the case of Edwards v. Grand, 121 Cal. 254, 53 P. 796, laid down the rule that in order that a paper might be filed it must be presented to the proper officer at his office, not on the streets. There are a number of cases in 25 Corpus Juris, pp. 124–127, which make a distinction between mere manual possession and filing. They lay down the rule that giving a paper to an officer on the street or at his home is not a filing, but if you present it to the officer at the proper place of business for the purpose of filing whether he stamps it or not is not material. That is not your fault; you have done all you can do. That is supported by numerous authorities in 25 Corpus Juris.

Study the case of Griffin v. Dingley and you will find not only the sections of the Political Code, but the sections adopted by the Legislature and section 12a had no application to this case because they all relate to the word "within." If you follow all those sections referred to in section 12a of the Code of Civil Procedure, you will find, as stated, that the word "within," and not the word "before," is used.

[5] I will state that so far as filing is concerned, the case of Edwards v. Grand is referred to in Harris v. Superior Court, 82 Cal. App. 88, 255 P. 229, and Andrews v. Metzner, 83 Cal. App. 764, 257 P. 203, approving the rule laid down in Edwards v. Grand. There does not seem to be any question that the papers should have been filed 65 days preceding the 28th day of August, and it is the opinion of the court that Sunday cannot be excluded. It is one of the days to be counted just as other Sundays intervening, quite a number of them, and all of them to be counted. If the statute had read "within" a certain time it must be filed then a different construction must be given, just as in serving summons,

within so many days you have to answer. If the last day is a holiday you have the next day, because it does not count; but if the statute had read "prior" the last day which is a holiday, your answer should have been in the day before the holiday. Applying that rule here, Sunday the 24th of June is a holiday and it cannot be excluded, because it must be counted as one of the days before which your papers must have been filed.

So far as outside questions and public policy are concerned, we cannot pass on those. It is the statute and nothing else we must follow.

Therefore the judgment must be, and is, affirmed.

140 Cal.App. 310

PEOPLE v. ENGLAND et al.

Cr. 2468.

District Court of Appeal, Second District, Division 1, California.

Aug. 4, 1934.

Rehearing Denied Aug. 17, 1934.

1. Criminal law ⇐956(13)

Judgment of conviction will not be reversed and new trial ordered on ground of jury's misconduct, where defendants offered only inadmissible or hearsay testimony to establish such misconduct.

2. Criminal law ⇐959

Denial of defendants' request for fourth continuance of date for hearing of their motion for new trial on ground of newly discovered evidence *held* not error, where they offered only hearsay statements as to what direct relevant evidence might be produced.

3. Criminal law ⇐1171(1)

Alleged impropriety of deputy district attorney's remarks during trial *held* unavailing to defendants on appeal, where it was unlikely that jury's verdict would have been more favorable to them had such remarks not been made.

4. Criminal law ⇐622(1)

Order for separate trials of defendants jointly charged with crime is discretionary in court (Pen. Code, § 1098).

5. Criminal law ⇐622(1)

Denial of motion by one of three defendants for separate trial because of fact, known to court, that one codefendant had been convicted of felony, *held* not abuse of discretion (Pen. Code, § 1098).

6. Constitutional law ⇐209

"Uniformity of operation" of law and "equal protection of the law," guaranteed by Constitution, mean that equal protection of one's civil rights shall be secured to him in same manner and to same extent as same or similar rights are accorded to all other persons under similar circumstances (Const. U. S. Amend. 14; Const. Cal. art. 1, § 21).

[Ed. Note.—For other definitions of "Equal Protection of the Law" and "Uniform Operation of Laws," see Words & Phrases.]

7. Constitutional law ⇐250, 257
Criminal law ⇐622(1)

Statute requiring that defendants jointly charged with crime be tried jointly, unless court orders separate trials, *held* not unconstitutional as denying due process and equal protection of laws or as not uniform in operation (Pen. Code, § 1098; Const. art. 1, § 21).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Glen C. England, Arthur Clensay, and Robert C. Hoff were convicted of robbery, and they appeal.

Affirmed.

R. E. Parsons, of Los Angeles, for appellants England and Clensay.

Robert C. Hoff, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From a judgment of conviction of the crime of robbery, as well as from an order by which their motion for a new trial was denied, defendants England and Clensay, who are represented by counsel, and defendant Hoff, who appears in propria persona, have appealed to this court.

[1] It is urged that because of alleged misconduct of the jury the judgment should be reversed and a new trial ordered. But since none other than inadmissible or hearsay testimony was offered by the defendants to establish any misconduct on the part of any member of the jury, it is clear that the point is without merit.

[2] Appellants also contend that they were prejudicially affected by reason of the refusal of the trial court to grant a postponement of

the date of the hearing of their motion for a new trial, the principal ground of which was "newly discovered evidence" that would tend to impeach certain corroborative testimony that was given by a witness for the prosecution to the effect that one of the defendants had made damaging admissions regarding his participation, and that of his codefendants, in the commission of the crime of which they were jointly charged. However, in addition to such ground, counsel for defendants represented that they wished to produce substantial and proper evidence that related to the alleged misconduct of the jury. In connection with the suggested postponement of the hearing of the motion, by order of the trial court the hearing was first continued for a period of eight days, at the expiration of which time an additional two-day continuance at 9 o'clock a. m. was ordered, and which latter continuance was followed by a third continuance from 9 o'clock a. m. until 4:30 o'clock p. m. of the same day. At no time was any direct evidence, either of the "newly discovered evidence," or of any "misconduct of the jury," offered by the defendants for the consideration of the trial court. Their efforts in that direction consisted in hearsay statements as to what direct and relevant evidence might be produced, provided that they were given more time within which to locate certain asserted witnesses and to procure from them their respective affidavits. In such circumstances, we are of the opinion that no error properly may be charged to the trial court in denying the request of the defendants for a further continuance of the date for the hearing of their motion for a new trial. Instead of any abuse of discretion in the trial court being shown, it is apparent that the defendants were extended more than a fair opportunity to present their evidence, but that they wholly failed in that regard. Consequently they have no substantial ground for complaint.

[3] Appellants also predicate error on certain remarks which were made by the deputy district attorney in the course of the trial of the action. The language used by the deputy district attorney in that connection, together with the circumstances connected therewith, have been given careful consideration by this court. Some of such remarks were made in reply, or were responsive, to remarks of a similar nature that were made by counsel who represented the defendants. Nor was any assignment of error made by either of the defendants to any of the so-called improper remarks made by the deputy district attorney. It is more than doubtful that anything to which attention has been directed really constituted legal misconduct; but assuming that the contention of appellants in that regard is correct, at most the effect of any remark or remarks or conduct of which complaint has been made was of no great consequence as far as any influence which it or they could have exerted upon the verdict of the jury was concerned. If error was committed in that regard, it was harmless. In other words, it is altogether unlikely that without the so-called objectionable remarks having been made, the verdict of the jury would have been more favorable to the defendants than was the verdict returned by it. It follows that the point is unavailing to the appellants herein.

Further complaint is made by appellant Hoff regarding the refusal of the trial court to grant his motion for a trial separate from that of his codefendants.

[4] By the terms of section 1098 of the Penal Code it is provided that when two or more defendants are jointly charged with the commission of a crime, "they must be tried jointly, unless the court order separate trials." And not only by express provision of the same statute is the order in that regard made discretionary in the court, but by each of many adjudications by the appellate tribunals of this state is the same doctrine announced. People v. Erno, 193 Cal. 272, 277, 232 P. 710; People v. Nelson, 90 Cal. App. 27, 30, 265 P. 366; People v. Swoape, 75 Cal. App. 404, 408, 242 P. 1067; People v. Anderson, 75 Cal. App. 365, 379, 242 P. 906.

[5] The contention on the part of appellant Hoff that because of the fact that was made known to the trial court at or preceding the time when a severance of trials for the defendants was denied, that theretofore defendant Clensay had been convicted of a felony, the trial court abused its discretion in making the order in question, is refuted by the several rulings made in like circumstances in each of the following cases, to wit: State v. Hurlbert, 153 Wash. 60, 279 P. 123; State v. Remick, 156 Wash. 19, 286 P. 67; People v. Sobzcak, 286 Ill. 157, 121 N. E. 592; People v. Hotchkiss, 347 Ill. 217, 179 N. E. 524.

In addition to such authorities, in many cases it has been held that the discretion of the trial court was not abused in making an order by which a motion for a separate trial of a defendant was denied, even where the stronger reason for granting a separate trial appeared, to wit, that his codefendant either

had made a confession of his guilt, or had made admissions from which his guilt necessarily would be inferred. People v. Remington, 74 Cal. App. 371, 376, 240 P. 526; People v. Burdg, 95 Cal. App. 259, 268, 272 P. 816; People v. Perry, 195 Cal. 623, 631, 234 P. 890; People v. Dowell, 204 Cal. 109, 114, 266 P. 807; People v. Swoape, 75 Cal. App. 404, 408, 409, 242 P. 1037; People v. Booth, 72 Cal. App. 160, 165, 236 P. 987.

[6, 7] But appellant Hoff suggests that the statutory provision contained in section 1098 of the Penal Code by which an order of the kind in question is made discretionary with the trial court is "violative of the 'due-process' and 'equal-protection-of-the-laws' clause of the Fourteenth Amendment of the Constitution of the United States; in that said part of section 1098 of the Penal Code places the determination of what constitutes the rights of any person who may be charged with a public offense, at the mercy of the favor or discretion of a court. Further, that said section 1098 of the Penal Code is contrary to subdivisions 2 and 33, § 25, art. 4, and section 21, art. 1, of the Constitution of the state of California."

In substance, as may be gathered from the argument presented by appellant Hoff, it is contended that the law is not uniform in its operation, and that the practical effect of the statute is that by its operation a defendant who is charged "jointly" with another or others with the commission of a criminal offense, is, or may be, subjected to an adverse discrimination in that he may be compelled to go to trial with a codefendant who has confessed his guilt, or one whose criminal record as presented either by his admission, or by indisputable evidence, is such that because thereof, and because of the association between the two defendants, the defense of the one defendant is seriously, if not irreparably, prejudiced. But by so many adjudications on the principle of law thus suggested that to cite them would amount to a great superfluity, it has been decided in substance that by "uniformity of operation," or by "equal protection of the law" guaranteed by constitutional provision is meant that equal protection of one's civil rights shall be secured to him in the same manner and to the same extent as under similar circumstances the same or similar rights are accorded to all other persons. See authorities cited in Words and Phrases, in its several editions, under the title "Equal Protection of the Law." Moreover, in the case of People v. Rogers, 60 Cal. App. 177, 212 P. 412, the constitutionality of the statute, or of similar statutes, has been directly passed upon contrary to appellant's contention.

In People v. Yeager, 194 Cal. 452, 488, 229 P. 40, 55, it was said: "It is within the province of the Legislature to vest the trial court with authority to decide whether there shall be a separate or a joint trial of defendants jointly charged. * * *"

In People v. Dowell, 204 Cal. 109, 114, 266 P. 807, 809, where, on various grounds, the constitutionality of the statute was in issue, in part the court said: "There is no merit whatsoever in these contentions. Prior to 1921 separate trials were provided for by statute. At said time section 1098 of the Penal Code was amended (St. 1921, p. 90) to provide that two or more defendants when jointly charged with any public offense must be tried jointly unless the court ordered separate trials. This amendment, in effect, adopted the common-law rule upon this subject. There is no federal question, constitutional or otherwise, involved. It has always been the rule in the federal courts that defendants jointly indicted for the same offense must be tried together unless the court for some reason orders a separate trial for one or more of them. All the questions raised by appellant as grounds for a separate trial have been thoroughly considered by this court in the case of People v. Perry, 195 Cal. 623, 234 P. 890. We have re-examined the question and are satisfied with the ruling made in that case. Several similar rulings have been made. People v. Erno, 195 Cal. 272, 232 P. 710; People v. Wilson, 76 Cal. App. 688, 693, 245 P. 781; People v. Pilbro, 85 Cal. App. 789, 260 P. 303; People v. Anderson, 59 Cal. App. 408, 211 P. 254; People v. Ford, 81 Cal. App. 449, 253 P. 966."

Likewise in Anderson v. State, 56 Tex. Cr. R. 360, 120 S. W. 462, 463, it was held (syllabus) that "the right of accused to a severance is a statutory but not a constitutional right."

And in People v. Foster, 261 Mich. 247, 246 N. W. 60, 62, it was declared that the right to a separate trial was "a statutory procedural right which the Legislature could abrogate."

In accord with the foregoing authorities, it follows that the point suggested by appellant Hoff cannot be sustained.

As to each defendant, the judgment and the order by which the motion for a new trial was denied, are, and each of them is, affirmed.

We concur: CONREY, P. J.; YORK, J.

140 Cal.App. 473

Ex parte McCARTY.

Cr. 271.

District Court of Appeal, Fourth District, California.

Aug. 23, 1934.

1. Habeas corpus ⇐92(1)

In habeas corpus proceedings for release of one held to answer by committing magistrate for murder, court cannot weigh the evidence, and question before it is not whether evidence was sufficient to support a conviction, but whether it showed "reasonable or probable cause" and was sufficient to justify the holding of petitioner for trial (Pen. Code, § 872).

"Reasonable or probable cause" in proceedings before committing magistrate is such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.

[Ed. Note.—For other definitions of "Probable Cause" and "Reasonable Cause," see Words & Phrases.]

2. Criminal law ⇐238

In proceedings before committing magistrate, evidence must show that an offense has been committed and that there is "probable" cause to believe that defendant committed it (Pen. Code, § 872).

"Probable" means having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves room for doubt.

[Ed. Note.—For other definitions of "Probable," see Words & Phrases.]

3. Habeas corpus ⇐85(1)

In habeas corpus proceedings, evidence *held* sufficient to justify committing magistrate in committing petitioner to answer for crime of murder (Pen. Code, § 872).

Application by Lottie McCarty for a writ of habeas corpus discharging from custody petitioner who was held to answer for crime of murder.

Writ denied. Petitioner remanded.

John G. Covert, of Hanford, for petitioner.

Clarence H. Wilson, Dist. Atty., of Hanford, for respondent.

GRIFFIN, Justice pro tem.

This is an original application for a writ of habeas corpus brought in this court seeking the discharge of petitioner upon the ground that the evidence produced at her preliminary examination did not show reasonable or probable cause that a crime had been committed by her.

The petitioner, together with one Fong Quong, were held to answer by the committing magistrate for the crime of murder alleged to have been committed in the county of Kings, on or about the 8th day of December, 1933.

[1-3] Petitioner, of course, cannot, in these proceedings, test the sufficiency of the evidence to support a conviction. The sole question is whether the evidence introduced at the preliminary hearing was sufficient to justify the committing magistrate in holding the petitioner for trial in the superior court and whether the evidence adduced at the preliminary hearing would show reasonable or probable cause.

By "reasonable or probable cause" is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty. The evidence must show that an offense has been committed and that there is probable cause to believe the defendant guilty. Ex parte Vice, 5 Cal. App. 153, 89 P. 983; In re Mesquita (Cal. App.) 33 P.(2d) 459. The term "probable" has been defined to mean "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." Ex parte Heacock, 8 Cal. App. 420, 97 P. 77.

Section 872 of the Penal Code provides in part as follows: "If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make * * * an order," holding the defendant to answer to the superior court. This order must state generally the nature of the offense and its appearance of having been committed by the defendant.

There are many reasons why it is unnecessary, and indeed improper, to recite and comment on the evidence taken before the committing magistrate. It is not our province to weigh that evidence. In re Cordish, 94 Cal. App. 680, 271 P. 784. In this case, as in most cases, the prosecution produced some evidence, but we cannot assume that it produced all of its evidence. The defense produced no evidence. If all of the people's evidence had been produced, it still would be improper for us to express an opinion, as a jury will later have to pass on the weight of the evidence. It will suffice for us to state that we have carefully

examined the record before us, and we are of the opinion that there is sufficient evidence to indicate, with reasonable probability, the probable guilt of petitioner, although it should be clearly understood that this court is not passing on, nor endeavoring to pass upon, the question of the sufficiency of the evidence to support a verdict of guilty.

Writ denied. Petitioner remanded.

We concur: MARKS, Acting P. J.; JENNINGS, J.

140 Cal.App. 499

PEOPLE v. McCURDY.

Cr. 1376.

District Court of Appeal, Third District, California.

Aug. 29, 1934.

1. Homicide ⇐151(1)

When commission of homicide by defendant is established, burden of proving circumstances in mitigation or that justify or excuse devolves on accused, unless proof on part of prosecution tends to show that crime committed amounted only to manslaughter or that defendant was justified or excusable (Pen. Code, § 1105).

2. Homicide ⇐119

Accused firing first shot in self-defense, disabling assailant, was not justified in continuing firing or fatally wounding him, particularly while he lay on floor.

3. Homicide ⇐276

Whether accused in murder prosecution acted in self-defense and whether means used were justified *held* for jury.

4. Homicide ⇐187

In prosecution of radio worker for murder of Indian, evidence that certain Indian woman had told deceased and no one else two or three years before of attempted assault by man working at radio station, *held* properly excluded as hearsay and too remote under evidence.

5. Criminal law ⇐711

Court may limit time for argument providing it does not thereby deprive accused of opportunity for full defense.

6. Criminal law ⇐711

In murder trial occupying three days, where accused's counsel addressed jury approximately five hours, and at time for adjournment at evening refused suggested night session and stated that he would probably require hour on following morning, limitation of subsequent argument for defense to 45 minutes *held* not abuse of discretion in absence of showing that any matters had not been argued which counsel wished to discuss before jury.

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Jesse J. McCurdy was convicted of murder in the second degree, and he appeals.

Affirmed.

John L. Childs, of Crescent City, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant is here appealing from a judgment finding him guilty of murder of the second degree and from an order denying a motion for new trial.

Inasmuch as one of the grounds urged for reversal is the insufficiency of the evidence to sustain the verdict, we will set forth the evidence in some detail. We will not, however, narrate such circumstances as may appear in the record favorable to appellant, for in considering the insufficiency of the evidence it is not our province to pass upon the guilt or innocence of the accused, that being the duty of the jury, it being for this court to determine from the record whether the finding of the jury is supported by legal evidence tending to show the guilt of the accused.

The Smoke Shop in the city of Crescent City appears from the testimony to be a gathering place for certain of the young men of that community, where, in connection with a coffee shop, is conducted a pool hall and cigar stand where beer and perhaps other beverages are sold. On the night of May 25, 1933, a dance had been held at Klamath, some miles from Crescent City, and several persons, including defendant, had stopped at the Smoke Shop for breakfast and refreshments. About 3:30 Sunday morning defendant was at the bar when a young man entered and purchased some cigarettes. His change was placed before him but was picked up by one of the bystanders. Remarks were made by those present regarding the

matter and the attendant at the bar inquired to the effect: "Shall I hit him?" to which the proprietor, one Lloyd McLaughlin, replied in the negative. McCurdy, the appellant here, also spoke up and said, "No, don't hit him." At this point the deceased, David Lopez, an Indian, who was standing at the entrance to the bar, said to defendant, McCurdy, "What have you got to say about it?" McCurdy answering, "Nothing, it is none of my business." At this point McLaughlin, the proprietor, called Lopez and McCurdy together and introduced them and thereafter no further controversy was heard in regard to that matter. The evidence is clear that McCurdy was not under the influence of liquor, but it is equally clear that the deceased was intoxicated. As the two men stood conversing, Lopez asked McCurdy his name, and a third person to the conversation interposed and said, "His name is McCurdy, he works at the Radio Station," meaning the Naval Radio Compass Station, which is located near Crescent City. Lopez then requested McCurdy to go with him into the rear occupied as a billiard room and the two then retired to that portion of the Smoke Shop. Shortly thereafter McLaughlin went back into the darkened billiard room to see what the two men were doing, and, being assured by both that they were merely engaged in a friendly conversation, he left them alone. After the men had been in the billiard room some ten or fifteen minutes, a shot was heard, followed by an interval, then by eight more shots. As the last shots were fired, the back of the defendant appeared through the glass door between the bar and the billiard room, disappeared for a moment, then defendant emerged into the front of the building. He approached the bar and asked for a glass of beer, which was refused him. He then said no one could hit him with a cue and attempted to pass his revolver to McLaughlin, who refused to receive it. He then made some attempt to reload the revolver, but when some bystander remarked to him he better get rid of the shells he stepped to the curb in front of the Smoke Shop and threw several into the street. He then returned to the barroom, where he awaited the arrival of a deputy sheriff, and, on being informed he was an officer, surrendered himself to him. Investigation showed that the deceased had been killed by gun wounds. An autopsy revealed that the deceased was struck by seven bullets, three entering from the front and four from the rear and two of the wounds were, according to the autopsy surgeon, fired into the body of the deceased as he lay upon the floor. It was the claim of the accused that he fired in self-defense. Upon entering the billiard room at the rear of the bar, defendant testified that Lopez seized him and accused him of being responsible for an attack upon a former woman friend of his. This accusation was denied by defendant, and, after some further conversation, Lopez again renewed his charge and seized McCurdy and thrust him against the wall. While McCurdy was recovering his balance, the deceased seized a billiard cue and rushed at defendant, who attempted to flee out of the doors leading from the billiard room, but finding himself cut off from escape in each instance, to avoid being struck by the cue in the hands of Lopez, he drew his revolver, so he avers, and fired. Defendant testified he could recall none of the details of the shooting, his mind becoming a blank after firing the first shot.

[1-3] The first assignment of error by appellant is that the evidence was insufficient to sustain the verdict. It is, of course, elementary that the commission of the homicide by the defendant being established, the burden of proving circumstances in mitigation or that justify or excuse devolves upon the accused, unless the proof on the part of the prosecution tends to show that the crime committed amounted only to manslaughter or that the defendant was justified or excusable. Pen. Code, § 1105. Here not only was the killing proved, but was admitted, and from the verdict it is evident the jury did not credit defendant's claim of self-defense. It may have been they were not convinced of the truth of the version of defendant. Although only a thin wall board partition separated defendant from the bar, where several of his companions were, he made no outcry. He claimed to have remembered nothing after firing the first shot, although he walked out from the rear room after the shooting and asked for a drink and remarked that he had just shot the deceased, who had attempted to strike him with a billiard cue. He told the night watchman to whom he surrendered his pistol and who placed him under arrest that he had shot a man; he asked one of his acquaintances to take care of his automobile and refused to make any statement to the sheriff until he had consulted an attorney. The jury also visited the pool room and examined the physical facts there present. Conceding that defendant may have fired the first shot in self-defense, disabling his assailant, he was not justified in continuing firing or in fatally wounding the assail-

ant, particularly while the deceased lay upon the floor. People v. Barrett, 22 Cal. App. 780, 136 P. 520; People v. Brown, 62 Cal. App. 96, 216 P. 411. The testimony of the doctor was to the effect that two of the shots fired while the deceased lay upon the floor would of themselves have caused death. It was within the province of the jury to determine whether the defendant acted in self-defense and whether the means used were justified. Having resolved these issues against defendant upon conflicting evidence the verdict of the jury is conclusive.

[4] Defendant made an offer of proof in the absence of the jury, and the sustaining of an objection thereto is also cited as error. The offer was that a certain Indian woman, on an occasion two or three years prior to the homicide, while driving her automobile along a country road, was forced to stop by reason of lack of gasoline. On that occasion three men came to her assistance, one of whom attempted to commit an assault upon her. Her assailant she identified as being stationed at the radio station, which fact, as well as the attempted assault, she had communicated to deceased and to no one else. To this offer an objection was made that it was hearsay and too remote, and the objection was sustained. We believe the court was correct in its ruling. There was contained in the offer nothing to prove that defendant ever had threatened to punish the attacker, or that he was particularly interested in the young woman assaulted, or any proof of any threat or declaration of deceased in regard thereto. As confirmation of the conversation between defendant and the deceased upon the subject of the attack appellant claims that the victim had never mentioned the fact to any one other than deceased and therefore it is argued that defendant must have learned of the incident from deceased in the billiard room of the Smoke Shop, but the fact that neither the woman nor deceased had discussed the matter with others does not negative the possibility that the three radio men who were involved had themselves related the incident and that defendant learned of the incident at the radio station. We do not believe the court erred in sustaining the objection to the offer of the testimony.

[5, 6] Appellant also insists that he was prevented from fully presenting to the jury his defense because the court erroneously limited the time for argument. The trial occupied something less than three days, the people calling seventeen witnesses in chief and six in rebuttal, the defense twelve. The attorney for the defendant addressed the jury approximately five hours. The district attorney used about three hours. As the hour for adjournment approached on Friday evening, the attorney for the defendant was still arguing. The court then stated he wanted the case in the hands of the jury by noon of the following day and he wanted the case submitted to the jury Saturday while the facts were fresher in their minds than they would be if the matter were continued until Monday, and suggested a night session, which the attorney for the appellant refused upon the ground he was unable to continue longer with the argument that evening. He said that he would probably require an hour the following morning, but the court limited him to forty-five minutes and at the end of the forty-five minutes argument for defendant was ended. We do not believe that the court abused its discretion in this matter. There is no showing that any matters had not been argued which counsel wished to discuss before the jury and we believe the limitation was reasonable. While the constitutional right of the defendant to be heard in his defense includes a right of complete discussion of all the matters of law and evidence embraced by the case, there is nothing to prevent the court from limiting the time for argument, providing it does not thereby deprive the defendant of the opportunity for a full defense. 8 Cal. Jur. 261; People v. Prewett, 40 Cal. App. 416, 180 P. 844. We find no abuse of discretion under the circumstances here present.

We have examined the entire record and have carefully noted the objections urged by appellant, having in mind the seriousness of the charge from the point of view of the appellant, but can find no error in the record and for that reason the judgment and the order should be affirmed and it is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

PEOPLE v. McKINLEY.*

Cr. 2518.

District Court of Appeal, Second District, Division 2, California.

Aug. 27, 1934.

Hearing Granted by Supreme Court Sept. 24, 1934.

Criminal law ⇐1104(6)

Appellate court had no jurisdiction to hear appeal in which statement of grounds of appeal and demand for phonographic transcript were filed more than five days after notice of appeal was presented and filed (Rules of Supreme Court and District Courts of Appeal, rule 2, § 7).

Appeal from Superior Court, City and County of Los Angeles; Robert H. Scott, Judge.

James F. McKinley was convicted of the offense of petty theft, with a prior conviction, and he appeals.

Appeal dismissed, and judgment affirmed.

Edwin F. Franke, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SCHMIDT, Justice pro tem.

This is an appeal from a conviction in the trial court of the offense of two counts of petty theft, with a prior conviction.

In respondent's brief the Attorney General calls attention to the fact that this court is without jurisdiction to hear the appeal for the reason that the clerk's transcript shows that notice of appeal was presented and filed on the 23d day of January, 1934, and that the statement of the grounds of appeal and demand for a phonographic transcript were filed on January 30, 1934, more than five days thereafter.

This same question was presented to the Supreme Court and decided in People v. Lewis & Crist, 219 Cal. 410, at page 413, 27 P.(2d) 73, 74, where it is stated: "The requirements as to the time for filing notices of appeal are mandatory and jurisdictional in both civil and criminal actions" (citing authorities); and at page 414 of 219 Cal., 27 P.(2d) 73, 74: "Not only must the notice of appeal be filed in time, but a defendant who appeals from a judgment of conviction must, within five days after giving notice of appeal, file with the clerk and present to the trial court an application stating in general terms the grounds of his appeal and the points upon which he relies, and must designate the portions of the reporter's notes necessary to be transcribed. Where the defendant fails to conform with this rule (rule II, § 7, Rules of Supreme Court and District Courts of Appeal), the appellate court is without jurisdiction to consider his appeal."

The appeal must therefore be dismissed, and the judgment affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 625

JAMES A. CLAY & CO. v. SHAFER et al.

Civ. 8620.

District Court of Appeal, Second District, Division 2, California.

Sept. 12, 1934.

Judgment ⇐176

Where defendant filed proposed verified answer at time of filing motion to set aside first default, ordering second default for failure to file answer *held* within discretion of court.

Appeal from Superior Court, Los Angeles County; Isaac Pacht and H. Parker Wood, Judges.

Action by James A. Clay & Co., against Milton Shafer and others. From an adverse judgment, the named defendant appeals.

Affirmed.

William G. Kenney and John E. Glover, both of Los Angeles, for appellant.

Wilbert C. Hamilton, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff brought this action against defendant Shafer and others for money paid to them for bonds which were alleged to be false, fraudulent, and worthless. No appearance being made within the statutory time after service of summons, the default of defendant Shafer was entered. Upon his motion, accompanied by proposed answer, the

lower court set aside the default. Thereafter no answer was filed, and at the expiration of four weeks the court ordered default of said defendant. The latter again moved to set aside the default, and the motion was granted on conditions with which said defendant has not complied. From judgment entered on the second default, he has appealed.

Appellant's sole contention is that the second default was illegal and void, that, because he had filed a proposed verified answer at the time he filed his motion to set aside the first default, he was not required to file another answer, and that the court could not legally enter a second default under the circumstances. The two following cases cited by appellant do not support this contention:

In Merchants' Ad Sign Co. v. Los Angeles Bill Posting Co., 128 Cal. 619, 61 P. 277, the question before the court was whether the defendants had the right to answer as a necessary consequence of the order setting aside their default and the court held that they did. In Berry v. Crowell, 55 Cal. App. 534, 203 P. 835, 836, the court merely said that the clerk should not have entered a second default "in the face of a plain record showing an answer on file," but it is not intimated that the answer was not properly filed following the order setting aside the first default. As the court stated in the latter case: "It has been held so often that the matter of setting aside defaults rests within the sound discretion of a trial judge that we need not refer to the cases."

No abuse of discretion having been shown in this case, the judgment is affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 490

PEOPLE v. FIERRO.

Cr. 2574.

District Court of Appeal, Second District, Division 2, California.

Aug. 29, 1934.

Larceny ⇐55

Evidence of defendant's possession of stolen automobile and circumstances indicating his and codefendant's plan and intent to steal automobiles *held* sufficient to support conviction of theft.

Appeal from Superior Court, City and County of Los Angeles; William S. Baird, Judge.

Albert Fierro was convicted of theft of an automobile, and he appeals.

Affirmed.

J. Robert Arkush and Eugene E. Sax, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Appellant and his codefendant, Tellez, were charged with the theft of a Ford automobile in count 1 of an information, on which count they were found guilty in a trial before the court without a jury. From the judgment of conviction on such count as well as an admitted prior conviction, Fierro has appealed.

It is urged: (1) That the court erred in denying appellant's motion to dismiss, made at the close of the People's case; (2) that the evidence does not show that appellant had possession of the stolen automobile; (3) that it is insufficient to establish his guilt beyond a reasonable doubt; and (4) that it is so improbable and incredible as to amount to no evidence at all.

It hardly needs the citation of authority to show that no error was committed in denying the motion to dismiss, if in fact there was evidence supporting the judgment; and the other objections raised go to the same real objection.

The evidence shows that the automobile in question belonged to Thomas H. Linden, who loaned it to his brother James, who in turn parked it on Spring street, in Los Angeles, about 300 feet south of Seventh street, at about 8:20 in the evening. Returning to the place a few minutes later, Linden found the car had been stolen. At about 10 o'clock p. m. of the same day Police Officers Shelton and Simpkins were patrolling the district around Eighth and Santee streets, and on the north side of Eighth near Santee they observed Tellez getting into a Hudson automobile while appellant was standing by the hood on the left side of the car. Tellez started the Hudson and raced the motor "for a little bit, at which time Mr. Fierro there turned around and walked across 8th street, and right opposite where the Hudson was parked, and cranked a Motel T Ford coupe [afterwards shown to be Linden's], and got into it." About that time Tellez put the Hudson in gear and pulled out from the curb "about 8

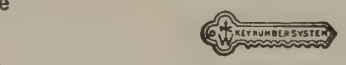
or 10 feet," where the motor sputtered and died, the car rolling back into approximately its original position. When the Hudson's motor stopped appellant got out of the Ford, leaving the motor running, and went back across the street, "raised up the hood of the [Hudson] car and tinkered with it a little bit, and Tellez continued to grind on the starter, and they tried it for a few minutes, to get it started again, and were unsuccessful." Tellez then got out of the Hudson and "they both walked east on Santa Fe to an Essex coach. * * * Fierro tried the door handles of that car and was unable to get into it." Both then walked over to the Ford and got into it. The officers pursued them "until they crossed at 12th street, and we pulled alongside of them and asked them to get over to the curb; they hesitated like they were going to stop, and then started up again, and we chased them west on 12th about half a block and crowded them into the curb," where they were arrested. Officer Shelton testified that when he later that evening examined the Hudson car he found the hooks on both sides of the hood "down," and gasoline running out of the vacuum tank, and that he closed the valve.

Appellant told the officers at the police station that he had served a year and a half in San Quentin "on a charge of grand theft, auto." The owner of the Hudson coach testified that he parked it near Eighth and Santee streets about 9:30 p. m. and "took the rotor out and shut the vacuum tank," and that when he returned he found another rotor "in its place." No one saw either defendant take the Ford from Spring street. Tellez testified that he borrowed it from a friend called Joe, whose last name he did not know, at a dance hall between Eleventh and Twelth streets at Olive, "about 25, or 20 to nine, and went up to a fellow's house," where he "stayed about 25 or 30 minutes" and then picked up appellant and came down town and parked the car "over on Eighth, near Santee." A sister of appellant testified that Tellez came to their house "about 9 o'clock or 10 minutes after," and that appellant and Tellez left the house "about 9:30" that evening. Again, she said: "It must have been about 10 o'clock." Tellez also told the arresting officers that he obtained the car at about 8 p. m., which was before the driver of the machine had parked it, and that he parked it at Eighth and Santee "some place," "just a little after 9:00." He testified that he had known appellant "for a long time, in Texas," and denied that either of them had a rotor with them on the occasion in question or that either put one in the Hudson. Tellez further denied that either of the two defendants went from the Hudson and tried to open the door of an Essex coach. It is apparent from the record that Tellez had no car of his own.

In our opinion under the evidence the court had a right to conclude that the two men were jointly engaged that evening in a plan to steal automobiles, and that the possession of the Ford was a joint possession pursuant to their plan to steal cars. While possession of stolen property alone is not sufficient evidence to justify a conviction of grand theft, the evidence of possession shown here, with the other circumstances indicating plan and intent to commit similar acts, in our opinion sufficiently supports the judgment rendered. Nor do we find anything that is inherently improbable or incredible in the People's evidence.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.



140 Cal.App. 291

PEOPLE v. LOVELESS.

Cr. 1382.

District Court of Appeal, Third District, California.

Aug. 2, 1934.

1. Criminal law ⇐1216(2)

Where one on parole from state prison for prior felony was convicted of robbery, trial court did not err in postponing commencement of sentence for robbery until completion of term under which parole was granted (Pen. Code, § 669).

2. Criminal law ⇐942(1)

Evidence designed to contradict witness is not justification for new trial.

3. Criminal law ⇐941(1)

Newly discovered evidence which is merely cumulative is not sufficient ground for new trial.

4. Criminal law ⇐942(1)

In robbery prosecution, newly discovered evidence fixing time certain automobile was stored in certain garage *held* not to warrant new trial, where such evidence would be offered to contradict testimony of state's wit-

ness and would not be directly contradictory thereof.

5. Criminal law ⇐938(1), 1156(3)

Motion for new trial is addressed to trial court's discretion, and clear, unmistakable abuse must be shown before appellate court will disturb findings, particularly where application is based on newly discovered evidence.

6. Criminal law ⇐1169(2)
Witnesses ⇐268(1)

In robbery prosecution, cross-examination of defense witness whether her mother requested third person to be witness for defendant *held* not error, and harmless, where mother had previously testified that she had asked such third person to be witness for defendant.

7. Witnesses ⇐268(1)

In robbery prosecution, cross-examination of defense witness as to how often she had seen defendant and if any other man came to her mother's place with defendant *held* not error, in view of witnesses' other testimony.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Walter Loveless was convicted of robbery, and he appeals.

Affirmed.

Clifford A. Russell and Archibald M. Mull, Jr., both of Sacramento, and Ivan Sperbeck, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant, with another, was charged with robbery. Entering a plea of not guilty, he was duly tried and convicted on two counts of robbery of the first degree and sentenced to state prison. He now appeals from the order denying his motion for a new trial and from the judgment and sentence.

[1] At the time of the perpetration of the robbery here in question, appellant was then on parole from the state prison for a prior felony, and the first point urged by him in this appeal is that the trial court erred in postponing the commencement of the sentence for robbery until the completion of the term under which the parole was granted; appellant contending that the court was without authority so to do. In this appellant is in error. Section 669 of the Penal Code provides: "When any person is convicted of two or more crimes, the judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be."

In this case defendant having been convicted of two crimes, first, the crime for which he was on parole, and secondly, the conviction of the robbery here in question, it became the duty of the court under the section just quoted to determine whether the sentences should be served consecutively or concurrently. In Re Daniels, 110 Cal. App. 638, 294 P. 735, 736, the court, in discussing section 669 of the Penal Code, said: "Under the provisions of that statute, if it has any application at all to a misdemeanor case, it was the duty of the justice of the peace who pronounced judgment in the misdemeanor case to have sentenced the petitioner so that his imprisonment would commence 'at the termination of the first term of imprisonment' for the felony charge. If the justice was not aware of the fact that the prisoner was then subject to a judgment of commitment in the state prison, it would be the duty of the petitioner to inform the court of that fact. The accused may not remain silent at the time of his second sentence respecting his status as a prisoner and then claim the benefit of his own secrecy."

Appellant cites several cases which he advances as being in support of his contention, but they were rendered prior to the amendment of section 669 of the Penal Code in 1931 (St. 1931, p. 1052), and are of no assistance in the present instance.

[2-4] Appellant moved also for a new trial upon the ground of newly discovered evidence; such evidence having to do with fixing the time a certain Ford coach was stored in a garage in Grass Valley.

During the trial the night man of the garage had been called as a witness for the people, and had testified that on the night of the perpetration of the robbery he was on duty at the garage from 9 p. m. until 8 a. m. the next morning. He made up the list of cars in the garage that night, which list showed that a certain Ford coach was in the

garage, but the witness could not fix the time of its arrival except as being some time between 9 o'clock p. m. and the early hours of the morning. On cross-examination he did testify, however, he thought it came in about an hour after he went on duty. He also identified one Ashton, whom the prosecution charged was the companion of appellant at the time of, and took part in, the robbery in question, as the man who drove the coach in the garage that night. Appellant, in support of his application for a new trial, submitted two affidavits that between the hours of 9 o'clock and 12 o'clock Ashton was with affiants in Sacramento. Appellant also submitted an affidavit of the man who appeared by the list of cars to have been the next after the coach to have stored his car that night, and he fixed the time of his arrival at about 12 o'clock.

It is apparent that the affidavits offered are not directly contradictory of the testimony of the floor man of the garage, he fixing the time of the arrival of the Ford coach at between 9 o'clock and the early hours of the morning, and the affidavits placed Ashton in Sacramento at a time between 9 and 12, and the other affiant fixed the time of the arrival of his car at *about* 12 o'clock. Evidence which is designed to contradict a witness is not justification of a new trial. People v. Anthony, 56 Cal. 397; People v. Weber, 149 Cal. 325, 86 P. 671; 8 Cal. Jur. 431. Another affidavit submitted on another point was admittedly cumulative, but newly discovered evidence which is merely cumulative in character is not of itself sufficient ground for a new trial.

[5] In considering a motion for new trial, it must be kept in mind that such a motion is addressed to the sound legal discretion of the trial court. A clear and unmistakable abuse of such discretion must be shown before an appellate court will disturb the findings, and this is particularly true where the application is based upon the ground of newly discovered evidence. 8 Cal. Jur. 442, and cases there cited.

Therefore it appears that, since the proposed evidence submitted by the affidavits would be offered to contradict the testimony of the garage man, and which, too, as a matter of fact would not be directly contradictory thereof, the court was justified in denying the order for new trial.

[6] It is next urged by appellant that the court erred in admitting certain evidence. One Dolores Bisphan, a witness called by the appellant, was asked on cross-examination whether or not her mother, Alice Bisphan, had requested Tony Belaski to be a witness for the defendant. This evidence was offered to show bias on the part of Alice Bisphan and admitted over objection. We can see no error in this testimony, but, even if so, it was harmless, for Alice Bisphan herself, while on the witness stand, had previously testified that she had had a conversation with Tony Belaski and others and had asked them if they would be witnesses for the defendant.

[7] Another citation of error is based upon a question asked of the same witness on cross-examination when the court permitted the district attorney to ask her if she had seen appellant on other occasions than that to which she had testified on direct examination, and, if so, how often and also if she had ever seen any other man come to her mother's place with the appellant. The objection to this was that it was immaterial and not proper cross-examination; appellant claiming that on direct examination nothing was brought out as to how many times appellant had visited her mother's home nor if his associate Ashton had ever been there. We find no error in the cross-examination. The witness had testified that appellant was in her mother's apartment on a certain night, and when, on cross-examination, she was asked if anybody ever came to her mother's apartment with the appellant, she replied that Ashton did once. We believe it was entirely proper to go into all the circumstances surrounding the calls made by appellant at her mother's apartment. Appellant argues that the testimony and other of a similar character was adduced to show that appellant and Ashton were constantly in one another's company. We fail, however, to see where such showing is made or in what way the evidence objected to was prejudicial.

The judgment and the order are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

CRAWFORD v. SOUTHERN PACIFIC CO.*

Civ. 9219.

District Court of Appeal, First District, Division 2, California.

Aug. 14, 1934.

Rehearing Denied Sept. 13, 1934.

Hearing Granted by Supreme Court Oct. 11, 1934.

1. Appeal and error ⇐930(1)

On appeal from judgment on verdict for plaintiff, appellate court must consider only evidence most favorable to plaintiff.

2. Railroads ⇐328(5)

Truck driver, driving ahead on failing to see flagman at railroad crossing, with knowledge that view of approaching trains was obstructed by box cars, and increasing speed to unlawful rate without taking further precautions, so that he could not avoid collision with engine after seeing on-coming train, *held* contributorily negligent as matter of law (St. 1931, p. 2120, § 113).

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by Claude L. Crawford against the Southern Pacific Company and others. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

Harold D. Durst, of Redwood City, and Roy G. Hillebrand, of San Francisco, for appellants.

Fred A. Watkins and Edmund J. Holl, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff brought this action against defendants seeking to recover damages for personal injuries received when a truck driven by plaintiff collided with a freight train of the defendant company. The cause was tried by the court sitting with a jury. Defendants' motion for nonsuit and defendants' motion for a directed verdict were duly made and denied. The jury rendered a verdict in favor of plaintiff in the sum of $15,000. Defendants' motion for judgment notwithstanding the verdict was denied, and, from the judgment entered upon the verdict, defendants appeal.

The main contention of appellants on this appeal is that respondent was guilty of contributory negligence as a matter of law, and, as we believe this issue to be determinative of this litigation, we need not discuss the other points urged by appellants.

The accident occurred at 2:40 p. m. on the afternoon of November 14, 1931, at a point where the double tracks of the defendant company cross Third street, a short distance north of Sixteenth street in the city and county of San Francisco. Third street runs in a general northerly and southerly direction. The ordinary type of railroad crossing signs were located near the tracks at either side of the highway. On the west side of the highway and north of the tracks stood a flagman's shanty and other structures.

Plaintiff was driving an automobile truck loaded with 300 boxes of apples in a northerly direction along Third street. He was following another truck at a distance of about 150 feet. The last-mentioned truck had cleared the tracks, but, as respondent approached, he collided with an engine hauling three box cars as said engine was proceeding in a westerly direction across Third street on the northerly track.

[1] The evidence was conflicting in many respects, but on this appeal we must consider only the evidence most favorable to respondent. We will assume, therefore, that no flagman was present at the crossing and that the bell on the engine was not rung, for, despite the positive testimony of numerous witnesses who stated that the flagman was present and that the bell was ringing, respondent testified that he saw no flagman and heard no bell. We will further assume that a line of box cars was located on the southerly track on the easterly side of and extending into Third street, disregarding the conflict with respect to the exact number and location of said cars. According to respondent's testimony, said box cars obstructed his view of the approaching train on the northerly track until he was in close proximity to the crossing.

[2] We may now consider the manner in which respondent approached and proceeded onto this crossing. In his complaint he alleged that he was familiar with the crossing "and was aware of the fact that a flagman was stationed at said intersection and had become accustomed to rely upon the signal of said flagman or flagmen that a train was about to cross said Third street, and to proceed across said railroad tracks when said flagmen omitted to signal the approach of a train." On the trial respondent testified that, when he was 150 feet from the crossing, he looked and saw no flagman and "presumed that the crossing was clear." Throughout his testimony are found similar expressions

such as "I presumed the road was clear" and "I figured the coast was clear." There was a conflict as to respondent's speed, but, taking his own testimony, he stated that before he crossed Sixteenth street he slowed down "and it was between 15, around 15 miles per hour, I could not have been going much faster than that, when I shifted into third and picked up a little speed before the collision, because when I went into third, I could roll along and I had my hand on the gear, fixing to come back into high to keep rolling, I could have almost come back into high when I seen the train. Then I applied my brakes with my emergency and applied my brakes standing on my clutch and brake, and of course that slowed my speed down, but about how fast I was going I could not say." He stated that the point where he slowed down to about 15 miles per hour was "150 feet or better" from the scene of the accident. When asked if he gained any speed thereafter, he said, "I picked up a little speed, you are bound to when you shift and get into a lower gear and give it the gas, because I thought the way was open, was clear, and then I seen the train, when I seen the train I was about to come back into high gear, when I saw the train and I was running—it might have been 18 miles because I was running and possibly I could go back into high gear when I saw the train." He indicated on a diagram his exact position when he saw the train, and was then asked the following questions and gave the following answers:

"Q. And that is the time you were going approximately 18 miles per hour? A. Yes, sir.

"Q. At that particular point did you have any view up or down this track for a distance of 400 feet? A. Not to my right for the box cars had my view shut off, I had not passed the box cars."

From respondent's testimony it appears he was somewhere between 18 and 25 feet, "probably 20 or 25 feet," from the northerly track when he first saw the train. He estimated the speed of the train at 15 miles per hour. The train and truck collided; the front of the truck striking the left front corner of the engine. As respondent expressed it, "I swung my truck just a little to the left before we hit, just swayed the front end, turned it just a little, to give it more of a side sweep than a straight hit," and the truck and train struck "corner for corner." The front of the truck was demolished, while the damage to the engine extended from the front thereof back to the steam cylinder on the left side. Neither the train nor the truck traveled off the highway after the impact. The engine was derailed and the truck burst into flames. One of respondent's own witnesses testified that the skid marks made by the truck extended 30 feet back from the track. On the second day of the trial respondent was recalled to the stand and gave further testimony indicating that his speed was "about 15 miles an hour when he was 50 feet from the tracks." This testimony can hardly be said to create a conflict with the material testimony of respondent previously given in which he stated that he had slowed down to about 15 miles an hour and had then picked up a little speed before the collision and was going about 18 miles per hour when he first saw the train. Respondent also testified that, if he was going 15 miles per hour under the conditions prevailing, he "could not probably stop within 30 or 35 feet."

The general rules applicable to accidents at railroad crossings have been well summarized in the recent case of Koster v. Southern Pacific Company, 207 Cal. 753, 279 P. 788. Respondent cites other authorities dealing with so-called guarded crossing accidents, and contends that under the circumstances before us the issue of contributory negligence resolved itself into a question of fact for the jury. With this contention we cannot agree. Respondent knew that he was approaching a railroad crossing and that his view of approaching trains was obstructed by the box cars on the southerly track. He blindly relied upon the alleged absence of the flagman, taking it for granted that the "coast was clear." Without taking any further precautions of any kind, he increased his speed to a point in excess of that permitted by law (California Vehicle Act, § 113 [St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120]), and by reason of said conduct, he was unable to avoid the accident after coming to a point where he could see the on-coming train. In other words, upon failing to see a flagman, respondent drove ahead without exercising any care whatever for his own safety. Under these circumstances we believe that a reversal is required under the authority of Koch v. Southern California Railway Company, 148 Cal. 677, 84 P. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795. See, also, Southern Pacific Company v. Day (C. C. A.) 38 F.(2d) 958. The Koch Case involved a crossing guarded by safety gates, which gates failed to operate at the time of the accident. In sustaining a directed verdict in favor of the defendant, the court there said on page 680 of 148 Cal., 84 P. 176, 177: "A railway crossing is, itself, a place of danger and is an effectual warning of danger, a

warning which must always be heeded, and the exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company, itself, to exercise reasonable care. (Citing cases.) Nor is it the law that when a railroad company adopts safety gates or any other appliance for the protection of the public, the public is thereby absolved from all duty of taking care of itself. A person is still required to exercise due and ordinary care, and while the quantum of care which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates, themselves, are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions, as did the plaintiff in this instance. (Citing cases.)" Again, on page 681 of 148 Cal., 84 P. 176, 178, in speaking of plaintiff's reliance upon defendant's failure to operate the gates at the time in question, the court said: "He cannot rely wholly upon them, and cannot recover without showing more, as to his own conduct, than that he so relied."

The cases cited by respondent are all clearly distinguishable. In Marini v. Southern Pacific Company, 201 Cal. 392, 257 P. 74, the court distinguishes the Koch Case upon the ground that the plaintiff stopped to shift gears and was proceeding cautiously over the tracks when the accident occurred. Again, in Gregg v. Western Pacific Railway Company, 193 Cal. 212, 223 P. 553, the Koch Case was distinguished upon several grounds, among which were that plaintiff had slowed his speed to 5 or 6 miles per hour and was looking and listening as he approached the crossing immediately behind an electric car, which electric car crossed after the conductor had made an investigation for approaching trains. In both Ogburn v. Atchison, etc., Ry. Co., 110 Cal. 587, 294 P. 491, and Cain v. Davis, 55 Cal. App. 565, 203 P. 807, the plaintiff actually stopped in close proximity to the tracks before proceeding across. In Robbins v. Southern Pacific Company, 102 Cal. App. 744, 283 P. 850, the deceased approached the tracks at from 4 to 6 miles per hour, "so slowly indeed that the watchman testified that he thought the truck had stopped." In other words, none of these authorities hold that the adoption of safety devices renders the railroad company absolutely liable for any injury which may occur to travelers on the highway by reason of the failure of such safety devices to function nor that a traveler may blindly rely upon such devices and run upon the tracks without exercising any care whatever for his own safety. In each of said cases, there was evidence to show the driver was exercising some care and was not relying wholly upon the safety devices of the railroad company. A reading of these cases cited by respondent shows that they are entirely in harmony with the authorities above cited, and, while the application of the rules governing the conduct at railroad crossings may present difficulties under certain sets of facts, we find no such difficulty in applying these rules to the facts of the present case.

In justice to the trial judge, it may be stated that he expressed some doubt upon the question here discussed when ruling upon appellants' motions in the trial court, and that he made an order purporting to grant a new trial to appellants, but failed to make said order within the time prescribed by law. In our opinion, appellants' motion for a directed verdict and appellants' motion for judgment notwithstanding the verdict should have been granted.

The judgment is reversed, with directions to the trial court to enter judgment in favor of the defendants.

We concur: NOURSE, P. J.; STURTEVANT, J.

GREENBERG v. DU BAIN REALTY CORPORATION et al. *

Civ. 9341.

District Court of Appeal, First District, Division 2, California.

Aug. 27, 1934.

As Modified Sept. 12, 1934.

1. Pleading ⇨192(1)

Demurrer was properly sustained where good on any ground.

2. Vendor and purchaser ⇨123

Where contract for purchase of lots in city subdivision provided that seller was not liable for promises or representations not set forth in contract, complaint for rescission of contract for alleged failure to improve subdivision in accordance with such promises, brought more than eight years after execution of contract and at time purchaser was

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 42 P.2d 628.

in default, *held* demurrable on grounds of purchaser's laches and default at time of attempted rescission and stipulation in contract as to representations.

3. Pleading ⇨49

Where cause of action is joined with one containing specific allegations of identical transaction upon which both causes are based, nature of action is determined by specific allegations.

4. Appeal and error ⇨1026

Judgment appealed from was required to be affirmed, unless entire record disclosed that error complained of resulted in miscarriage of justice.

5. Appeal and error ⇨1040(4)

Sustaining demurrer to cause of action in assumpsit for money had and received, if error, *held* harmless, where such cause of action was based on same facts as alleged in cause of action for rescission, which was also demurrable.

6. Pleading ⇨8(15)

When cause of action is laid in fraud, pleader may not rest in generalities and conclusions.

7. Pleading ⇨8(15)

Complaint alleging that plaintiff was induced to buy lots in subdivision in reliance on oral and written representations that subdivision would be improved, which did not indicate which representations were oral and which were plaintiff's conclusions from written exhibits attached to complaint, or by whom representations were made, *held* insufficient as stating generalities and conclusions.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Joseph Greenberg against the Du Bain Realty Corporation and others. From a judgment sustaining a demurrer to the complaint without leave to amend, the plaintiff appeals.

Affirmed.

Benjamin Chipkin, of Los Angeles, for appellant.

Joseph Musgrove, Fred O. McGirr, and Thomas H. Cannan, all of Los Angeles, for respondents.

NOURSE, Presiding Justice.

The appeal herein is taken from a judgment rendered by the lower court after sustaining the demurrer to appellant's (Greenberg's) third amended complaint, which demurrer was sustained without leave to amend after appellant had stated to the court that, if sustained, he would request that it be without leave to amend.

The complaint is framed in three causes of action. The first cause seeks rescission of two written contracts for failure of consideration. In paragraph VII it is alleged that on May 14, 1924, two written contracts dated the 8th day of October, 1923, were entered into between the Ambassador Park Syndicate through its agents, Du Bain Realty Corporation and Stoll & Boyd, as first parties, and plaintiff as second party, whereby the first party for a valuable consideration agreed to sell and convey to plaintiff, and plaintiff agreed to buy from first party, two lots in a Los Angeles subdivision; that on October 8, 1923, a receipt was given to plaintiff by the selling agents, which receipt (Exhibit A) recited, among other things: "This sale is subject to selling agents' approval conditions, restrictions, reservations and taxes as set forth in the company's regular printed contract," and "Verbal Agreements are not binding on Either Party. * * *" Contracts of sale for each lot for the sum of $1,500 each were duly executed, and these are attached as exhibits to the complaint.

By paragraph VIII it is alleged that between October 8, 1923, and October 7, 1931, plaintiff paid, pursuant to said contracts, on lot 368, principal, $1,267.83; interest, $403.15; taxes, $102.97; total $1,773.95; and on lot 373, principal, $1,145.54; interest, $350.10; taxes, $102.97; total, $1,598.61—total for the two lots being $3,372.56.

By paragraph X it is alleged: "That the consideration for entering into said contracts were the agreements, both written and oral, of the defendants Ambassador Park Syndicate, their agents and servants, and more specifically upon the agreements and representations of O. O. Boyd and H. A. Stoll, agents and salesmen for the Du Bain Realty Corp., which corporation in turn was acting for the Ambassador Park Syndicate; that copies of said agreements as set forth in defendants' contracts, prospectus, and newspaper advertisements, are set out and annexed hereto and made a part of this complaint and marked 'Exhibits A-B-C-E-F-G-H-I-J-K'; that said agreements were that the party of the first part will put in paved streets of rock and oil to a depth of five (5") inches, cement sidewalks, gutters, curbs, gas, electricity, water, drainage system, electroliers, shade and ornamental trees, free of cost and without as-

sessment of any kind to the said party of the second part, plaintiff herein."

The plaintiff further alleges that, but for the agreement to put in the improvements as set out in paragraph X, both oral and in writing, plaintiff would not have entered into the agreements aforementioned; that plaintiff entered into said agreements in reliance and in consideration of a full and faithful performance of said condition by the defendants herein within a reasonable amount of time; that plaintiff herein, and more particularly in November, 1931, inspected the said real property, and found same to be in the same condition as in October, 1923, except as to poor and broken curbing, and sidewalks overgrown with weeds; that on or about the first week in November, 1931, plaintiff made demand upon defendants to put in the aforementioned improvements and that the defendants then and there refused, and since then have and still refuse, so to do; that said real property is of no use to plaintiff without the improvements as herein set forth; and that the only improvements that have been put in are gas, water, and electricity; that on the 9th day of February, 1932, plaintiff notified defendants in writing and by personal presentation of his rescission of said agreements of date October 8, 1923.

From the contracts of sale attached to the complaints it appears that the full purchase price was due in May, 1927, four years prior to the notice of rescission. But installments were long past due at the time rescission was attempted. It also appears that each contract contained this stipulation: "It is understood and agreed that the Buyer is of legal age and that the property above described has been inspected by the Buyer or the Buyer's duly authorized agent; that the same is and has been purchased by the said Buyer as a result of said inspection and not upon representation made by said Seller or any selling agent, and said Buyer hereby expressly waives any and all claims for damages by reason of any cancellation or foreclosure of this contract because of any representation made by any selling agent or person whatsoever other than is contained in this contract, and the said Seller shall not be responsible or liable for any inducement, promise, representation, agreement, condition or stipulation not set forth herein."

[1, 2] As this cause sounds in rescission, the demurrer was properly sustained on at least three grounds—the manifest laches of plaintiff; his admitted default at the time of his attempted rescission; and the stipulation in the contract waiving all representations made by agents not incorporated in the contract. If the demurrer was good on any ground, the order must be sustained. We had occasion to consider the last ground mentioned in the recent case of Clancy v. Becker-Arbuckle-Wright Corp., 29 P.(2d) 868, 869, where we said: "We will first direct our attention to the question of the propriety of the trial court's ruling granting the nonsuit in favor of the respondent owner. The contract entered into by the appellant and the respondent owner contained the following provisions: 'It is understood that this instrument contains the entire agreement between the parties, and the Buyer agrees that the Seller has not, and that no agent of the Seller has made any representation or promise with respect to, or affecting said property or this contract not expressly contained herein.' It should be stated that appellant's claim of fraud rests solely upon certain alleged oral promises and representations made by the representatives of the selling agent, none of which alleged promises or representations were contained in the written contract with the owner. In view of the above-mentioned provision of the contract we are of the opinion that appellant may not rely upon said alleged oral promises and representations of the representatives of the selling agent in an action against the owner. Gridley v. Tilson, 202 Cal. 748, 262 P. 322; Speck v. Wylie (Cal. App.) 29 P.(2d) 312; W. J. Latchford Co. v. Southern California Gas Co., 125 Cal. App. 112, 13 P.(2d) 871; Campbell v. Title Guarantee & Trust Co., 121 Cal. App. 374, 9 P.(2d) 264; Warner v. Taft Land & Development Co., 113 Cal. App. 71, 297 P. 969; Munn v. Earle C. Anthony, Inc., 36 Cal. App. 312, 171 P. 1082; Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 P. 906; Pease v. Fitzgerald, 31 Cal. App. 727, 161 P. 506. The provision in the contract here and the provision under consideration in Campbell v. Title Guarantee & Trust Co., supra, are identical. In an attempt to escape the effect of the foregoing authorities, appellant cites Simmons v. Ratterree Land Co., 217 Cal. 201, 17 P.(2d) 727, and states that the decision in Gridley v. Tilson, supra, has 'been definitely clarified' in the later decision. We find these authorities entirely in accord. The Supreme Court said on page 729 of 17 P.(2d) in the Simmons Case: 'The doctrine of Gridley v. Tilson, supra, would preclude plaintiff from relying on representations of the agents, contrary to the express provisions of the written contract, were it not for additional circumstances

which operate in plaintiff's favor.' The court then proceeded to point out the circumstance that the plaintiff in the Simmons Case was in legal effect coerced into the actual signing of the contract at a late hour in the evening without a full opportunity to consider it, and was compelled under the terms of the contract to permit the seller to retain the buyer's copy. It then distinguished the two cases by saying: 'In Gridley v. Tilson, supra, the fraud was not in the execution of the contract, but antecedent thereto and in the inducement of the contract.' "

Here it should be noted that the action is not for fraud in the execution of the contract, but is in rescission for failure of consideration; the "failure" being in alleged representations of subagents as to what the principal would do in addition to what he agreed to do in the contract. The soundness of the rule of the cited cases is illustrated here where the oral representations complained of were alleged to have been made more than eight years prior to the filing of the complaint and where the contracts were not executed until seven months after the negotiations had been completed and for a like period after the representations were alleged to have been made.

[3-5] The second cause of action is in assumpsit for money had and received. It is admittedly based on the same facts which are alleged in the first cause of action. Where such a cause is joined with one containing specific allegations of the identical transaction upon which both causes are based, the nature of the action is to be determined by the specific allegations. Powers v. Freeland, 114 Cal. App. 146, 150, 299 P. 736; Stone v. Superior Court, 214 Cal. 272, 275, 4 P.(2d) 777, 77 A. L. R. 743; Hamberger-Polhemus Co. v. Hind, Rolph & Co., 81 Cal. App. 624, 628, 254 P. 615. We are required to affirm a judgment appealed from unless the entire record discloses that the error complained of has resulted in a miscarriage of justice. Hence, though the ruling on the demurrer to the second cause of action might have been technical error, no injustice has been done, and a reversal would merely add expense and delay to the parties. If the plaintiff was unable in his third amended complaint to plead facts sufficient to constitute a cause of action, it is fair to assume that he would be unable to prove a case in assumpsit.

The third cause of action rests on the same allegations as those found in the first with additional allegations claiming fraud in the oral representations made by certain agents. The theory of this cause of action is that these oral representations entered into and became a part of the contract, thereby imposing on the vendor additional obligations to those stipulated in the contract.

[6, 7] All that is said in reference to the first cause of action is applicable to the third, but, in addition, this pleading is particularly objectionable under the special demurrer. When a cause of action is laid in fraud, a pleader may not rest in generalities and conclusions. Thus it is alleged in paragraph VI that plaintiff entered into the contracts in reliance upon the representations pleaded in paragraph IX of the first cause of action where it is alleged that plaintiff relied upon promises both written and oral and upon statements made in defendants' prospectus and newspaper advertisements, copies of which are attached to the complaint. It is then alleged that the defendants "agreed to put in paved streets of rock and oil to a depth of five inches, cement sidewalks and curbs, gutters, gas, electricity, water, drainage system, electroliers, and ornamental trees, free of cost. * * *" Turning to Exhibits E, F, G, H, and I, we find that the agents represented that the streets would be paved with oil and rock three and one-half to five inches thick. The complaint alleges that the streets were not paved with oil and rock five inches thick. In Exhibit K appears the statement that the paving was to be completed in December, 1923. In paragraph VIII it is alleged that none of the promised improvements was made except the installation of gas, water, and electricity. In paragraph VII it is alleged that plaintiff found poor and broken curbing and sidewalks covered with weeds. There is nothing in any of the written exhibits relating to electroliers and ornamental trees. It cannot be ascertained from the pleading which of the alleged representations were made orally, or by whom, and which were plaintiff's conclusions from the written exhibits.

Plaintiff was given three trials to plead his cause of action with sufficient clearness to enable defendants to meet the issues. The pleadings fail to disclose diligence on his part or excuse for his failure to rescind promptly or to complain of the alleged derelictions of the defendants.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

PEOPLE v. BROOKS.*

Cr. 170.

District Court of Appeal, Fourth District, California.

Aug. 15, 1934.

Rehearing Granted Aug. 23, 1934.

1. Criminal law ⇐1023(3)
Order denying probation is not appealable.

2. Assault and battery ⇐92
Evidence that defendant without cause struck another with his fist, and thereby caused a compound fracture of the jaw, *held* to support conviction for assault by means of force likely to produce great bodily injury.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

W. K. Brooks was convicted of assault upon the person of another by means of force likely to produce great bodily injury, and, from such conviction and an order denying probation, he appeals.

Appeal from order denying probation dismissed, and judgment affirmed.

J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

MARKS, Justice.

By an amended information filed by the district attorney of Tulare county, appellant was charged with the crime of an assault upon the person of another by means of force likely to produce great bodily injury. This appeal is from the judgment and from an order denying probation.

[1] An order denying probation is not an appealable order. People v. Freithofer, 103 Cal. App. 165, 284 P. 484. Furthermore, there is no such order in the record. The clerk's transcript contains an order granting appellant probation.

[2] Appellant maintains that the evidence does not support the judgment. The complaining witness testified that without cause or provocation appellant struck him with his clenched fist. The blow caused a compound fracture of the jaw. This evidence is sufficient to support the judgment. People v. Hinshaw, 194 Cal. 1, 227 P. 156; People v. Kimmerle, 90 Cal. App. 186, 265 P. 525.

Appellant urges that the trial court erred in overruling an objection of his counsel to a question propounded by the district attorney to a witness. The record shows that the ruling was proper and the evidence adduced was material and competent.

The attempted appeal from the order denying probation is dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

140 Cal.App. 480

PEOPLE v. BROOKS.

Cr. 170.

District Court of Appeal, Fourth District, California.

Aug. 24, 1934.

1. Criminal law ⇐1023(3)
Order denying probation is not appealable.

2. Criminal law ⇐1023(10), 1086(13)
Where there was no judgment in record and none was pronounced on defendant in prosecution for assault, attempted appeal therefrom would be dismissed.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

W. K. Brooks was convicted of assault, and he appeals.

Appeal dismissed.

On rehearing. For former opinion, see 35 P.(2d) 583.

J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

MARKS, Acting Presiding Justice.

By an amended information filed by the district attorney of Tulare county, appellant was charged with the crime of an assault upon the person of another by means of force likely to produce great bodily injury. This appeal is from the judgment, and from an order denying probation.

[1, 2] An order denying probation is not an appealable order. People v. Freithofer, 103

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 35 P.2d 583.

Cal. App. 165, 284 P. 484. Furthermore, there is no such order in the record. The clerk's transcript contains an order granting appellant probation.

The order granting probation contains the following: "The Court * * * doth order that the imposition of sentence herein be suspended for two years," with the terms of the probation particularly stated. There is no judgment in the record, and none was pronounced on appellant. Therefore the attempted appeal therefrom is not effectual for any purpose. People v. Von Eckartsberg, 133 Cal. App. 1, 23 P.(2d) 819.

The Attorney General has moved to dismiss the appeal on the ground that the order granting probation is not an appealable order. The soundness of this position is shown by the following cases: People v. Payne, 106 Cal. App. 609, 289 P. 909; People v. De Voe, 123 Cal. App. 233, 11 P.(2d) 26; People v. Patello, 125 Cal. App. 480, 13 P.(2d) 1068; People v. Noone, 132 Cal. App. 89, 22 P.(2d) 284; People v. Von Eckartsberg, supra.

The appeal is dismissed.

We concur: JENNINGS, J.; GRIFFIN, Justice pro tem.

140 Cal.App. 566

PEOPLE v. KOCALIS.

Cr. 2586.

District Court of Appeal, Second District, Division 2, California.

Sept. 4, 1934.

Rehearing Denied Sept. 18, 1934.

Hearing Denied by Supreme Court Oct. 4, 1934.

1. Kidnapping ⇐5

Evidence in trial for child stealing *held* sufficient to justify jurors' conclusion that defendant took and enticed children with intent to detain and conceal them from their parents or guardians, though she released them after accomplishing felonious purpose (Pen. Code, § 278).

2. Criminal law ⇐507(7)

Testimony of prosecuting witness of tender years as to defendant's commission of lewd acts need not be corroborated (Pen. Code, § 288).

3. Assault and battery ⇐91, 92
Infants ⇐20
Kidnapping ⇐5

Evidence *held* sufficient to support convictions of assault by force likely to produce great bodily harm, child stealing, commission of lewd acts with children, and simple assault (Pen. Code, §§ 278, 288).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Betty Kocalis was convicted of assault by means of force likely to produce great bodily harm, child stealing, commission of lewd acts with children under the age of fourteen, and assault, and she appeals.

Affirmed.

George B. Hancock, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted of nine offenses involving three small children. She appeals on the ground of insufficiency of evidence. The offenses will be considered in the chronological order in which they occurred.

On or about February 13, 1933, at the noon hour, appellant asked a seven year old boy, who was returning to school, to show her the location of a store. After the boy pointed out a store, appellant took him by the hand, pulled him a quarter of a mile and into an alley, took down his trousers, whipped him with a switch and then with a board and slapped his face. She then buttoned up his trousers, pulled him along, telling him to keep still. They entered an apartment, where appellant made the boy suck her breasts. She later left the youth outside, where he was found and taken home. His body showed bruises and welts. On the basis of these acts the jury convicted appellant, in count 7, of "assault by means of force likely to produce great bodily injury," which was reduced by the court to "assault," in count 8 of child stealing (Pen. Code, § 278), and in count 9 of violation of section 288 of the Penal Code.

On or about June 16, 1933, appellant stopped an eight year old girl who was leaving school about 2 o'clock in the afternoon, and asked if she "wanted to go with her and see the girls that had two legs cut off." The girl answered "No," whereupon appellant put her arm around her and went up to a room in a house. Appellant there removed the

child's dress and told the girl to "nurse her," to "suck her breast," which the child did. They left the house and went to another, where appellant "spanked" her very hard with a strap, later whipped her with switches, and slapped her face. She then took the girl to the corner and left her. The child's face and body were swollen and bruised. For the acts relating to this little girl, the jury convicted appellant in count 4 of "assault by means likely to produce great bodily injury," which was reduced by the court to "assault," in count 5 of child stealing, and in count 6 of violation of section 288 of the Penal Code.

On or about March 1, 1934, appellant accosted a six year old boy on his way home from school and told him "your mother got killed with a hand cut off down some place and I will be your new mother." She put her arm around him and went up on the porch of a house. Appellant whipped the boy with switches, threw him down on the porch, choked him, and put her hand over his nose. Meanwhile, the boy cried and tried to get away. She then sat in a chair and had the boy sit on her lap and nurse her breasts. The boy was found and taken to the receiving hospital, where it was observed that his clothing was torn and his body dirty, bruised, and bleeding. On the basis of these acts the jury convicted appellant in count 1 of assault by means of force likely to produce great bodily harm, in count 2 of child stealing, and in count 3 of violation of section 288 of the Penal Code.

[1] It is not disputed that the evidence furnished ample support for the convictions under counts 1, 4, and 7. Appellant's position as to counts 2, 5, and 8 is stated to be: "If appellant took these children for the purpose of gratifying her sexual desire or those of the children, then she would not be guilty of taking the children with the intent to detain and conceal them from their parents or guardians. It is conceded that the length of time the children were held is not material only for the purpose of showing what her intentions were." The evidence, however, was sufficient to justify the conclusion of the jurors that appellant took and enticed these three children with intent to detain and conceal each of them from its parent or guardian. The fact that she released each of them after she had accomplished her felonious purpose in no way detracts from the force or effect of the evidence of such intent.

[2] Appellant contends that a witness of tender years must be corroborated as to testimony concerning a violation of section 288 of the Penal Code. No such corroboration is required. People v. Camp, 26 Cal. App. 385, 147 P. 95.

[3] The evidence fully supports the conviction on each of the nine counts, and it is clearly apparent from the record that substantial justice has been accorded by the trial court.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 613

PEOPLE v. BERNFIELD.

Cr. 1792.

District Court of Appeal, First District, Division 2, California.

Sept. 12, 1934.

1. Witnesses ⇐48(2)

One convicted of first-degree murder *held* not incompetent as witness for prosecution in robbery trial (Pen. Code, §§ 675, 1102; Code Civ. Proc. §§ 4, 1879; Pol. Code, § 4480).

2. Criminal law ⇐511(10)

Admission of testimony corroborating defendant's accomplice by one branded by such accomplice as another accomplice *held* not error, where court submitted controverted fact question as to whether corroborating witness was accomplice to jury under proper instructions after admitting all testimony on subject.

3. Criminal law ⇐761(11)

Instructions, using expressions, "the crime," "the robbery," and "the criminal act," *held* not erroneous as assuming material controverted facts put in issue by defendant's plea of not guilty of robbery, where uncontradicted testimony clearly showed commission of crime.

4. Criminal law ⇐761(9)

It is not error to assume in instruction existence of fact which is undisputed or admitted by pleadings.

Appeal from Superior Court, San Francisco County; Louis H. Ward, Judge.

Louis Bernfield was convicted of robbery, and he appeals.

Affirmed.

Gardiner Johnson and Gordon Johnson, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

An indictment was returned against the defendant accusing him with having committed robbery. It alleged four different counts. The defendant pleaded not guilty and on his trial the jury returned a verdict acquitting him on counts 1, 2, and 4, but convicting him on the third count. Thereafter, the defendant moved for a new trial. His motion was denied. He has appealed from the judgment and from the order denying him a new trial.

[1] On the trial of the case one Edward Anderson was called as a witness by the prosecution. At that time Anderson had been convicted of murder in the first degree and sentenced to death, but had taken an appeal and the appeal had not been decided. The defendant claims that Anderson was not a competent witness. In that connection he asserts that at common law Anderson would have been incompetent as a witness and that the statutes of California have not changed the rule. In making this contention we think the defendant is in error. Section 1102 of the Penal Code states: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code." In section 1879 of the Code of Civil Procedure it is provided that one who has been convicted of crime is not excluded as a witness. Section 675 of the Penal Code is to the same effect. In section 4480 of the Political Code it is provided: "With relation to each other, the provisions of the four codes must be construed (except as in the next two sections provided) as though all such codes had been passed at the same moment of time, and were parts of the same statute." Then in section 4 of the Code of Civil Procedure it is further provided: "* * * The Code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." In view of these provisions we think it is quite clear that the rule at common law, contended for by the defendant, does not obtain in the state of California.

[2] On the evening that the alleged offense was committed the defendant, Edward Anderson, and one Harry Flynn were together. On the trial both Anderson and Flynn were called as witnesses. At this time the defendant contends that a conviction based upon the testimony of an admitted accomplice, corroborated only by that of a person branded by him as another accomplice, is contrary to law and the evidence. The point assumes that the record showed that both Anderson and Flynn were accomplices. However, that is not a correct statement of the record. It is clear that Anderson was an accomplice. However, one of the controverted facts was the question as to whether Flynn was an accomplice. All of the testimony on the subject was admitted by the trial court and thereafter, under proper instructions, the trial court submitted the question of fact as to whether Flynn was an accomplice. We find no error in the procedure followed.

[3, 4] In his last point the defendant contends that the trial court misdirected the jury in a matter of law by assuming in its instructions material facts which were controverted and put in issue by the defendant's plea of not guilty. In making the point we think that the defendant does not distinguish between the fact that a crime was committed and the question as to who committed the crime. That a crime was committed clearly appears from the uncontradicted testimony. Under such circumstances the trial court did not err in assuming such to be the fact and it did not err in using the expression "the crime" in instructions given by it. The same remark applies to the use of the words "the robbery" and to the use of the words "the criminal act." The rule applicable is stated as follows: "* * * Nor is it error to assume the existence of a fact which is undisputed, or is admitted by the pleadings." 24 Cal. Jur. 843. The rule has been applied in criminal cases many times. People v. Putman, 129 Cal. 258, 61 P. 961; People v. Lee Sare Bo, 72 Cal. 623, 14 P. 310; People v. Phillips, 70 Cal. 61, 11 P. 493.

We find no error in the record.

The judgment and order are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

RAISCH v. MONTEREY COUNTY.

Civ. 8911.

District Court of Appeal, First District, Division 2, California.

Sept. 13, 1934.

Hearing Denied by Supreme Court Nov. 8, 1934.

1. Witnesses ⇐268(1)

In action against county on written paving contract providing that where county surveyor ordered pavement placed one-half width at a time plaintiff would be paid $1 per cubic yard in addition to contract price, where plaintiff introduced testimony that county surveyor had made such order, permitting defendant to show on cross-examination that plaintiff before making bid for work understood that no additional payment was intended *held* not error.

2. Evidence ⇐155(10)

In action against county on written paving contract, where plaintiff introduced evidence as to what had been said in conversation between plaintiff's managing agent and county officers previous to acceptance of plaintiff's bid, defendant could call county officers who had been present at conversations to support its theory of conversation.

3. Evidence ⇐458

In action against county on written paving contract, evidence of conversations had previous to acceptance of plaintiff's bid *held* admissible as portrayal of circumstances surrounding parties when they entered into contract (Civ. Code, § 1647; Code Civ. Proc. §§ 1860, 1861).

4. Evidence ⇐450(5)

Where language in contract is fairly susceptible of more than one interpretation without doing violence to its usual and ordinary import or some established rule of construction, ambiguity may be explained by extrinsic evidence (Civ. Code, § 1647; Code Civ. Proc. §§ 1860, 1861).

5. Evidence ⇐458

Conversations and declarations of parties during negotiation of contract are competent not only to show circumstances under which contract was made, but also to prove that parties intended and understood language in sense contended for (Civ. Code, § 1647; Code Civ. Proc. §§ 1860, 1861).

6. Highways ⇐113(4)

In action against county on written paving contract providing that plaintiff was to receive $1 per cubic yard in addition to contract price where concrete was poured in half width at order of county surveyor and plaintiff kept opposite side of roadway clear of equipment and open to public traffic, evidence *held* not to establish plaintiff's compliance with conditions so as to permit recovery of additional amount.

Appeal from Superior Court, San Benito County; Maurice T. Dooling, Jr., Judge.

Action by A. J. Raisch against the County of Monterey, a body politic and corporate of the State of California. Judgment for defendant, and plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., not voting. SPENCE, Justice pro tem. not participating.

J. A. Bardin and J. T. Harrington, both of Salinas, and Sullivan, Roche, Johnson & Barry, of San Francisco, for appellant.

Wyckoff, Gardner & Parker, of Watsonville, and Harry Noland, Dist. Atty., of Salinas, for respondent.

STURTEVANT, Justice.

In an action to recover an alleged balance due under a construction contract the trial court made findings in favor of the defendant, and from the judgment entered thereon the plaintiff has appealed and has brought up typewritten transcripts.

The plaintiff alleged a contract for an agreed price in his first count and he alleged the reasonable value in his second count. In its answer the defendant denied that there was any balance due, alleged full payment and discharge, and alleged that the controversy arose out of a written contract which it pleaded in haec verba. On the trial it was the theory of the plaintiff that the written contract provided the terms of the contract and a specified sum for its performance and that it also provided for the payment of the additional sum of $1 per yard if, by order of the defendant's agent, the county surveyor, the plaintiff should lay the concrete road base in strips, one-half at a time. On the other hand, it was the contention of the defendant that although the general printed specifications contained a passage, as claimed by the plaintiff, such passage was subordinate to and gave way in the presence of certain special written specifications inconsistent therewith, and further, even though the contract contained the provisions claimed by the plaintiff, that the plaintiff never came within its provisions and is not entitled to any relief thereunder.

That the contract is ambiguous is manifest. That both parties so viewed the instrument appears from the fact that before the plaintiff made a bid and several times thereafter the representative of the plaintiff deemed it

necessary to call, and therefore called on the county surveyor of the defendant county and asked for his interpretation of subdivision K of section 28 of the printed specifications. That officer freely stated his interpretation. It also appears that before the bid was let the members of the board of supervisors, the county surveyor, and the plaintiff's representative held a meeting at which said clause was discussed and the plaintiff was specifically advised that the defendant would not pay the dollar charge provided in said subdivision K. The ambiguity arose in this manner: In framing the contract a printed form of specifications was used. That form contains over four hundred folios. It covers specifications of roads of various types, also of bridges, etc. To it are annexed certain special specifications comprising about thirty-five folios. The latter contained among other provisions the following:

"In case of conflict between these Special Provisions and the Standard Specifications, the Special Provisions shall take precedence over and be used in lieu of such completed portions. * * *

"Section 6—Maintaining Traffic.

"The Contractor shall conduct his operations so that all traffic coming from ranches facing along the road between the Hilltown Bridge and the Monterey-Castroville road and all traffic coming from any roads leading into the Salinas-Monterey road may be cared through construction without interruption and with as little inconvenience to said travel as possible. * * *

"All through traffic over the Salinas-Monterey road shall be detoured over the Monterey-Castroville road and signals and lights with proper signs shall be maintained by the contractor at his expense at the junction of the Monterey-Castroville road and the Monterey-Salinas road, and at a point southeasterly from the Hilltown Bridge. * * *

"(i) The pavement shall be poured in two ten foot sections, and a cold joint left between the sections. The edges along the cold joint shall be rounded as shown on plan." On the other hand the general specifications contained a passage as follows:

"Placing Concrete Pavement. * * *

"(k) Half Width Construction.—Where ordered by the County Surveyor, concrete pavement shall be constructed one-half (½) width at a time and the roadway opposite the side under construction shall at all times be kept clear and open to public traffic.

"No portion of the equipment used for mixing the concrete for pavement shall be allowed to stand on or project over that portion of the roadbed open to public traffic as herein provided.

"Concrete work shall be adequately barricaded longitudinally to protect the work and safeguard the public traffic.

"For all pavement ordered placed one-half (½) width at a time, the Contractor will be paid one dollar ($1.00) per cubic yard in addition to the contract price for Class 'A' Portland cement concrete pavement, when not otherwise provided in the Special Provisions." The general specifications also provided:

"Section 4—Scope of Work. * * *

"The Contractor shall do such extra work and furnish such materials as may be required for the proper completion or construction of the work contemplated and he shall do no extra work except upon written order from the County Surveyor, and in the absence of such written order he shall not be entitled to payment for such extra work. All bills for extra work done shall be filed in writing with the County Surveyor." Also they provided, section 5, subdivision (a) that the county surveyor should decide "* * * all questions which may arise as to the interpretation of the plans and specifications * * * (and) His decision shall be final. * * *" They further provided:

"Section 5. Control of the Work. * * *

"(d) Coordination of Plans, Specifications and Special Provisions.—These specifications, the plans, special provisions, and all supplementary documents are essential parts of the contract, and a requirement occurring in one is as binding as though occurring in all. They are intended to be cooperative, to describe and provide for a complete work. Plans shall govern over specifications, special provisions shall govern over both specifications and plans.

"(e) Interpretation of Plans and Specifications.—Should it appear that the work to be done or any of the matters relative thereto, are not sufficiently detailed or explained in these specifications and the Special Provisions, the Contractor shall apply to the County Surveyor for such further explanations as may be necessary and shall conform to the same as part of the contract so far as may be consistent with the original specifications; and in the event of any doubt or question arising respecting the true meaning of the specifications, reference shall be made to the Board of Supervisors, whose decision thereon shall be final. * * *

"Section 7. Legal Relations and Responsibility to the Public. * * *

"(e) * * * Residents along the road must be provided for as far as practicable. Convenient access to driveways, houses and buildings along the line of the work must be maintained and temporary approaches to crossings or intersecting highways shall be provided and kept in good condition, where required by the County Surveyor. * * *

"Joints. * * *

"(p) Contact Joints shall be formed by pouring the concrete on one side of the joint and allowing it to set before the adjacent concrete is placed. * * *

"Basis of Payment.

"(hh) * * * All concrete shall be measured in place in accordance with the dimensions shown on the plans and cross-section and as given in the Special Provisions. Allowance will be made for the theoretical quantities to which shall be added one-half (½) the volume of concrete placed due to unavoidable construction of low subgrade. No other allowance for concrete will be made unless placed in accordance with written instructions specifying definite locations, previously given by the County Surveyor."

With the issues so made up and presented the trial proceeded.

At this time the plaintiff makes two points. Both involve the rulings admitting evidence of oral conversations claimed by the plaintiff to vary the terms of a written contract. These points we will now take up in the order in which they are stated in the plaintiff's brief.

Mr. Quimby, the managing agent of the plaintiff, was sworn as a witness by the plaintiff. He testified that he was in charge of the construction under the contract as the representative of the plaintiff and that the concrete was poured one-half at a time; that he had several conversations with Howard Cozzens, the county surveyor of Monterey county; that in one conversation something was said as to how the concrete should be poured. Continuing the witness testified:

"Q. What was said in that regard at that conversation? A. I asked him if he wished it poured that way. He countered, and asked me if it were not the most practical way to do it. I replied that I thought it was, that there were other methods that were used by the state, and he himself mentioned one other method, but he didn't think it was as practical as the other. Well I said 'Then you desire it poured one-half at a time, I must order my equipment to fit the job'; and he said he desired it that way, thought it was the most practical way.

"By the Court. Well what was the one other method he mentioned? A. The other method was setting a strip under—well it is the same method that was used on the Bay Shore, said we have here recently, I have a drawing of it.

"Q. What is called a weakened blade? A. A longitudinal weakened blade joint. They set a little strip, and he described it to me at the time, 4 or 5 inches high, a little redwood strip, blade, and force little sticks in, leaving it in underneath, and then they insert above it a blade, long thin blade, that practically meets, cannot entirely meet, and leave that in there until this initial set takes place. These blades, you have to have a number of them, and move them ahead as the concrete sets sufficiently to remove them without it running together and binding.

"By the Court. And in that way the two sections may be poured at the same time, and you still get a cold joint? A. You still get the same results.

"Q. Now you state that the work then proceeded, the pouring being poured one-half at a time? A. Yes."

Pointing to that testimony the plaintiff in the trial court claimed, and he now claims, that the statements made by the county surveyor in that conversation constituted an order by him and brought the plaintiff within the scope of the above-mentioned provision contained in the aforementioned printed specifications. In other words, the plaintiff tendered such evidence as showing an order made by the county surveyor. In controverting that claim by the plaintiff, on cross-examination the defendant asked certain questions and the following proceedings were had:

"Q. State what that conversation was the Saturday before the bids were opened? A. I called the County Surveyor's, Mr. Cozzens' attention to the clause that called for the $1 added cost if poured in one-half width.

"Q. And what did you say to him about that clause? A. Why I asked him if he wanted me to figure it that way.

"Q. What did he say? A. He said that he had not intended it that way.

"Q. That he did not intend you were to get the dollar, in other words, is that it? A. I think that it is. * * *

"Q. Didn't they make it plain to you that it was their interpretation, and the engineer's that you couldn't get the dollar on this job?

"By Mr. James. I object to that on the further ground it calls for the conclusion of the witness.

"By the Court. Objection sustained. A. That impression I was left yes, I rather think that was their intent.

"Q. They were telling you you were not to have the dollar; that was before the signing of the contract, wasn't it? A. Yes.

"Q. And didn't you tell them you didn't expect it? A. Well I don't recall that definite statement. * * *

"Q. Well is that your answer to my question, as to whether you did assent to their statement, that you were not to have the dollar, that you said that you knew it, or words to that effect? A. Yes.

"Q. Did you say words to that effect, that you understood that you were not to have the dollar? A. I said that I understood Mr. Cozzens did not intend the dollar to be paid, outside, perhaps, if it was asked me now, they told me, they asked me if I understood it, if it was put in that way, I probably did, because he had told me that before.

"Q. And you assented to that proposition right then did you not? A. Whatever was said there I agreed to, yes sir.

"Q. Yes, you agreed to what they said, that you were not to have the dollar, and that interpretation of this contract and specifications, did you not? A. I don't think that was brought out to that length at all. Yes, I would say yes, I assented."

Other similar proceedings were had. The plaintiff duly objected, but his objections were overruled.

[1] We see no error in the rulings. The cross-examination was within the bounds of the direct examination, the subject-matter was clearly pertinent to the issue on trial, and the evidence was competent proof. Nor did it tend to vary the terms of a written instrument as will later appear.

[2-5] The second point which the plaintiff presents is this: In presenting its case the defendant called as witnesses the county officers who had been present at the above-mentioned conversations and introduced their evidence as to what had been said. The plaintiff objected to each part. His objections were overruled and he assigns the rulings as error. We find no error in any one of the rulings. As to the conversation, evidence of which was introduced by the plaintiff, the defendant had the clear right to introduce evidence as to its theory regarding that specific conversation. The other conversations were clearly a mere portrayal of the circumstances surrounding the parties when they entered into the contract and as such were admissible. Civ. Code, § 1647. In Balfour v. Fresno C. & I. Co., 109 Cal. 221, at page 225, 41 P. 876, 877, the court said: "If the language of the contract is, as defendant contends, plain and unambiguous, and susceptible of but one construction, then the objection was good, and the evidence properly excluded. If, however, the language employed be fairly susceptible of either one of the two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties. 'The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself.' Sandford v. Newark, etc., R. R. Co., 37 N. J. Law, 1, 3. For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown. Code Civ. Proc. §§ 1860, 1861; City of Atlanta v. Schmeltzer, 83 Ga. 609, 10 S. E. 543, 545; Keller v. Webb, 125 Mass. 88 [28 Am. Rep. 209]; Long v. Long, 44 Mo. App. 141; Swett v. Shumway, 102 Mass. 365 [3 Am. Rep. 471]."

[6] Moreover, many other parts of the record go to show, and do show, that in the instant case the plaintiff was not entitled under his contract to recover an additional dollar for each yard poured. There is evidence, as shown above, that the county surveyor

made no order, oral or written. There is uncontradicted evidence that as plaintiff poured the concrete he did not at any time keep the opposite side of the roadway clear and open to public traffic. There was uncontradicted evidence that as plaintiff poured the concrete he allowed his equipment to stand and project over that portion of the roadbed which it is claimed was open to the public. The plaintiff did not, therefore, introduce a case within the purview of that portion of the contract on which he rests his claim.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

140 Cal.App. 640

LOCKARD v. MATLAW.

Civ. 9822.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1934.

Appeal and error ⇐1012(1)

Appellate Court is not authorized to reweigh evidence and reverse trial court's findings of fact.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Fern Lockard against A. P. Matlaw. From a judgment for plaintiff, defendant appeals, and plaintiff moves for dismissal of the appeal or affirmance of the judgment.

Affirmed.

Harry P. Sweet, of San Diego, for appellant.

William P. Mealey, of Los Angeles, for respondent.

CONREY, Presiding Justice.

Motion by the respondent for dismissal of the appeal or affirmance of judgment on the ground that the question on which the decision depends is so unsubstantial as not to need further argument.

The liability of appellant for the injuries sustained by the plaintiff is founded upon provisions of section 141¾ of the California Vehicle Act (St. 1923, p. 517, added by St. 1929, p. 1580, as amended by St. 1931, p. 1693). At the time of the accident respondent was riding in the automobile as guest of appellant, who was driving. The injury to the plaintiff proximately resulted from the intoxication of appellant, and his consequent negligence.

The sole ground of appeal as presented in the brief for appellant is that under the evidence it is an established fact that respondent knew, or in the exercise of reasonable care should have known, that appellant was intoxicated when she undertook to ride with him as his guest, and that therefore, as a matter of law, she was guilty of contributory negligence. The evidence, as set forth in the brief, is entirely sufficient to negative both of these propositions. Under the decisions applicable to the case, this court is not authorized to reweigh the evidence and reverse the trial court's findings of fact.

The judgment is affirmed.

We concur: YORK, J.; HAHN, Justice pro tem.

140 Cal.App. 646

EAGLE'S HOME ASS'N OF LOS ANGELES, Inc., v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9819.

District Court of Appeal, Second District, Division 2, California.

Sept. 13, 1934.

1. Master and servant ⇐405(4)

In compensation proceeding, where there was direct, credible, and uncontradicted evidence that janitor of benevolent association's building, who lived in the building, was intoxicated when he met death and that intoxication was primary cause of death, contrary finding and award based on such finding *held* not within jurisdiction of commission, regardless of whether janitor was on duty when he died (St. 1929, p. 430, § 6, subd. 3).

2. Master and servant ⇐405(4)

To support compensation award, it must appear by preponderance of evidence that injury was received in course of employment.

Proceeding upon a claim under the Workmen's Compensation Act for the death of O. C. Leger, employee, which claim was opposed by the Eagle's Home Association of Los Angeles, Inc., employer. To review an adverse award of the Industrial Accident Commission, employer brings certiorari.

Award annulled.

Charles W. Cradick, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Commission.

CRAIG, Acting Presiding Justice.

An award and findings of fact in support thereof are questioned upon the ground that the same are contrary to the substantial creditable evidence, and that evidence upon which they were based requires a denial of compensation.

The undisputed facts are: The employer is a benevolent association maintaining a large three-story building in the city of Los Angeles containing a meeting hall, lobby, several small rooms, and basement; also a fully furnished apartment consisting of living room, bedroom, kitchen, and bathroom which the employee, O. C. Leger, occupied as a home. His duties were those of a janitor—cleaning and rearranging the furniture after meetings, attending to lights, and sometimes locking the doors. Early one morning his lifeless body was found lying on the floor at the foot of a stairway, but no one saw him at the time of his demise. This occurred between the hours of 2 to 2:30 a. m. and 8:30 a. m., June 7, 1934.

The witness Frankenberger testified that between the hours of 6:30 p. m. and 9 p. m. on the 6th day of June, 1934, he was with deceased; that during that time the latter took six or eight drinks of intoxicating liquor; and that when they parted Leger was "feeling pretty good," but was not drunk. The witness O'Brien testified that deceased and he left the hall at about 1 a. m. of June 7th and went to a "speakeasy" place, where Leger "was drinking" liquor and became "pretty well intoxicated." The witness took Leger back to his apartment at the hall about 2 to 2:30 a. m. and unlocked the door and let him in; at the time they left the hall Leger appeared to have had some drinks. This witness found the body of deceased at 8:30 that morning. It was clad in the same way as when they had parted a few hours before. The coroner's autopsy report, received in evidence, states that acute alcoholism was the primary cause of death and that injury to deceased's skull was the secondary cause. As against this evidence, there is none which could qualify before a trial court. A witness stated that members of a drill team who were at the hall at about 1 o'clock a. m. of the 7th and saw Leger said that he was not then intoxicated.

As to the duties which Leger was employed to perform, there is some conflict. The witness White, a brother-in-law of deceased, testified that Leger had informed him that he was required to sleep in the building on account of insurance—to do considerable night work and to watch the place and eject intruders. However, Hull, the officer of the Eagle's Lodge who employed Leger, stated that the latter was hired as a janitor only and not as a caretaker; that he was not required to live on the premises or to watch or protect them otherwise than while at work, as any janitor would; and that he was under orders not to do his janitor work at hours that would require him to use lights; also that it was the duty of the steward, O'Brien, to turn the lights out at night and lock the doors. This testimony is largely corroborated by other witnesses, to wit, O'Brien and one Barrett. From the testimony of several witnesses, it appears that Leger, when at his work, dressed in striped overalls.

[1] It is unnecessary to consider the cases cited or to distinguish the instant one from them. None have held that where, as here, there is direct, creditable, and uncontradicted evidence that the deceased was intoxicated when he came to his death, that such intoxication was the primary cause thereof and no competent evidence is in conflict therewith, a finding to the contrary and an award based on such finding is within the jurisdiction of the commission. Regardless of whether deceased was on duty when he passed away, such an award must be beyond such jurisdiction. Section 6, subd. 3, Workmen's Compensation Act (St. 1917, p. 831, as amended by St. 1929, p. 430).

[2] Further, it does not appear by a preponderance of the evidence that the injury received by the employee was received in the course of his employment. To support the award this is necessary. Employers' Liability Assur. Corp. v. Industrial Accident Comm., 182 Cal. 612, 187 P. 42. Here the great preponderance of the evidence is against such finding. There is no competent evidence to sustain the claim that Leger was required to live on his employer's premises or that his duties were those of a caretaker. There is

direct and competent evidence to the contrary. There is no competent evidence that he was on duty when he met his death. There is direct and competent evidence that he was not.

It follows that the award must be annulled and it is so ordered.

We concur: DESMOND, J.; WILLIS, Justice pro tem.

140 Cal.App. 272

HILL v. FRESNO COUNTY et al.

Civ. 1292.

District Court of Appeal, Fourth District, California.

Aug. 1, 1934.

Rehearing Denied Aug. 31, 1934.

Hearing Denied by Supreme Court Sept. 27, 1934.

1. Automobiles ⇐244(11)

Jury *held* entitled to consider plaintiff's testimony as to distance of his and defendant's automobiles from street intersection, at which they collided, and speeds thereof when plaintiff saw defendant's automobile on question of which first entered intersection, though only direct evidence on question was defendant's testimony that he saw plaintiff's automobile enter intersection immediately after defendant entered it.

Plaintiff testified that defendant's automobile was 200 feet from intersection and approaching it at 35 to 40 miles per hour when plaintiff saw it and that plaintiff was 30 feet from intersection and proceeding at about 15 miles per hour at such time, and fact that defendant's automobile collided with rear part of plaintiff's automobile was undisputed.

2. Automobiles ⇐245(80)

Driver of automobile, struck by another automobile, *held* not contributorily negligent as matter of law in entering street intersection without looking toward latter automobile after seeing it approaching 200 feet away at not over 40 miles per hour when he was 30 feet from intersection and proceeding at about 15 miles per hour.

3. Appeal and error ⇐1048(1)

Court's ruling, sustaining objection when no question was pending to testimony of plaintiff's witness on cross-examination as to conditions at southwest corner of street intersection, at which defendant's automobile, approaching from east, struck plaintiff's car, proceeding northward, *held* not prejudicial to defendant, though there was evidence that plaintiff exceeded speed limit at intersections at which driver's view is obstructed (St. 1931, p. 2120, § 113 (b) (2).

4. Appeal and error ⇐1170(9)

Trial court's ruling that defendant county, failing to deny allegation of complaint in action for injuries to driver of automobile, struck by automobile driven by individual defendant, that latter was county's employee, engaged in maintaining and repairing roads at all times alleged, admitted that he was in course and scope of employment at time of accident, and instruction that it was admitted that he was then representing county in performance of work, *held* not prejudicial to county (Const. art. 6, § 4½).

Only evidence directly bearing on question whether individual defendant was acting in scope of employment when collision occurred was his uncontradicted testimony that he was on way home at time of accident, but intended to stop at courthouse to consult with county supervisor, and that collision occurred on day designated by supervisors for his appearance at their offices.

5. Automobiles ⇐246(25)

Instruction that jury must determine whether plaintiff was guilty of negligence proximately and directly contributing to automobile collision *held* erroneous as imposing unwarranted burden on defendant by word "directly."

6. Appeal and error ⇐1064(1)

Error in instruction that jury must determine whether plaintiff was guilty of negligence proximately and "directly" contributing to automobile collision *held* not so prejudicial to defendants as to demand reversal of judgment against them.

The instruction purported to inform jury generally as to issues submitted to them, and instruction given at defendant's request properly and more definitely advised jury that plaintiff could not recover if guilty of negligence proximately causing or contributing to collision.

7. Trial ⇐295(1)

It is improper for reviewing court to consider particular instruction separately from entire body of instructions, especially when it purports to describe issues submitted to jury in general terms.

8. Appeal and error ⇐1064(1)
Trial ⇐296(3)

Instruction submitting to jury question whether automobile collision, causing injuries to plaintiff, occurred in residential district, *held* not prejudicial to defendant, though plaintiff failed to show that district was signposted as residence district, in view of defendant's admissions, another instruction, and plaintiff's evidence (St. 1931, pp. 2120, 2122, §§ 113, 116; St. 1929, p. 510, § 28½ (b).

The instruction complained of advised jury that statute prohibits operation of motor vehicle at speed exceeding 25 miles per hour in "residence district," which was defined in language of statute; defendant conceded sufficiency of evidence to support finding that number of dwelling houses and business structures, required by statute to constitute residence district, were located on one side of highway within required distance and codefendant's negligence; another instruction properly advised jury that vehicle must be driven at careful, prudent speed, not greater than is reasonable and proper; evidence was submitted that defendant approached and traversed intersection at unreasonable speed, that plaintiff was first in intersection, but that defendant failed to yield right of way, and that such failure proximately caused collision; and plaintiff produced uncontradicted evidence that territory was residence district.

9. Automobiles ⇐244(26)

Evidence in action for injuries in collision between plaintiff's automobile and car driven by defendant county's employee *held* to show that latter was engaged in scope of employment at time of collision.

10. Automobiles ⇐244(37)

Evidence, in action for injuries to driver of automobile, struck by automobile driven by defendant at street intersection, *held* to justify jury's finding that defendant was guilty of negligence, proximately causing collision, in approaching intersection at unreasonable speed and failing to yield right of way to plaintiff (St. 1931, p. 2120, § 113).

11. Appeal and error ⇐1001(1)

Reviewing court must affirm judgment, if record contains any evidence sufficient to support it.

12. Appeal and error ⇐1066

Instruction to return verdict against defendant county, if jury returned one against individual defendant in its employ, in action for injuries to driver of automobile, struck by automobile driven by individual defendant, *held* not fatally defective, though evidence of his admission that he could not see plaintiff's car until very near it because sun was in his eyes was expressly limited by court to question of his negligence, in view of evidence of his negligence in other respects.

13. Appeal and error ⇐216(1)

Defendant, not requesting court to instruct jury to find separately as to each of various elements of damage specified in complaint, cannot complain on appeal of failure to instruct jury not to award more than amount demanded in complaint for each element.

14. Appeal and error ⇐1004(1)

Whether damages, awarded plaintiff in personal injury suit, are excessive, may be determined on appeal only by comparing award with evidence produced during trial.

15. Damages ⇐132(3)

Verdict, awarding 27 year old man $35,000 damages for numerous skull fractures, rendering him unconscious for six or seven days, paralyzing side of his body, confining him in hospital for 17 days and to bed at home for about 2½ months more, necessitating use of wheel chair for about 3 weeks thereafter, and completely and permanently disabling him, *held* not so excessive as to indicate passion and prejudice.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by W. Earl Hill against Fresno County and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Glenn M. Devore, Dist. Atty., and Ray W. Hays, both of Fresno, for appellant Fresno County.

David E. Peckinpah, of Fresno, for appellant J. Fred Shedd.

Theodore M. Stuart, of Fresno, for respondent.

JENNINGS, Justice.

This is an appeal by the defendants from a judgment in favor of plaintiff entered in conformity with the verdict returned by a jury.

The essential facts which are disclosed by the record may be summarized as follows: At about 5 o'clock p. m. of the afternoon of August 18, 1931, the plaintiff was driving a touring type Dodge automobile in a northerly direction on Orange avenue in the city of Fresno, and was approaching the intersection of Orange avenue with Butler avenue. At the same time the defendant J. Fred Shedd was driving a touring type Lincoln automobile in

a westerly direction along Butler avenue and was approaching the intersection of the above-mentioned streets. The two automobiles proceeded into the intersection, and a collision occurred between them at a point which was slightly north of the center of the intersection. The evidence showed that the Lincoln automobile collided with the right rear part of the Dodge. As a result of the collision, plaintiff suffered serious injuries which will hereinafter be described. Thereafter he instituted this action by filing a complaint in which he alleged that the collision and his consequent injuries were proximately caused by the negligent operation of the Lincoln automobile by the defendant Shedd, who was alleged to have been an employee of the defendant county of Fresno, and who was also alleged to have been acting in the scope of his employment at the time of the collision. Each defendant filed a separate answer, in which it was denied that Shedd was guilty of negligence which was the proximate cause of the collision. In addition, each answer affirmatively alleged that the plaintiff himself was guilty of negligence which directly and proximately contributed to the happening of the collision. Upon the conclusion of the trial of the issues raised by the pleadings, the matter was submitted to a jury, which returned a verdict in plaintiff's favor against both defendants in the amount of $35,000.

The first contention advanced by appellants is that the judgment lacks evidentiary support, for the reason that the evidence established that the plaintiff was himself guilty of contributory negligence as a matter of law. In advancing this contention, it is conceded that evidence was produced at the trial from which the jury was warranted in finding that appellant Shedd was guilty of negligence. It is also conceded that the correct rule which is applicable to this contention is as declared in Cummins v. Yellow & Checker Cab Co., 127 Cal. App. 170, 175, 15 P.(2d) 536, 538, in the following language: "It is a question of law for the court only where the facts are undisputed, and only then where on those facts reasonable minds can draw but one conclusion."

Since the automobile operated by appellant Shedd approached the intersection from respondent's right side, it is obvious that two factors are important on the issue of contributory negligence. These are the rate of speed at which each automobile approached and traversed the intersection under the circumstances which the evidence showed existed at the time of the collision and the question of which automobile first entered the intersection. The respondent testified that, when he had arrived at a point which was 30 feet south of the south line of the intersection, he looked first to the west and saw no vehicle approaching the intersection from that direction, that he then looked to the east and saw the Lincoln automobile which was then about 200 feet to his right and approaching the intersection at a rate of speed between 35 and 40 miles per hour as he came up to the intersection, and, after he had looked in both directions, he increased his speed slightly and proceeded into the intersection; that he did not again look either to the east or west as he traversed the intersection; that he did not remember being struck since he was rendered unconscious by the force of the collision. Appellant Shedd testified positively that he approached the intersection at a speed of 25 to 30 miles per hour, and that he entered the intersection in advance of respondent.

In urging that this court must declare that respondent was guilty of contributory negligence as a matter of law, it is said that the only positive evidence which was produced on the question of who first entered the intersection was the testimony of Shedd as above noted. From this it is said to follow that respondent was guilty of negligence in failing to yield the right of way to Shedd, and that this failure constituted negligence which contributed to the happening of the collision. It is further urged that respondent's failure to look again to the east and to make any further observation of Shedd's automobile which he estimated was approaching the intersection at a speed of approximately 35 to 40 miles per hour constituted negligence as a matter of law which contributed proximately to the happening of the collision.

[1] With respect to the contention that the only direct evidence on the important question of which man first entered the intersection consisted of Shedd's positive testimony that immediately after he had crossed the east boundary of the intersection he observed that respondent's automobile was just then entering the intersection, it may be conceded that such is the case. Nevertheless, we think that the jury was entitled to consider respondent's testimony on this point. From this testimony the jury may reasonably have inferred that respondent had entered the intersection before Shedd came into it. If respondent was correct in his statement that, when he saw Shedd's automobile, it was 200 feet to the east of the east boundary of the intersection, and approaching it at a speed of approximately 35 to 40 miles per hour, at which time he was 30 feet south of the south boundary, and was

proceeding at a speed of about 15 miles per hour, it requires a very simple calculation to discover that respondent must have first entered the intersection. Appellants contend that respondent must have been mistaken in his estimate of the distance which intervened between the east boundary of the intersection and Shedd's automobile when respondent observed it, since the evidence showed that respondent had to proceed only 60 feet to the point of collision, whereas Shedd had to proceed approximately 229 feet to the same point. It is then pointed out that, if respondent was proceeding at a rate of 15 miles per hour and Shedd at a rate of 40 miles per hour, respondent must have passed the point of collision in safety, or Shedd must have been driving in excess of 50 miles per hour. It may well be that respondent was mistaken as to the distance which intervened between the east boundary of the intersection and Shedd's automobile. It is also possible that he misjudged the speed at which Shedd was moving, and that, instead of 40 miles per hour, Shedd may have been proceeding at a much faster rate. At all events, the jury was entitled to consider respondent's testimony together with all other evidence submitted. We think that we are not called upon to indulge in a mathematical calculation in which certain factors must be assumed to be definitely determined in order that we may declare that respondent's testimony was so inherently improbable that the jury was not justified in giving any consideration to it. Fugelsang v. Steiner, 115 Cal. App. 167, 173, 1 P.(2d) 553. Finally, the undisputed fact that Shedd's automobile collided with the rear part of respondent's automobile was evidence which of itself indicated that respondent's automobile entered the intersection in advance of that of Shedd.

[2] We also entertain the conviction that we are not called upon to declare that respondent was guilty of negligence as a matter of law because he testified that he looked to the east only once prior to entering the intersection, and, having observed Shedd's automobile approaching the intersection from that direction at a rate of speed between 35 and 40 miles per hour, proceeded into the intersection without again looking to the east. The contention of appellants in this regard is based solely on respondent's testimony. Since, therefore, it is founded on the hypothesis that respondent's testimony was true and correct, we must assume that it was correct in every particular, which manifestly includes the correctness of respondent's estimate that Shedd's automobile was 200 feet distant from the east boundary of the intersection at the time he observed it, and that it was being operated at a speed which did not exceed 40 miles per hour. If respondent's estimate as to distance and speed were correct, respondent was entitled to assume that the speed of Shedd's automobile would not be increased to such an extent that it would bring the Shedd automobile into collision with his own automobile, and that he could therefore proceed into and through the intersection without giving further attention to Shedd's automobile. Fugelsang v. Steiner, supra. We must therefore resolve the contention that the evidence showed that respondent was guilty of negligence as a matter of law adversely to appellants.

[3] It is contended by appellants that the trial court committed reversible error in excluding evidence relating to the conditions which existed at the southwest corner of the intersection in which the collision occurred. Examination of the record discloses that the question of whether or not the intersection was an obstructed or blind intersection had an important bearing on the issue of the alleged contributory negligence of respondent. It is pointed out that the trial court permitted a full showing of the conditions which existed at the southeast corner of the intersection, but it is charged that the court did not permit such showing as to conditions which existed at the southwest corner. Appellant county of Fresno particularly complains of the court's ruling. The ground of complaint is that the language of subdivision (b) (2) of section 113 of the California Vehicle Act (St. 1923, p. 553, § 113 (b) (2), amended by St. 1931, p. 2120) provides as follows: "Fifteen miles an hour in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of two hundred feet from such intersection."

In accordance with this language, it is said that it was just as important to show the conditions which existed at the southwest corner of the intersection as to show those that existed at the southeast corner, since, if the view of the respondent was obstructed either to the east or to the west at any point during the last 100 feet of his approach to the intersection, the rate of speed at which he was legally permitted to cross the intersection was limited to 15 miles per hour. It is then pointed out that evidence was produced by appel-

lants which would have justified the jury in finding that respondent traversed the intersection at a speed of 30 miles per hour. The final step in this argument is that, since there was evidence from which the jury might have concluded that respondent exceeded the speed limit permitted in an intersection where the view of approaching drivers was obstructed, therefore the fact-finding body might have found that respondent was guilty of contributory negligence if the trial court had not made the ruling of which complaint is here presented.

The contention is entirely lacking in merit. Examination of the record shows that the ruling occurred during the cross-examination of a witness called by respondent. This witness was permitted to testify fully as to the conditions that existed at the southwest corner of the intersection. He stated that at the southwest corner there was an apartment house which was located not more than 50 or 55 feet south of Butler avenue, and that it stood 15 or 20 feet from the west curb of Orange avenue. He further testified that there was a pole between the apartment house and the corner of the intersection. At this point, and when no question was pending, an objection was interposed on the ground that the southwest corner of the intersection was not involved in the case, and that any inquiry regarding the southwest corner was immaterial. The objection was sustained. Notwithstanding the court's ruling in sustaining the objection when no question was pending, the record shows that the witness was permitted to testify further with respect to conditions which existed at the southwest corner, and that he gave the location of a store which evidently stood on the south side of Butler avenue west of the intersection. It is significant that no motion to strike the testimony of the witness was made and that no further showing with respect to the condition that existed at the southwest corner was attempted by either appellant. We cannot assume that the court would have incorrectly sustained an objection to proper evidence if such had been offered. The court's ruling in sustaining an objection when no question was pending wrought no damage to appellants. The evidence respecting the southwest corner remained for the jury's consideration. No further evidence which tended to show that respondent's view to the west was obstructed at any point during the last 100 feet of his approach to the intersection was submitted. Under the circumstances, the court's ruling was not prejudicial to appellants, and was entirely harmless.

[4] Appellant county of Fresno further contends that the trial court improperly and incorrectly advised the jury in various specified instructions.

It is contended that the court incorrectly advised the jury that this appellant had admitted in its answer that its codefendant was acting in the scope of his employment at the time of the collision. The record shows that the first paragraph of respondent's complaint alleged as follows: "That the defendant, J. Fred Shedd, is and was during all of the times alleged in this complaint an employee of the said County of Fresno, employed in said work of maintaining and repairing the said public roads, and was engaged in said work." Paragraph III of the complaint alleged that Shedd, on August 18, 1931, in the performance of his work as a county employee, and while engaged in doing said work, and while acting within the scope of his employment, was driving an automobile westerly on Butler avenue. Paragraph IV of the complaint alleged that on the above-mentioned date, and at the intersection of Butler and Orange avenues, J. Fred Shedd, "in said performance of his said work for the defendant, County of Fresno," so negligently, etc., operated his automobile that he caused the same to collide with respondent's automobile. The answer of appellant county of Fresno contained no denial of the allegations of paragraph I of the complaint. With respect to the allegations of paragraph III, this appellant alleged that it had no information or belief as to the matters therein alleged, and for that reason denied generally and specifically each and every allegation therein contained. The answer contained a general denial of each and every allegation contained in paragraph IV of the complaint. Upon this state of the pleadings the court ruled that the legal effect of the failure of the county of Fresno to deny the allegations of paragraph I of the complaint was an admission that the appellant "Shedd was in the course and scope of his employment at the time of the alleged accident." The court also instructed the jury that, "since it is admitted by both defendants that the said J. Fred Shedd was engaged in his work for the County of Fresno at all of the times alleged in the complaint, it is an admitted fact in this case that the said J. Fred Shedd was then and there representing the County of Fresno in the performance of his said work, and if under these instructions and under the evidence you should find that the plaintiff is entitled to a verdict against the said J. Fred Shedd, you must also find that the plaintiff is entitled to a verdict against the County of Fresno."

It may be conceded that it is open to doubt whether or not the court's ruling and instruction which had the effect of relieving respondent from the burden of establishing that at the time of the collision appellant Shedd was acting in the scope of his employment was correct. Nevertheless, a review of the record impels the conviction that, assuming that the ruling and instruction were incorrect, no prejudice resulted to appellant county of Fresno therefrom. The only evidence which was produced during the trial which had a direct bearing on the question of whether or not appellant Shedd was acting in the scope of his employment when the collision occurred consisted of the testimony of Shedd, who stated that at the time of the accident he was on his way home, but that he intended to stop at the courthouse for the purpose of consulting with one of the county supervisors of Fresno county with respect to several matters about which the witness desired information. This evidence also showed that the day on which the collision occurred was the day of the week which had been designated by the supervisors for the appearance of this witness at the offices of two supervisors to transact any business that might be required or to secure any information relative to the work in which the witness was engaged. The county of Fresno, admitted employer of Shedd, produced no evidence which contradicted or questioned the above-mentioned evidence. The situation is therefore one which amply justifies the application of section 4½ of article 6 of the Constitution of California, since it is manifest that the claimed error was not prejudicial to the appellant complaining of it, and that no miscarriage of justice resulted therefrom.

[5-7] Appellant county of Fresno contends that the trial court erroneously instructed the jury with reference to the issue of contributory negligence. The particular instruction which is attacked as containing an incorrect statement of law is as follows:

"* * * Therefore in considering the evidence, the first two issues that you shall determine under said evidence are as follows:

"1. Was the defendant Shedd guilty of negligence which proximately caused said collision and the resultant injury and damages, if any, to the plaintiff?

"2. *Was the plaintiff guilty of any negligence which proximately and directly contributed to or was a proximate cause of the said collision and the injuries and damage, if any, to plaintiff?*" (Italics ours.)

The record shows that three instructions bearing on the question of contributory negligence were given. In addition to the above-quoted instruction which was given at respondent's request, the court gave two other instructions at the request of appellants. One of these latter instructions was in the following language: "You are instructed that the law does not concern itself with the relative degree of negligence of the plaintiff and the defendants. Thus, if you find that the defendants were negligent and that their negligence proximately caused the injury of which the plaintiff complains, and you further find that the plaintiff himself was negligent, and that his negligence proximately contributed to the injuries of which he complains, you are not to concern yourself with the question as to whether the plaintiff's contributory negligence was equal to or greater than or less than that of the defendant's negligence. Contributory negligence if proven is a bar to the plaintiff's recovery, regardless of its relative degree."

The second of such instructions was as follows: "You are instructed that if the plaintiff, W. Earl Hill, was guilty of negligence which proximately caused or contributed to the collision, he is not entitled to recover any damages. Therefore, if you shall find that the plaintiff W. Earl Hill was guilty of negligence which proximately caused or contributed to the collision, he is not entitled to recover."

The complaining appellant argues that the two instructions which were given at the request of appellants correctly advised the jury that respondent's asserted negligence would bar recovery if it proximately contributed to the occurrence of the collision. It is urged that the instruction which was given at respondent's request imposed an unwarranted burden on appellants, in that it advised the jury that respondent's negligence must be found to have "directly" contributed to the collision before the jury would be justified in finding in favor of appellants on the issue of contributory negligence.

We think that it must be conceded that the instruction was erroneous. We are not, however, convinced that the error was so prejudicial to appellants or to either of them as to demand a reversal of the judgment. In the first place, the language which is challenged as an incorrect definition of contributory negligence occurs in an instruction which purported to inform the jury generally as to the two issues which were submitted for their determination. In the two instructions which were given at the request of appellants, the jury was properly and more definitely advised that, if it should find that respondent was

guilty of negligence which proximately caused or contributed to the collision, he was not entitled to recover. It is manifestly improper for a reviewing court to select one particular instruction and to consider it separately from the entire body of instructions of which it forms merely a part. Especially is this true when it is apparent that the criticized instruction purports to describe in general terms the issues which are submitted for the jury's determination. Evidently, if the criticized instruction had omitted the words "and directly," appellant would have had no cause for complaint, since its meaning would then have been practically identical with the final sentence of the second of the above-quoted instructions given at the request of appellants. Under the circumstances disclosed by the record, we feel that we cannot declare that the jury was misled by the criticized language to the prejudice of appellant. Particularly is this true since a review of the entire record entirely fails to produce a conviction that the giving of the instruction resulted in a miscarriage of justice.

[8] Further complaint is voiced by appellant county of Fresno that the trial court erred in submitting to the jury the question of whether or not the collision occurred in a residential district. In the instruction which presented this matter for consideration, the jury was advised that the California Vehicle Act provides that the driver of a motor vehicle may operate the same at a speed not exceeding 25 miles per hour in a residence district. In the same instruction the court defined the term "Residence district" in the language of the aforementioned statute. It is conceded by appellant that the evidence was sufficient to support a finding that the required number of dwelling houses and business structures specified in the act were located on one side of the highway within the required distance. It is, however, urged that this was not sufficient to justify the court in submitting the question to the jury, as it is urged that it was incumbent on respondent to establish the additional fact that the district was signposted as a residence district as required by section 116 of the California Vehicle Act (St. 1923, p. 555, § 116, as amended by St. 1931, p. 2122). In the absence of a showing that the district was signposted, it is said that the highway along which appellant Shedd was driving as he approached the intersection was conclusively presumed to be outside a residence district. In support of its contention that the submission of the question was prejudicially erroneous, appellant urges that, if the instruction respecting the speed permitted in a residence district had been omitted, the jury might well have concluded that a speed in excess of 25 miles per hour was permissible to appellant Shedd in approaching the intersection, whereas the giving of the instruction may have caused the jury to conclude that such speed was unlawful. It is pointed out that this question had an important bearing on the question of the alleged negligence of Shedd, since the respondent testified that Shedd was approaching the intersection at a rate of speed between 35 and 40 miles per hour.

It may be conceded that, since the respondent requested the giving of the instruction which submitted the question to the jury, he should have produced evidence to show that the district was signposted as a residence district. It may therefore be assumed that the submission of the question was erroneous under the circumstances. It does not, however, follow that the submission of the question was prejudicially erroneous. The appellant complaining of the court's action in this regard has expressly conceded that the evidence was sufficient to support a finding that the appellant Shedd was negligent. Having this concession in mind, it is difficult to conceive how the court's action could have been prejudicial to appellant. Moreover, the record demonstrates that the court in another instruction properly advised the jury that the California Vehicle Act (St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120) provides that any person driving a vehicle on the public highways shall drive the same at a careful and prudent speed not greater than is reasonable and proper, and that no person shall drive any vehicle upon a public highway at such speed as to endanger the life, limb, or property of any person. Evidence was submitted from which the jury may well have concluded that appellant Shedd approached the intersection and traversed it at a rate of speed which was not reasonable and proper under the circumstances. Furthermore, evidence was submitted from which the jury may have concluded that respondent was first in the intersection and that Shedd failed to yield the right of way to respondent, and that such failure was the proximate cause of the collision without reference to the speed at which Shedd was traveling. Finally, it must be borne in mind that the respondent did produce evidence which was not contradicted which showed that for a distance of 930 feet along Butler avenue adjacent to the intersection there were 19 business structures and residences. This was ample to indicate that the territory was in fact a residence district

as this expression is defined in subdivision (b) of section 28½ of the California Vehicle Act (St. 1923, p. 517, § 28½(b), as added by St. 1929, p. 510). Under all the circumstances, we feel that we cannot declare that the submission of the question to the jury was so prejudicial to the complaining appellant that a miscarriage of justice resulted therefrom.

[9-12] Appellant county of Fresno also objects that the trial court advised the jury to return a verdict against the county if it returned one against appellant Shedd. This is declared erroneous because it is said that the evidence was such that the jury might properly have found for the county of Fresno, although it returned a verdict against Shedd. It is pointed out that certain evidence respecting admissions made by Shedd immediately after the collision to the effect that the sun was in his eyes and he could not see respondent's car until he was very near to it was admitted, but that such evidence was by the court expressly limited to the question of Shedd's negligence. It is then argued that the jury may have found that the collision occurred through Shedd's negligence in driving forward when his vision was thus impaired, and that, since the evidence regarding his admissions was expressly limited to the question of Shedd's negligence and his consequent liability, it follows that there is no evidence which would tend in the slightest degree to fasten liability upon the appellant county on account of the negligence of its employee Shedd in driving into the intersection with his vision so completely impaired by the rays of the sun as his admission would indicate. The argument is ingenious, but not convincing. In the final analysis the problem resolves itself into two questions, viz.: (1) Was Shedd, the admitted employee of the county, engaged in the scope of his employment at the time of the collision? and (2) Does the record contain any evidence which justifies the jury's verdict that Shedd was guilty of negligence which may fairly be said to have been the proximate cause of the collision and the consequent injuries sustained by respondent? We have heretofore expressed our opinion as to the first of the above-stated inquiries, and have indicated that all evidence respecting the question of whether or not Shedd was following out his duties as a county employee which was produced during the trial shows that at the time of the collision Shedd was engaged in the scope of his employment. This question must therefore be answered in the affirmative. The second question must likewise receive an affirmative answer. The testimony of respondent was that, as he approached the intersection from the south at a speed of 15 miles per hour, and when he had arrived at a point 30 feet south of the south boundary of the intersection, he looked to the east and observed Shedd's automobile approaching from the east at a speed of approximately 35 to 40 miles per hour, and that Shedd's automobile was then about 200 feet east of the east boundary of the intersection, that respondent then proceeded into the intersection at a speed of 15 miles per hour, and had arrived at a point slightly north of the center of the intersection when the right rear part of his automobile was struck by Shedd's automobile. If the jury believed this testimony, it must have concluded that respondent was first in the intersection, and therefore had the right of way over Shedd; that respondent traversed the intersection at a rate of speed which was entirely reasonable under the circumstances; that, on the other hand, Shedd approached the intersection at a rate of speed which was not reasonable and entered the intersection after respondent had proceeded into it and failed to yield to respondent the right of way; and that the consequent collision was therefore proximately caused by Shedd's breach of the duty which he owed to respondent to permit respondent to pass safely through the intersection. The jury may well have taken this view of the collision without giving any consideration whatever to the evidence that Shedd had admitted that his vision was seriously obstructed by the sun's rays. Application of the familiar rule which requires a reviewing court to affirm a judgment if the record contains any evidence sufficient to support it therefore impels us to reject the complaint of the appellant county that the instruction to which reference has here been made was fatally defective.

[13] Appellant county of Fresno presents another ingenious argument in support of a contention that the trial court erroneously advised the jury with respect to the question of damages. In his complaint respondent demanded compensatory damages in a total amount of $51,500, which was divided into the following elements: (1) $20,000 for loss of earning capacity; (2) $1,500 for medical and hospital charges, expenses incurred for nursing and kindred expenses; and (3) $30,000 for elements of damage including physical pain and suffering. In the various instructions which the trial court gave with respect to damages, it advised the jury that, if it should find for the respondent and discover that he was entitled to any amount by way of compensation, it should award such total

amount as would fairly and justly compensate for all detriment, if any, which the evidence showed that he had suffered by reason of the injuries sustained by him, but that such total amount should not exceed the sum of $51,500. It appears, therefore, that the trial court did not instruct the jury that it might not award more than the amount demanded in the complaint for each of the various elements of damage specified. Appellant county objects that the failure so to do constitutes reversible error, and urges that, for all that appears, the jury in returning a verdict in respondent's favor for $35,000 may have allowed an amount in excess of $20,000 for loss of earning capacity or an amount in excess of $30,000 for physical pain and suffering or an amount in excess of $1,500 for the expenses incurred by respondent by way of hospital and medical charges, nursing and kindred expenses.

The answer to the contention thus advanced is that the record shows that appellant county of Fresno did not request the trial court to instruct the jury to segregate the various elements of damage specified in the complaint and to find separately as to each one of the three elements for which compensation was demanded. Appellant may not, therefore, justly complain of the court's failure in this regard. Bloomberg v. Laventhal, 179 Cal. 616, 620, 178 P. 496. The situation is analogous to that which is presented when a trial court in an action for damages renders judgment upon findings which are uncertain because it does not appear therefrom what elements the court considered in ascertaining the amount of damages allowed. Application of the familiar rule that any uncertainty in the findings must be so construed as to uphold rather than to defeat a judgment compels affirmation of a judgment under such circumstances. Murphy v. Stelling, 8 Cal. App. 702, 705, 97 P. 672.

[14, 15] The final complaint of appellant county of Fresno is that the award of damages to respondent in the amount of $35,000 is excessive. The only method by which this question may properly be determined consists in a comparison of the award with the evidence produced during the trial of the action. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. The record shows that the undisputed evidence presented by respondent on the question of the injuries sustained by him as a result of the collision and the effect of these injuries upon his physical and mental system established the following facts: At the time of the collision, respondent was a man 27 years of age in perfect physical condition and capable of performing whatever duties were required of him. He had a life expectancy of 37.43 years. As a result of the collision, he sustained numerous fractures of the skull. He was rendered unconscious by the force of the collision and by reason of the injuries he received, and the entire right side of his body was completely paralyzed. He remained unconscious for a period of 6 or 7 days, during which time it was impossible to determine whether he would live or die. He remained in the hospital to which he had been removed immediately following the collision for 17 days. He was then taken to his home, where he was confined to his bed entirely helpless for a period of approximately 2½ months. After this he was able to sit in a wheel chair, and for about 3 weeks this contrivance was used. At the expiration of a period of approximately 4 months after the happening of the collision, he had recovered to such an extent that he could walk without assistance. This, however, was possible only by the use of great care. Some regeneration from the paralysis with which he had been afflicted took place. He recovered to some extent the use of the right side of his body, but this recovery was far from complete. Prior to the occurrence of the collision, he was possessed of a pleasant disposition. After having suffered the above-described injuries, he became moody, morose, and melancholy. As a result of his injuries, he was rendered completely and permanently disabled. The only matter with respect to the probable effect of the injuries suffered by respondent upon which the medical witnesses produced by respondent and the doctor who testified for appellant county disagreed was the question as to whether it might reasonably be expected that at some future time he would suffer epilepsy. Respondent's medical witnesses testified that the probability of the development of epilepsy in respondent and the attendant loss of reasoning with the possibility of complete imbecility was considerable. On the other hand, the physician who testified on behalf of the county of Fresno expressed the opinion that epilepsy would not develop. Even if it be assumed that the single medical witness who testified on behalf of the appellant county is correct and that we may properly eliminate the development of epilepsy as a probable result of the injuries, we entertain the opinion that we cannot declare that the compensation awarded by the verdict is so excessive that it indicates that it was made as a result of the influence of passion and prejudice upon the minds of the jurors. The bare recital of the

uncontradicted facts of the injuries and of their effect upon the mental, moral and physical constitution of the individual is of itself sufficient to foreclose this court from arriving at such a conclusion. Further, it is to be remembered that the judge who presided over the trial and at first hand heard the testimony of medical witnesses respecting the man's injuries was given the opportunity to consider the question of excessiveness of the award on the motion for a new trial. It is significant that he chose not to disturb it, and by his action in denying a new trial gave to it his approval. This fact, together with the facts developed by the evidence produced during the trial of the action, impels the conclusion that we are not warranted in disturbing the award.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

QUINN et al. v. RECREATION PARK ASS'N et al.*

Civ. 9123.

District Court of Appeal, First District, Division 1, California.

Sept. 12, 1934.

Hearing Granted by Supreme Court Nov. 8, 1934.

1. Theaters and shows ⇐6

That a baseball player batted a foul ball which struck spectator in grand stand at baseball park is not proof that the player was negligent.

2. Joint adventures ⇐1

To establish a "joint adventure," there must be proof, as in case of a partnership, of a community interest and a sharing of profits.

[Ed. Note.—For other definitions of "Joint Adventure," see Words & Phrases.]

3. Theaters and shows ⇐6

Professional ball player of visiting club could not be held liable to injured spectator as joint adventurer with operators of local park in absence of proof of community interest or sharing of profits, or participation in management.

4. Appeal and error ⇐758(1)

Where appellant's brief makes no complaint of directed verdict as regards certain defendant, and does attempt to point out any legal ground on which he may be held liable, judgment will be affirmed as to such defendant.

5. Theaters and shows ⇐6

Operator of baseball park is required to exercise only ordinary care to prevent patrons from being struck by batted or thrown balls.

6. Theaters and shows ⇐6

Ordinary care to protect patrons of baseball park from being struck by batted or thrown balls does not require park management to screen all seats, or to provide screened seats for all who may apply for them, but only to provide screened seats for as many patrons as may reasonably be expected to call for them on ordinary occasions.

7. Theaters and shows ⇐6

Spectator at baseball park who chooses an unscreened seat or takes one because screened seat is not available assumes risk of being struck by thrown or batted balls.

8. Evidence ⇐5(2)

It is common knowledge that in baseball games hard balls are thrown and batted with such great swiftness that they are liable to be thrown or batted outside the lines of the diamond.

9. Theaters and shows ⇐6

Athletic girl of fourteen, who took unscreened seat along first base line in professional baseball park with full knowledge of danger attached to so doing, assumed risk of injury from thrown or batted balls and could not recover for injury resulting from batted ball, although she desired a screened seat in such section in which none was available and took unscreened seat temporarily at suggestion of usher.

10. Appeal and error ⇐973

In absence of clear abuse of discretion, reviewing courts will not interfere with rulings of trial courts in submitting or refusing to submit to juries whether contributory negligence of children of the age of fourteen years and younger was such as to prevent their recovering for injuries sustained.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Action by Joan Quinn, a minor, by Aloysius W. Quinn, her guardian ad litem, and others against the Recreation Park Association and others. From a judgment for named defendant and Gussie Suhr, a defendant, on directed verdict, plaintiffs appeal. On respondents'

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 46 P.2d 144.

separate motions to dismiss appeal or affirm the judgment.

Judgment affirmed as to each respondent.

George D. Collins, Jr., of San Francisco, for appellants.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for respondent San Francisco Baseball Club, Inc.

Robert P. Cahen and Vogelsang & Brown, all of San Francisco, for respondent Gussie Suhr.

KNIGHT, Justice.

The appellant, Joan Quinn, while occupying a seat in an open section of the grand stand in Recreation Park, San Francisco, witnessing a game of professional baseball which was being played between the San Francisco and Pittsburgh ball clubs, was struck and injured by a foul ball batted by a player named Suhr, a member of the Pittsburgh club. At the time the accident happened, she was fourteen years of age, and, through her guardian ad litem, she joined her parents in bringing this action for damages against the management of the park, the owners of both ball clubs, and the player who batted the ball. The action was brought to trial against two of the defendants only, namely, the San Francisco ball club and the player Suhr; and at the conclusion of plaintiff's case the trial court granted a motion made in behalf of said defendants for a directed verdict. From the judgment entered on said verdict, this appeal was taken.

Appellants contend that the proximate cause of the accident consisted in selling her an unscreened seat in the section of the grand stand near first base and requiring her to occupy said seat temporarily, after she had requested, at the time she purchased her ticket, a screened seat in that section.

[1-4] Following the filing of appellants' opening brief, the respondent Suhr, appearing separately, moved for a dismissal of the appeal or an affirmance of the judgment as to him upon the ground that nowhere in said brief was any complaint made as to the trial court's ruling directing a verdict in his behalf, nor was any attempt made therein to point out any legal ground upon which they sought to hold him liable, jointly or severally, for the accident. In response to the motion, appellants, for the first time, advanced the theories that the act of a baseball player in batting a foul ball which falls among the spectators in the grand stand is itself negligence; and that in any event in participating in the game as a player, respondent was engaged in a joint adventure with the club management which rendered him jointly and severally liable for any negligent act on its part. There is no merit in either theory. No authority has been cited in support thereof, and the fallacy of the first is self-evident. As to the second, it is well settled that in order to establish the existence of a joint adventure there must be proof, as in case of a partnership, of a community interest, and a sharing of profits (14 Cal. Jur. 761; Dempsey-Kearns Theatrical, etc., Enterprises v. Pantages, 91 Cal. App. 677, 267 P. 550); and here there was no proof whatever tending to show, nor do appellants claim, that there was any such community interest or sharing of profits between the players and the club management, nor that the players had anything to do with the management of the park, selling the tickets, seating the spectators, or promoting the exhibition itself. Therefore respondent's motion to affirm the judgment as to him should be granted.

The respondent baseball club at the outset contends too that the appeal as to it should be dismissed or the judgment affirmed upon the ground that appellants' opening brief failed to conform to the requirements of the statute and the rules of court relating to setting forth certain portions of the pleadings, the evidence, and a brief statement of the legal questions presented by the appeal. Inasmuch, however, as appellants in their closing brief have attempted to supply, to some extent at least, the omissions complained of, we have examined into the merits of the appeal; but, after having done so, are satisfied that the action of the trial court in directing the verdict should be sustained.

[5-8] With respect to the law governing cases of this kind, it has been generally held that one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls; that the management is not required, nor does it undertake to insure patrons against injury from such source. All that is required is the exercise of ordinary care to protect patrons against such injuries (Edling v. Kansas City Baseball, etc., Co., 181 Mo. App. 327, 168 S. W. 908), and, in doing so, the management is not obliged to screen all seats, because, as pointed out by the decisions, many patrons prefer to sit where their view is not obscured by a screen. Moreover, the management is not required to provide screened seats for all who may apply for them. The duty imposed by law is performed when screened seats are

provided for as many as may be reasonably expected to call for them on any ordinary occasion (Wells v. Minneapolis Baseball, etc., Ass'n, 122 Minn. 327, 142 N. W. 706, 46 L. R. A. (N. S.) 606, Ann. Cas. 1914D, 922; Brisson v. Minneapolis Baseball, etc., Ass'n, 185 Minn. 507, 240 N. W. 903); and if, as in the cases of Wells v. Minneapolis Baseball, etc., Ass'n, supra, and Kavafian v. Seattle Baseball Club Ass'n, 105 Wash. 215, 177 P. 776, 181 P. 679, a spectator chooses to occupy an unscreened seat, or, as in the Brisson Case, supra, is unable to secure a screened seat and consequently occupies one that is not protected, he assumes the risk of being struck by thrown or batted balls; and, if injured thereby, is precluded from recovering damages therefor. As aptly said in Cincinnati Base Ball Club Co. v. Eno, 112 Ohio St. 175, 147 N. E. 86, it is common knowledge that in baseball games hard balls are thrown and batted with such great swiftness they are liable to be thrown or batted outside the lines of the diamond, and spectators occupying positions which may be reached by such balls assume the risk of injury therefrom.

[9] In the present case the evidence shows that on the day in question the said Joan Quinn went to the game alone. She was a high school student, strong, mentally alert, weighing about 125 pounds, and active in several kinds of athletics, including baseball. She had been interested in professional baseball for about two years, during which time she had attended professional games at this same park about twice a week during baseball season, and she was admittedly thoroughly familiar with the rules of the game, the manner in which it was played, the frequency with which foul balls were batted into the grand stand, and the danger to spectators of being struck thereby. The grand stand in Recreation Park contained an unusually large number of screened seats, some in the section along the first base line and others in the section behind the home plate, and, according to her testimony, she asked the ticket seller for a screened seat near first base and not behind the home plate. Upon reaching the grand stand, however, the usher escorted her to an unscreened seat near first base, all of the screened seats in that section being occupied. She protested, but was told by the usher, so she testified, that she could see for herself there were no more unoccupied screened seats near first base; and he further told her, so she said, that inasmuch as the game had already started she would have to sit down in the seat called for by her ticket until he could see what could be done about it, that she was obstructing the view of those behind her; whereupon she sat down, believing the usher would be able later to provide her with a screened seat in that section. The evidence also shows that at the time she took the seat assigned to her there were a number of unoccupied screened seats in the section behind the home plate, but, as stated, she expressed a desire to witness the game from along the first base line, and consequently she continued to watch the game from the seat to which she had been assigned until she was struck by the ball, which she thought was during the fourth inning of the game, although she was not certain. And she frankly admitted knowing at the time she took the unscreened seat she would be in danger of being struck by a batted ball.

Under the law as declared in the cases above cited, therefore, it would seem clear that in accepting the unscreened seat, even temporarily, with full knowledge of the danger attached to so doing, she assumed the risk of injury, which precluded recovery of damages.

Appellants argue that the usher in effect compelled her to sit and remain in the unscreened seat assigned to her, and that consequently the case does not fall within the operation of the legal rules declared by the cases above cited. But the evidence will not bear such construction, for it is plain to be seen that she could have taken a screened seat elsewhere in the grand stand where she would not have been subject to danger, or she could have refused to accept the seat to which she was assigned and demanded the return of her admission money. But she did neither. According to her own testimony she wanted to witness the game from the section of the grand stand near first base.

[10] Appellants make the further contention that the element of contributory negligence may not be considered on the appeal because it was not properly pleaded in the answer; and that in any event it was a question of fact to be determined by the jury. In the absence of any demurrer to the answer, however, the allegations thereof were legally sufficient to raise the issue (Griswold v. Pacific Electric R. Co., 45 Cal. App. 81, 187 P. 65; Salvo v. Market Street R. Co., 116 Cal. App. 339, 2 P.(2d) 585); and, as to the latter point, it is held generally that, in the absence of a clear showing of abuse of discretion, reviewing courts will not interfere with the rulings of trial courts in submitting or refusing to submit to juries the question of

whether the contributory negligence of children of the age of fourteen years and under was such as to prevent their recovering for injuries sustained by them (Mayne v. San Diego Electric R. Co., 179 Cal. 173, 175 P. 690; Wallace v. Great Western Power Co., 204 Cal. 15, 266 P. 281); and there are a number of cases involving injuries to minors about the age of the girl in question here wherein it was held as a matter of law that they were guilty of contributory negligence, among them being Wallace v. Great Western Power Co., supra, Bolar v. Maxwell Hardware Co., 205 Cal. 396, 271 P. 97, 60 A. L. R. 429, Studer v. Southern Pacific Co., 121 Cal. 400, 53 P. 942, 66 Am. St. Rep. 39, and Whalen v. Streshley, 205 Cal. 78, 269 P. 928, 60 A. L. R. 445. In view of the admitted facts of this case, showing full knowledge on the part of the injured girl of the risks she was assuming in occupying an unscreened seat in the section of the grand stand along the first base line, there can be no ground for holding that the trial court in the present case abused its discretion in refusing to submit the issue of contributory negligence to the jury.

The judgment is affirmed as to each respondent.

We concur: TYLER, P. J.; CASHIN, J.

Joan QUINN (a minor), by Aloysius W. Quinn, her Guardian ad Litem; Frances Quinn and Aloysius W. Quinn, Plaintiffs and Appellants, v. RECREATION PARK ASSOCIATION (a Corporation), San Francisco Baseball Club, Inc. (a Corporation), Pittsburgh Baseball Club (a Corporation) and Gussie Suhr, Defendants; San Francisco Baseball Club, Inc. (a Corporation) and Gussie Suhr, Respondents.

Civ. 9123.

District Court of Appeal, First District, Division 1, California.

Sept. 12, 1934.

Hearing Granted by Supreme Court Nov. 8, 1934.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

George D. Collins, Jr., of San Francisco, for appellants.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for respondent San Francisco Baseball Club, Inc.

Robert P. Cahen and Vogelsang & Brown, all of San Francisco, for respondent Gussie Suhr.

KNIGHT, Justice.

For the reasons and upon the grounds set forth in the main opinion (35 P.(2d) 602) this day filed in the above-entitled cause, the motion of respondent Suhr to affirm the judgment is granted.

We concur: TYLER, P. J.; CASHIN, J.

140 Cal.App. 418

ROSE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9511.

District Court of Appeal, Second District, Division 1, California.

Aug. 16, 1934.

Hearing Denied by Supreme Court Oct. 15, 1934.

1. Contempt ⇐66(7)

In reviewing order adjudging petitioner in contempt of court, province of reviewing court is limited to determination of whether order under consideration was made by trial court acting within its jurisdiction.

2. Contempt ⇐10

Orders adjudging attorney in contempt were affirmed where orders showed that when addressing court attorney displayed obnoxious manner of speech and displeasing, irritating, and personally offensive expression of countenance (Code Civ. Proc. § 128, subds. 3, 5).

3. Motions ⇐56(1)

All orders of court need not be entered at length in its minutes in order that they may become effective, but in absence of statute order is effective from signing, or time it is signed and filed (Code Civ. Proc. §§ 1003, 1064).

Petition by A. Brigham Rose against the Superior Court of the State of California in and for the County of Los Angeles, Charles S. Burnell, Judge, and others, for a writ of

certiorari to review certain orders of respondent.

Orders affirmed.

A. Brigham Rose, of Los Angeles, in pro. per.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondents.

PER CURIAM.

By allegations contained in his petition for a writ of certiorari herein, it appears that in the course of the trial of an action that was pending before the respondent superior court, on each of three separate occasions petitioner was adjudged guilty of contempt of said court, and was sentenced to pay a fine of $500 and to serve a term of five days in the county jail. However, as to the second offense, later the fine was ordered remitted and the jail sentence was ordered to be served concurrently with that imposed by the adjudication which related to the first offense.

The specifications of the first misconduct of petitioner which resulted in the order by which he was adjudged guilty of contempt are stated in said order as follows:

"During the impanelment of the jury and while prospective jurors in the box were being questioned as to their qualifications to serve as trial jurors, the court made a statement to the jurors in the box as to the charge involved, to-wit, manslaughter, and the defendant's plea thereto, directing all jurors in the courtroom to listen carefully to said statement and to such questions as might be asked of the prospective jurors in the box by the court or by counsel and to note the answers to such questions in order that they might determine individually whether or not their answers would be the same as those given by the jurors in the box.

"The court then asked a number of questions of the jurors in the box, whereupon the said Rose proceeded to examine said jurors. During said Rose's examination, he repeatedly asked questions of jurors, which questions had already been asked and answered, although directed by the court to refrain from repeating the same questions that had been asked and answered, and particularly while questioning Mr. Danley, a prospective juror, said Rose asked him a question as to his belief in the honesty of Chinamen, which question had already been asked and answered by all of the jurors in the box, including said Danley. The court then called Mr. Rose's attention to the fact that said question had been asked and answered. Mr. Rose proceeded in an exceedingly loud and aggressive tone of voice and with a sneer upon his face, and contrary to the direct instructions of the court, to ask the same question. The court again directed him to refrain from repeating questions that had already been asked. Mr. Rose persisted in arguing with the court and to repeat the questions already asked and answered despite the admonition of the court that he refrain from so doing. Mr. Rose then in a loud and aggressive tone of voice and in a belligerent manner and with a sneering and contemptuous expression of the face stated that the court's ruling was 'unusual'. All of Mr. Rose's statements and arguments were made in an aggressively loud tone of voice and in a sneering manner, calculated, in the opinion of the court, to bring the court into contempt."

The foundational facts for the second order or judgment of contempt and the commitment of the petitioner are stated therein in the following language: "Thereupon the impanelment of the jury proceeded and certain questions were asked of the jurors in the box, which all of them answered in the affirmative. Mr. Rose then proceeded to ask the same questions of individual jurors. He was then directed by the court to refrain from repeating questions which had already been asked and answered; whereupon in a loud, insolent and aggressive tone of voice, and with a sneering and contemptuous expression on his face, Mr. Rose said, 'Will your Honor permit me to examine this juror?' The court then stated, 'You heard the court's ruling.' Mr. Rose then proceeded to again repeat the same questions that had already been asked and answered. He was again directed by the court to refrain from so doing, and in a loud, insolent and aggressive tone of voice and with a contemptuous and sneering expression, said, 'I demand a mistrial on the ground that your Honor has already prejudiced this jury by not permitting me to examine this panel as to their qualifications to act as jurors.' The court then directed the jury to disregard any remarks of the court addressed to counsel, admonishing them that the defendant and not his counsel was on trial. Mr. Rose, in a loud, aggressive and boisterous tone of voice and with a sneering and contemptuous expression of the face, yelled 'I demand an apology for that.' Whereupon Mrs. Aumaier, one of the prospective jurors in the box, asked to be excused, stating that she felt that the attitude

of Mr. Rose was very rude and that he had conducted himself in such an ungentlemanly way that she felt she would be prejudiced against the client he was representing and could not be fair to him; whereupon Mr. Rose again demanded a new trial, in the same voice and manner as hereinbefore stated, which motion the court denied, and because of Mr. Rose's disorderly, contemptuous and insolent behavior and his refusal to obey the admonitions of the court, all done and committed within the immediate view of the court and jury, tending to interrupt the proceedings and to impair the respect for the court's authority, the court adjudged him guilty of contempt of court. * * *"

That part of the third order or judgment of contempt of the petitioner and his commitment therefor that is here in question is as follows:

"During the cross-examination of witnesses for the People the said Rose repeatedly approached close to the witness and shouted his questions in a loud and belligerent tone of voice, although admonished by the court to refrain from so doing and to remain at or behind the counsel table unless when showing the witness a document or proceeding with illustrations at the blackboard. He also insisted in attempting to argue with the court after rulings had been made, sustaining or overruling objections.

"During the examination of the witness Sam Ho, a Chinese boy, eighteen years of age, the said Rose insisted in using loud and belligerent tone of voice and a threatening demeanor towards said witness, and on being admonished by the court to refrain from brow-beating said witness, he commented upon the court's ruling and admonition in a loud, aggressive and contemptuous tone of voice in a sneering manner. Throughout the entire cross-examination of the witnesses Mr. Rose's tone of voice was loud and aggressive, and his manner and facial expression were sneering and contemptuous.

"Wherefore, the court adjudged the said Rose guilty of contempt of court for disorderly, contemptuous and insolent behavior and for refusal to obey the admonitions of the court, all of which was committed in the immediate view of the court and jury, tending to interrupt the proceedings and to impair the respect for the court's authority. * * *"

Although petitioner has outlined many of the legal principles relative to the validity of an order that may be made by a trial court in a contempt proceeding, in the instant matter the real test is whether in its essence a sufficient statement of the facts before the court, and in reliance upon which it acted, has been made in the order in question to confer jurisdiction upon such court. And in the determination of the issue thus suggested it is necessary to consider, not whether each and all of such foundational facts is or are safely and securely grounded, but rather only whether in itself one essential "cause of action" is sufficiently stated. In that connection, the attack made by petitioner upon the order or orders is limited. He does not question the general powers of the court in the premises but confines his objections to the legality of the order or orders, either to the underlying facts which assumedly gave rise thereto, or to the manner in which such facts are stated within such order or orders. That is to say, he asserts that, considering the "cold" record of the proceedings, nothing therein contained as delineated by the language employed by petitioner, or his conduct, attitude, or demeanor with reference to the situation before the court, would indicate a legal justification for an adjudication of contempt; and, in addition thereto, that even assuming the possibility of just cause for the ultimate action of the court of which complaint is made, the manner of the statement of such ground within such order or orders constitutes but a conclusion of law, and as such is lacking in legal requirements as a foundation for a valid commitment. Thus narrowed, it becomes obvious that if within the questioned order or orders a single unexceptionable ground therefor may be discovered, the jurisdiction of the trial court in making such order necessarily becomes or is invulnerable. In that regard, an inspection of the several orders which are the subject of criticism reveals the condition, common to all, that when addressing the court, in substance the dereliction on the part of petitioner consisted in his obnoxious manner of speech and in his displeasing, irritating and withal, the personally offensive, expression of his countenance. Specifically, a reference to the several orders in question will disclose that as to the first of them it is charged that in a "loud and aggressive tone of voice and in a belligerent manner and with a sneering and contemptuous expression of the face," petitioner stated the court's ruling was "unusual"; that in the second of such orders it is alleged that (a) "in a loud, insolent and aggressive tone of voice, and with a contemptuous and sneering expression," petitioner said, "I demand a mistrial," etc.; (b) that "in a loud and aggressive and

boisterous tone of voice and with a sneering and contemptuous expression of the face," petitioner yelled, "I demand an apology" (from the court); and in the third of such orders it is again asserted that petitioner "insisted in using loud and belligerent tone of voice and a threatening demeanor towards said witness; and on being admonished by the court to refrain from browbeating said witness, he commented upon the court's ruling and admonition in a loud, aggressive and contemptuous tone of voice in a sneering manner."

As to each of such specifications of misconduct, the conclusion of the trial court was that its obvious effect was (1) "to bring the court into contempt," or (2) that it tended "to interrupt the proceedings and to impair the respect for the court's authority."

[1] Regarding the sufficiency of such allegations, at the outset it should be remembered that in this proceeding the province of this tribunal is limited to a determination of whether the order or orders under consideration were made by the trial court acting within its jurisdiction. In other words, and as in part is stated negatively, it is not, the underlying facts considered, whether or not either this court or any other court should have found the petitioner guilty of contempt; but rather is, was the trial court legally authorized to do so?

[2] Without meaning to indicate a conclusion relative either to the proper or to the sole source of power residing in a court with reference to its authority to adjudge in the matter of contempt of its proceedings, it should be noted that in specific instances at least statutory power is conferred upon the court in that regard. For example, by the provisions of subdivision 3 of section 128 of the Code of Civil Procedure, every court is given power "to provide for the orderly conduct of proceedings before it"; and (subdivision 5) "to control * * * the conduct * * * of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto. * * *" And by the express terms of section 1209 of the same Code, "the following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

"1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

"2. * * * Boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding."

So much for obvious, applicable, statutory authority relating to the general situation presented by the record herein. But in addition thereto, by direct adjudication by appellate courts and those of last resort, both in this state and elsewhere, has the question here at issue received attention, with the result that, in practically identical conditions with those here present, the exercise of the power by the trial court has been approved and affirmed not only as to the power and the authority of the court in general, but as well with reference to a designation or specification of objectionable attitude, conduct, or demeanor on the part of the contemnor in language, if not identical with that employed by the trial court herein, at least analogous thereto.

In the case entitled In re Hallinan, 126 Cal. App. 121, 14 P.(2d) 797, in substance it was held (syllabi):

"In said action where the tone of voice of the attorney for the defendant, in refusing to cease to continually interrupt the argument of the district attorney for the purpose of objecting thereto, was extremely and unduly loud, boisterous, harsh, offensive and contemptuous, his conduct was disorderly and contemptuous and his attitude and behavior toward the court while holding said session was insolent, all of which tended to and did interrupt the due course of the trial which was then and there in progress, and said conduct was boisterous and did breach the peace of said judicial proceedings and create a violent disturbance, thereby interrupting the due course of the trial, and the trial court so found in its judgment of contempt, the manner in which said attorney conducted himself brought him clearly within the operation of the provisions of section 1209 of the Code of Civil Procedure, and subjected him to punishment for contempt.

"A contempt may be shown either by language or behavior, and although the language itself may not be contemptuous it may become so if uttered in an insolent or defiant manner; and in determining whether the language used was a contempt, regard must be had not only to the very words used but to the surrounding circumstances, the connection in which they were used, the tone, the look, the manner and the emphasis.

"Where the contempt consists, not in the use of language which in itself is offensive, but in the contemptuous tone of voice in which it was spoken, accompanied by disorderly behavior, and the court, in describing the volume, tone, accent and inflection of the contem-

ner's voice and manner of speech, finds that it was extremely and unduly loud, boisterous, harsh, offensive and contemptuous and, in describing his attitude and behavior toward the court, finds that it was insolent, contemptuous, boisterous and disorderly to the extent of creating a disturbance and breach of the peace, all of which interrupted and interfered with the orderly progress of the trial, such findings are not mere conclusions, but are legally sufficient to support the trial court's adjudication of contempt and are final and conclusive on habeas corpus."

In principle and to the same effect, see State v. Zioncheck (State v. Johnson) (1933) 171 Wash. 388, 18 P.(2d) 35, 37, 23 P.(2d) 1118, wherein in part the court stated: "In such a case as this, much depends upon the manner, expression, and attitude of the party adjudged in contempt in addressing the court or other person in using the language held improper. A finding of contempt is not necessarily based alone upon the language used. The contempt may largely exist in the manner in which the words are spoken, and appellate courts are necessarily slow to reverse a finding of contempt by a trial court who is naturally in a much better position than is this court to determine whether or not a contempt was actually committed. In the colloquy which occurred between court and counsel almost immediately after the fine was imposed, the trial court referred to the necessity of keeping order in the courtroom, and stressed appellant's attitude toward the witness. The word 'attitude' includes more than the mere use of words, and it is evident that the court based its summary order upon something more than the language used by appellant as shown in the written record before us. In the formal order from which appellant appeals, the court found that appellant used the language which the court found objectionable 'in a manner insulting to the witness.' * * *"

In State v. Buddress (1911) 63 Wash. 26, 114 P. 879, 881, it was contended that the order of contempt stated "conclusions and not facts." In that regard, in part, the court said: "It recites that an action was pending in court, that the appellant was applying to have an order of dismissal 'signed by the court,' and that, in the presence of the judge at chambers in the courthouse, the appellant used 'boisterous' and 'angry' 'language' and 'gestures', and that in the clerk's office, 'in the immediate presence' of the court, he engaged in a fight with his codefendant. * * * It is clear, also, that, while the order contains certain adjectives that are conclusions, it recites facts which are highly contumacious in a member of the bar and an officer of the court. The word 'boisterous' is defined in Webster's New International Dictionary as 'loud; stormy; noisy.' If the appellant and his codefendant used towards each other loud and angry language and gestures, and engaged in a fight in the presence of the court while the former was applying for an order, their conduct was contemptuous, and the court would have been both lacking in dignity and recreant to its duty if it had not visited summary punishment upon them."

In accord with the foregoing authorities, it follows that the point presented by petitioner, and upon which he places principal reliance, cannot be sustained.

[3] However, in effect, petitioner further contends that by the clerk's minutes of the proceedings of the trial of the action in which the court was engaged at and prior to each of the particular occasions, upon the occurrence of which the order or judgment of contempt and the commitment of petitioner depended, an insufficient showing of jurisdiction of the court was made upon which to base the order of commitment. In other words, that the minutes of the clerk constitute the order of the court; and that the purported judgment of the court, as set forth in the written order and the commitment with relation to the contempt of petitioner, is of no materiality; nor is of any validity as far as it may be considered a basis for the commitment of petitioner.

In that regard, other than a reference to sections 1003 and 1064 of the Code of Civil Procedure, which respectively and generally define an order and a judgment, no authorities are cited by petitioner in support of his contention. In 18 California Jurisprudence, p. 663, it is said: "Nor is there any provision of law which requires that all orders of a court be entered at length in its minutes, in order that they may be effective. On the contrary, except where some statute expressly or by implication provides otherwise, an order is effective from the time it is signed, or from the time it is signed and filed, notwithstanding the fact that it is not entered in the minutes. It is true that the statute makes it the duty of the county clerk to enter a synopsis of all orders proper to be entered, unless the court orders them entered at length, but this statute merely defines his duties as an officer, rather than prescribes or limits the functions or judicial powers of the court. The entry is no part of the order, but is a ministerial duty devolving upon the clerk, which may be compelled in some appropriate manner. The en-

try of an order only serves the purpose of fixing the time from which an appeal may be taken." Citing appropriate authorities.

See, also, Von Schmidt v. Widber, 99 Cal. 511, 34 P. 109; In re McKean, 82 Cal. App. 580, 256 P. 226; Demens v. Huene, 89 Cal. App. 748, 265 P. 389.

It follows that petitioner's point in that regard is without merit.

It is ordered that the several orders to which the writ is directed are, and each of them is, affirmed.

140 Cal.App. 432

PEOPLE v. MARRON et al.

Cr. 2539.

District Court of Appeal, Second District, Division 1, California.

Aug. 16, 1934.

1. Criminal law ⇐13

Statute providing that any person who shall procure a female inmate for a "house of prostitution" shall be guilty of a felony *held* not invalid for failure to define "house of prostitution," since its meaning is common knowledge (St. 1911, p. 9, § 1).

A "house of prostitution," which is synonymous with a "house of ill fame," may be a flatboat with a cabin on it, a tent, one room of a steamship, or a single room, and "prostitution" means common, indiscriminate, illicit intercourse for hire, or the practice by a female in offering her body to an indiscriminate intercourse with men for money or its equivalent.

[Ed. Note.—For other definitions of "House of Ill Fame, Assignation, Lewdness, or Prostitution" and "Prostitution," see Words & Phrases.]

2. Prostitution ⇐1

Facts that one knowingly and with criminal intent aided and abetted in procurement of female inmates for house of prostitution *held* sufficient to support conviction for such procurement, since he was guilty as a principal (St. 1911, p. 9, § 1; Pen. Code, § 31).

3. Criminal law ⇐112(1)

Where offense of procurement of female inmates for house of prostitution was committed partly in each of two counties of a state, prosecution therefor could be brought in either (St. 1911, p. 9, § 1; Pen. Code, § 781).

4. Criminal law ⇐1129(3)

Assignment that court erred in failure to give or in giving certain indefinitely specified instructions will not be noticed on appeal, particularly where neither argument nor authority is presented in support thereof.

5. Criminal law ⇐1129(3)

Appellate court will not search record for alleged erroneously admitted evidence to which appellant does not direct court's attention.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Art Marron, Pauline May Le Roy, Anna Taylor, and Mamie Wells were convicted on three counts of pandering and on one count of conspiracy to commit the same offense, and they appeal.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant Marron.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendants were convicted on each of three counts of the crime of pandering, and on one count of the crime of conspiracy to commit the same offense. They appeal from the ensuing judgments that were rendered against them, as well as from an order by which their motion for a new trial was denied.

By the terms of the statute (Stats. 1911, p. 9) under which in part the defendants were prosecuted, it is provided that: "Any person who shall procure a female inmate for a house of prostitution * * * shall be guilty of a felony, to wit: pandering. * * *" Section 1.

In that connection, the first point presented in behalf of appellant Marron is that the statute "is too vague and indefinite to constitute the basis of a criminal charge * * *"; and in substance, the argument is restricted to the contention that, because the phrase "house of prostitution" is not defined in the statute, no one is apprised of the nature of the crime that is intended to be denounced.

In the case of Ferguson v. Superior Court, 26 Cal. App. 554, 558, 147 P. 603, 605, the word "prostitution" is defined as follows: "Prostitution means common, indiscriminate, illicit intercourse for hire. It is the practice

by a female in offering her body to an indiscriminate intercourse with men for money or its equivalent. * * *"

And in People v. Mead, 145 Cal. 505, 78 P. 1047, 1049, in effect it appeared that the house in question contained twelve rooms, commonly known as "cribs," each of which was occupied by a different woman as a place of prostitution for herself alone, and that the wife of the defendant occupied one of the rooms for that purpose. It was held that, "under the circumstances, defendant's wife was in a 'house of prostitution,' within the meaning and intent of the statute under consideration. * * * The fact that the court instructed the jury that the house must be occupied by two or more women would not justify this court or the court below in granting a new trial because there was no proof that a particular room of the house was occupied by more than one woman, if the evidence was otherwise sufficient to justify the verdict."

In People v. Slater, 119 Cal. 620, 622, 51 P. 957, it was contended that the trial court erred in amending a certain instruction that was given to the jury. In passing upon the question thus presented, the Supreme Court said: "The instruction, as requested, is as follows: 'If you find from the evidence that the house where the defendant took the girl is only a house where one woman lives, then I charge you that such a house is not a house of ill fame.' The court added, 'unless it is used for the purposes of prostitution.' The amendment was pertinent and proper. A house kept by one woman may be entirely respectable and the woman virtuous; but one woman may be unchaste, and may keep a house of ill fame, to which others resort for purposes of prostitution."

See, also, People v. Ryberg, 287 Ill. 195, 122 N. E. 545; Wilson v. State, 17 Ala. App. 307, 84 So. 783; Pon v. Wittman, 147 Cal. 280, 293, 81 P. 984, 2 L. R. A. (N. S.) 683; and title "House of Ill-Fame" in Third Revision of Bouvier's Law Dictionary, where respective authorities are cited which hold that a flatboat with a cabin on it, a tent, one room of a steamship, or a single room, may constitute a house of ill fame, which is synonymous with a house of prostitution. See title in Words and Phrases, First, Second and Third Series, and authorities there cited.

[1] But, aside from such decisions, it is common knowledge what is meant by the phrase. It is exceedingly doubtful that the meaning which is properly attachable to the expression is unknown to any adult, English-speaking person within the jurisdiction; in consideration of which, together with the authorities to which attention has been directed, it must follow that the point advanced by appellant is wholly without merit.

[2] Appellant Marron also urges the point that the evidence adduced on the trial of the action was insufficient to establish the fact that he "procured" either of the young women named as a victim of his nefarious business "as an inmate of a house of prostitution." In that regard, although it may be that the evidence fails to show that appellant personally "procured" either of such women, nevertheless the evidence is replete with positive facts in substance that knowingly, intentionally, with criminal intent, and with full knowledge of the nature of his acts and their attendant consequences, he aided and abetted in consummating the offense. Under the terms of section 31 of the Penal Code, "all persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals," from which it follows that appellant's point is not well taken.

[3] Appellant Marron's third point is that, because the several acts of prostitution of the victims named in the information occurred without the boundaries of Los Angeles county, the court in that county was without jurisdiction to try the action against said defendant. It is undeniable that, according to the evidence adduced on the trial of the action, the offense was committed partly within Los Angeles county and partly within Kern county of this state. Such being the fact, a complete answer to appellant's contention is found in the terms of section 781 of the Penal Code, which provides that: "When a public offense is committed in part in one county and in part in another, or the acts or the effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

[4] Appellant Marron further complains of asserted error on the part of the trial court "in its failure to give," or in giving, to the jury several indefinitely specified instructions. Since no attempt is made by appellant to conform to the several rules of this court with reference to the presentation of such a specification of error, and particularly because neither argument nor authority is presented in support thereof, it is assumed that appellant is not serious in his suggestion in that regard.

[5] Finally, appellant Marron urges the point that error prejudicial to him was committed by the trial court in the matter of the admission of evidence. But said appellant fails to direct attention to the particular evidence to which he objects. In such circumstances, it is not incumbent upon this court to search the record for the purpose of establishing the correctness of said appellant's blanket complaint.

The judgments and the orders by which the motion for a new trial was denied are affirmed.

We concur: CONREY, P. J.; YORK, J.

140 Cal.App. 206

MAHONEY v. MURRAY.

Civ. 9089.

District Court of Appeal, First District, Division 1, California.

July 27, 1934.

Rehearing Denied Aug. 25, 1934.

Hearing Denied by Supreme Court Sept. 24, 1934.

1. Trial ⇐253(4)

In pedestrian's action for injuries against motorist, instruction that, if evidence as to which party was at fault was evenly balanced, verdict should be for defendant, *held* not error, because omitting reference to proximate cause and contributory negligence, in view of clear and correct instructions on omitted elements.

2. Trial ⇐296(8)

Instruction to find for motorist if pedestrian had not proved by preponderance of evidence that injuries were solely and proximately caused by motorist's negligence *held* not error, in view of four other instructions that pedestrian was entitled to verdict if defendant's negligence proximately caused, or proximately contributed to, pedestrian's injuries.

3. Trial ⇐296(4, 5)

Instruction that, if pedestrian failed to look both ways before starting to cross road, and such failure proximately contributed to injuries, he could not recover from motorist, *held* not error, in view of evidence that pedestrian turned back in front of motorist's car in lane previously crossed and other instructions on pedestrian's duty in crossing highway.

4. Automobiles ⇐226(2)

Crossing highway between intersections does not preclude recovery for injuries, but pedestrian cannot recover if failure to use reasonable care contributes to injuries received.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Michael Mahoney against James Murray. From a judgment for defendant, plaintiff appeals.

Affirmed.

W. I. Follett, of Oakland, for appellant.

Maurice J. Rankin, of San Jose, and Langton A. Madden, of San Francisco, for respondent.

PER CURIAM.

Action for damages for personal injuries. The case was tried before a jury. Judgment went in favor of defendant, and plaintiff appeals upon the ground that the jury was erroneously instructed.

The accident occurred on the highway near the city of Palo Alto. The highway at this place is 40 feet wide, with four lanes designated by three white lines. Vehicles traveling in a northerly direction used the two lanes on the easterly side of the highway, and vehicles going in a southerly direction used the two lanes on the westerly side. Appellant was a pedestrian attempting to cross from the east side to the west side of the highway. Respondent was driving an automobile in a northerly direction on the highway and in the traffic lane on the east side thereof commonly called the slow lane.

Appellant testified in substance that in walking across the highway he saw and watched respondent's automobile approaching some 150 feet to his left, and, as he believed he had passed in front of it, he turned his attention to another automobile coming from his right and was struck by respondent's car when in the middle of the four traffic lanes. Respondent testified in substance that appellant ran across the highway in front of his car, and, apparently seeing another automobile passing that of respondent's on his left, turned about and ran back toward the east side of the highway directly in front of respondent's car and was struck; that at the time of the impact respondent was

traveling at about ten miles an hour. The cause was tried by the court with a jury. A verdict was returned in favor of the defendant, and judgment was rendered accordingly. From such judgment plaintiff brings this appeal. Some fifty-one instructions were given by the trial court to the jury, and appellant claims four of these to be erroneous.

[1] It is first argued that the instruction numbered 41 is erroneous. It is as follows: "I instruct you that where the proof considered as a whole is even as to whether the plaintiff was at fault, or the defendant was at fault, then in that event I instruct you that the plaintiff has not made out his case, and it is your duty to return your verdict against the plaintiff and in favor of the defendant." It is contended that this is a formula instruction directing a verdict in favor of defendant under the circumstances therein recited, and that, as it omits any reference to the essential element of proximate cause, it is erroneous. Formula instructions which purport to recite the facts of a case and direct the findings of a verdict in accordance therewith, but which omit essential elements constituting a complete defense to the action, have been repeatedly criticized by the courts. The challenged instruction omitted any reference to the element of proximate cause, and failed to instruct on the burden of proving contributory negligence. In other instructions, however, the jury was fully and fairly instructed on the subject of proximate cause and contributory negligence. In view of the clear and correct instructions given to the jury on the omitted essential elements, we are unable to say that the jury was misled by the challenged one. Douglas v. Southern Pacific Company, 203 Cal. 390, 264 P. 237; Barham v. Wilding, 210 Cal. 206, 216, 291 P. 173; Reuter v. Hill (Cal. App.) 28 P.(2d) 390. There is a disposition to relax the rigid application of the rule regarding formula instructions announced in some of the earlier cases. Reuter v. Hill, supra.

[2] The next instruction complained of is as follows: "I again instruct you that before the plaintiff is entitled to recover, he must convince you by a preponderance of the evidence that plaintiff's injuries were caused *solely* and proximately by the negligence of the defendant, and not otherwise, and if plaintiff has failed to so convince you it is your duty to return your verdict in favor of the defendant." (Italics ours.) It is claimed that this is also a formula instruction and is erroneous for the reason that the law does not require the defendant's negligence shall be the *sole* cause of plaintiff's injuries, but all it does require is that the negligence in question shall be the proximate cause. In four other instructions the jury was told that plaintiff was entitled to a verdict upon negligence of defendant proximately causing, or proximately contributing to, the injuries of plaintiff. Under these circumstances, the jury must have understood that defendant was liable if he was negligent and such negligence was the proximate cause of the injury. Schatte v. Maurice, 116 Cal. App. 161, 167, 2 P.(2d) 489.

[3, 4] In the next challenged instruction the court instructed the jury that it was the duty of the plaintiff in attempting to cross the highway to look both ways for automobiles and other vehicles before starting to cross the road, and, if he failed to do this, he was guilty of negligence, and, if his failure to look for automobiles and other vehicles before attempting to cross the road proximately contributed in any degree to the accident which occurred, then he could not recover. Appellant claims this instruction to be erroneous, in that it required him to continue to be watchful of all traffic and vehicles on the street. Plaintiff, as above indicated, was walking from the east to the west side of the main highway. It was after dark and at a place other than an established crosswalk or pedestrian lane. Vehicles approaching him were coming from the south and also from the north. Appellant testified that he crossed the highway from the first traffic lane, when he looked to his left and saw respondent's car coming about 300 feet away; that he then walked across the first traffic lane, looking to the south and watching the on-coming car until he reached the first white line, at which time the car was 150 feet away and in the first traffic lane; that it appeared to him that he had passed in front of the on-coming car and was out of its way; that he then turned his gaze to the right and walked to the second white line; that, while crossing the second traffic lane, he was looking to the north, watching a car going south in the fourth traffic lane until it passed in front of him. Under these circumstances, appellant claims the challenged instruction was a peremptory one to find in favor of the defendant. As above indicated, there was other testimony to show that appellant, after he had passed safely in front of the path of respondent's car, turned around and retraced his steps, placing himself in front of respondent's approaching car. While a pedestrian is not precluded from recovering by reason of the fact that he was

crossing the highway between intersections, he must exercise reasonable care for his own safety, and, where the crossing is made between intersections, greater care must be observed than when using an established crossing, and, if he fails in the exercise of such care, and thereby contributes to the cause of the injury, he has no ground for complaint. De Nardi v. Palanca, 120 Cal. App. 371, 8 P. (2d) 220. Whether plaintiff under all the circumstances used sufficient care for his own safety in crossing the highway was a question for the jury. The trial court gave seven different instructions upon the question of the duty of a pedestrian crossing a highway to look for danger. They fully and fairly state the law on the subject. The court also instructed the jury that it was its duty to determine from all the circumstances whether or not appellant had exercised a proper degree of care for his own safety.

And, finally, it is contended that the fourth challenged instruction was erroneous because it stated that the accident occurred in a 45-mile zone, and the defendant was not exceeding such speed limit, whereas the accident happened in a 15-mile zone, and there was evidence from which the jury might have found that defendant was driving faster than 45 miles per hour. There is no merit in this claim. At the trial appellant made no attempt to prove that respondent violated the speed limit. The evidence without conflict shows that the highway was unobstructed and in a 45-mile zone.

There is nothing in the giving of the complained of instructions that constituted prejudicial error. The judgment is affirmed.

140 Cal.App. 608

PEOPLE v. SCHUMACHER.

Cr. 1394.

District Court of Appeal, Third District, California.

Sept. 11, 1934.

Criminal law ⇐1182

Manslaughter conviction would be affirmed where no brief was filed on behalf of accused and no appearance was made for accused at time case was called for hearing (Pen. Code, § 1253).

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

C. H. Schumacher was convicted of manslaughter, and he appeals.

Affirmed.

Edward Bickmore, of Merced, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Merced county of a felony, to wit, manslaughter.

The transcript on appeal was filed in this court July 26, 1934. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on September 11, 1934. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

140 Cal.App. 367

In re EASTON'S ESTATE.

DIXON et al. v. ECKENROTH et al.

Civ. 8784.

District Court of Appeal, First District, Division 1, California.

Aug. 9, 1934.

As Amended Aug. 14, 1934.

Rehearing Denied Sept. 8, 1934.

1. Appeal and error ⇐927(6)

Where order directing verdict which was controlling on appeal did not specify as ground for making thereof insufficiency of evidence to justify verdict, presumption on appeal was that order was not based on that ground (Code Civ. Proc. § 657).

2. Wills ⇐155(1)

"Undue influence" warranting repudiation of a will must be such as in effect destroyed testator's free agency, and substituted for his own another person's will, and mere general influence, however strong or

controlling, not brought to bear on testamentary act, is insufficient.

[Ed. Note.—For other definitions of "Undue Influence," see Words & Phrases.]

3. Wills ⇐166(7)

Proof of mere opportunity to influence mind of testatrix, even though coupled with interest or with motive so to do, is insufficient to warrant setting aside of will on ground of undue influence, to sustain which there must be substantial proof, direct or circumstantial, of pressure which overpowers volition of testator and operates directly on testamentary act.

The influence must consist in the exercise of acts and conduct by which the mind of the testator is subjugated to the will of the person operating upon it, some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to his own desires and different from what he would have done had he been permitted to follow his own inclinations or judgment.

4. Wills ⇐166(12)

Mere suspicion that undue influence may have been used is insufficient to warrant setting aside of will on that ground, evidence being required to do more than raise suspicion, but must amount to proof, and such evidence has force of proof only when circumstances proved show a pressure overpowering free agency and volition of testator at time will was made.

5. Wills ⇐324(3)

Facts *held* as matter of law not to establish undue influence over testatrix so as to warrant setting aside of will.

Facts disclosed that the testatrix was a childless widow; that previous to her death lived with a sister, with whom also lived testatrix' nieces; that testatrix opened a joint account in a bank with one of the nieces; that on the occasion of making the first will such niece accompanied testatrix to bank which executed the will; that, upon the occasion of a subsequent will, another niece accompanied the testatrix, and there was no evidence that the testatrix disposed of her property contrary to her own will.

6. Wills ⇐166(4)

That one of beneficiaries accompanied testatrix to bank and that another beneficiary accompanied testatrix to attorney's office, when testatrix directed preparation of wills, *held* insufficient to warrant finding that wills were product of undue influence.

7. Wills ⇐165(1)

That subsequent will was complete confirmation of wishes of testatrix as expressed in first will of itself may be taken as circumstance tending to refute charge of undue influence and to show permanent and fixed state of mind on part of testatrix with respect to disposition of her estate.

8. Wills ⇐163(2)

Presumption of undue influence is not generated alone by existence of confidential relationship between beneficiary and testatrix, but there must be in addition proof that one occupying such relationship displayed activity in preparation of will to his undue profit, and that will thereby became unnatural.

9. Wills ⇐163(6)

Where next of kin are collaterals and one or more are unprovided for in will, pretermitted persons, in order to establish that instrument is unnatural, must show affirmatively that they had peculiar or superior claims to decedent's bounty, and, if no such claim is adduced, instrument cannot be held to be unnatural; collateral heirs not being natural objects of bounty.

10. Wills ⇐155(1)

That testatrix did not repay money loaned to her husband during her lifetime, nor make suitable provision in her will for its repayment, did not justify setting aside will upon ground of undue influence.

11. Wills ⇐155(1)

Quarrel between testatrix' brothers and testatrix' sister with whom testatrix lived until her death could have no legal effect upon will on ground that will was executed under undue influence, where quarrel took place after her death.

12. Wills ⇐337

Will proponents' motion for new trial *held* properly granted, notwithstanding jury's finding for contestants, where evidence failed as matter of law to meet legal requirements for nullification of a will upon ground of undue influence claimed by contestants.

13. Statutes ⇐117(8)

Act amending section and adding new sections relating to findings, judgments, new trials, and appeals *held* not unconstitutional on ground that title embraced more than one subject, since numerous provisions which are germane to and deal with one general object, if fairly indicated in title, may be united in one act (Code Civ. Proc. § 659, as amended by St. 1929, p. 841, § 3; Const. art. 4, § 24).

14. New trial ⇐116(2)

Period of time for serving of notice of intention for new trial was tolled by trial court's entering judgment for proponents of will, non obstante veredicto, and by appeal taken from order made in that behalf (Code Civ. Proc. § 659, as amended by St. 1929, p. 841, § 3).

TYLER, P. J., dissenting.

Appeal from Superior Court, San Francisco County; Thomas F. Graham, Judge.

Will contest by Samuel W. Dixon and others, opposed by Sarah Hartnett and others, proponents, to set aside the will of Mary Easton, deceased. From an order granting a new trial after judgment for contestants, contestants appeal.

Affirmed.

Edwin L. Forster and Walker Peddicord, both of San Francisco, for appellants.

Robert McMahon, John P. Doran, and Andrew F. Burke, all of San Francisco, for respondents.

KNIGHT, Justice.

This is an appeal by contestants from an order granting a new trial in a proceeding brought to set aside the will of Mary Easton, deceased.

[1] The contest was based on several grounds, but during the trial all were dismissed except one based on allegations of undue influence; and upon that issue the jury found in favor of contestants. Thereafter, on motion of the proponents of the will, the trial court entered judgment in their favor, notwithstanding the verdict. Contestants appealed, and the order was reversed upon the ground that, under section 629 of the Code of Civil Procedure, the making of a motion for a directed verdict during the trial of the action was a necessary prerequisite to the rendition of a judgment non obstante veredicto, and that no such motion had been made. Accordingly the trial court was directed to enter judgment upon the verdict, and thereafter to hear and determine such other and further proceedings as were necessary to a final disposition of the case. In re Easton, 118 Cal. App. 659, 5 P.(2d) 635. Five days after the remittitur was filed, proponents filed notice of intention to move for a new trial, urging as grounds therefor: Insufficiency of the evidence; that the verdict is against law; and errors of law occurring at the trial and excepted to by the proponents. Following the hearing of the motion a minute order was entered, general in terms, reading: "Opposition to motion for new trial—Denied. Motion for a new trial granted." Contestants took this appeal therefrom, and after the appeal was briefed and argued, but before it was submitted for decision, proponents obtained from the trial court an ex parte order directing the entry nunc pro tunc of an order to the effect that proponents' motion for new trial had been granted upon the ground of insufficiency of evidence. Proponents then sought by way of motion for diminution of record to have said nunc pro tunc order made part of the record on this appeal, but the motion was denied (Estate of Easton (Cal. App.) 28 P.(2d) 376); consequently the original order from which the appeal was taken is controlling, and, inasmuch as it did not specify, as ground for the making thereof, insufficiency of the evidence to justify the verdict, the presumption on this appeal is that it was not based on that ground (section 657, Code Civ. Proc.); furthermore, proponents make no attempt to sustain said order upon the ground of errors of law occurring during the trial. The appeal is narrowed down, therefore, as appellants contend, to the single question of whether the verdict is against law; that is, whether the evidence as a whole, when considered most favorably to contestants, and resolving all conflicts therein in support of the verdict, measures up to the standard fixed by law for the setting aside of a will upon the ground of undue influence. We are of the opinion that it does not.

[2-4] The legal principles to be used in determining whether a will is the product of undue influence are well settled by a continuous line of decisions. They are set forth in the Estate of Morcel, 162 Cal. 188, 121 P. 733, 735, Estate of Bryson, 191 Cal. 521, 217 P. 525, Estate of Perkins, 195 Cal. 699, 235 P. 45, and several later cases hereinafter cited. As pointed out therein, the kind of influence that may be held to be undue influence warranting a repudiation of a will "must be such as in effect destroyed the testator's free agency, and substituted for his own another person's will" (Estate of Motz, 136 Cal. 558, 563, 69 P. 294, 295); and mere general influence, however strong or controlling, not brought to bear on the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount "to coercion destroying free agency on the part of the testator." Estate of Keegan, 139 Cal. 123, 127, 72 P. 828, 829; Estate of Fleming, 199 Cal. 750,

251 P. 637; Estate of Holloway, 195 Cal. 711, 235 P. 1012. So, also, proof of mere opportunity to influence the mind of the testatrix, even though coupled with an interest or with a motive so to do, is insufficient. In order to warrant setting aside a will on this ground, there must be substantial proof, direct or circumstantial, of a pressure which overpowers the volition of the testator and operates directly on the testamentary act. Estate of Graves, 202 Cal. 258, 259 P. 935; In re Langford's Estate, 108 Cal. 608, 41 P. 701; Estate of Morcel, supra. In other words, the influence must consist in the exercise of acts and conduct by which the mind of the testator is subjugated to the will of the person operating upon it, some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to his own desires and different from what he would have done had he been permitted to follow his own inclinations or judgment. Estate of Kilborn, 162 Cal. 4, 120 P. 762; Estate of Bryson, supra; Estate of Perkins, supra; Estate of Relph, 192 Cal. 451, 221 P. 361; Estate of Holloway, supra; Estate of Anderson, 185 Cal. 700, 198 P. 407; Estate of Fleming, supra; In re Calkins' Estate, 112 Cal. 296, 44 P. 577. It is well settled also that "mere suspicion that undue influence may have been used is not sufficient to warrant the setting aside of a will on that ground." Estate of Morcel, supra; Estate of Keegan, supra. The evidence must do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when the circumstances proved show a pressure overpowering the free agency and volition of the testator at the time the will was made. In re McDevitt, 95 Cal. 17, 30 P. 101; In re Langford's Estate, supra; Estate of Morcel, supra. In restating the extent a contestant is required to go in order to nullify a will upon the ground of undue influence, the Supreme Court in the Estate of Gleason, 164 Cal. 756, 130 P. 872, 876, said: "The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made'"—citing a number of cases.

The following are the essential, undisputed facts of the present case, as shown by the evidence: The testatrix, Mrs. Easton, died at the age of 65 years. She was a childless widow, and left surviving her as next of kin three brothers, Samuel, John, and Joseph Dixon, and a sister, Mrs. Sarah Hartnett. The brothers are the contestants herein, and the sister and her two daughters, Lucy Hartnett and Mrs. Margaret Eckenroth, are the proponents of the will. Mrs. Easton was afflicted with cancer, from the effects of which she eventually died. Her husband died March 19, 1928. At that time Mrs. Easton moved into the home of her sister; and she lived there until the date of her death, July 17, 1929. After moving into her sister's home and during the latter part of June, 1928, she went to a hospital and submitted to an operation. It was apparently successful, and for some time thereafter she went about evidently much improved in health; but later she began to fail, and for about 3 months before she died she was confined most of the time to her home. At the time of her husband's death she received $5,000 as the proceeds of a policy of insurance on his life, which sum afterwards became a part of her estate, the total value of which was approximately $15,000, including real estate of the estimated value of $1,000. The Dixon brothers and sisters were old residents of San Francisco, and their relations with each other were always close and affectionate. During her married life, Mrs. Easton lived in the vicinity of her sister's home, and for many years was a constant visitor there. During the day, while her husband was absent from home, Mrs. Easton would spend much of the time with her sister. Following the San Francisco fire in 1906 she and her husband lived with the Hartnetts for about 5 years, and for more than 20 years it was their custom to dine with the Hartnetts every Sunday evening. The brothers, too, lived near Mrs. Easton and visited her very frequently. The Hartnett home into which Mrs. Easton moved following her husband's death contained three flats. Mrs. Hartnett, her daughter Lucy, and for a while a son, lived in the lower flat. Mrs. Eckenroth and her husband lived in the middle flat, and the upper was unoccupied. Mrs. Easton slept in a room with her sister; and for the board and accommodations she received she paid her sister $12.50 a week. The brothers continued to visit the testatrix regularly at the Hartnett home; Samuel having called about once a week, and Joseph approximately four times a week. Soon after receiving the insurance money, Mrs. Easton deposited substantially all of it in a joint bank account which she opened in the names of herself and Lucy Hartnett at the latter's bank a few blocks distant from the Hartnett home. Lucy Hartnett accompanied her to the bank and was present when the account was opened and the money de-

posited. In June, 1928, when Mrs. Easton decided to undergo an operation, one of her brothers suggested that before doing so she should have her property affairs attended to. She discussed the matter with Lucy Hartnett, but what was said in this respect was not shown; and on June 17, 1928, accompanied by Lucy, she visited the same bank for the purpose of making a will. The instructions as to its provisions were given by Mrs. Easton, personally. Lucy Hartnett was present at the time, but said nothing. The next day, again accompanied by Lucy, Mrs. Easton returned to the bank and executed the will. It was attested by two attachés of the bank. By the terms of the will she declared that her sister, Mrs. Hartnett, was her "nearest living relative." She then bequeathed her personal effects and jewelry to her nieces, Lucy Hartnett and Mrs. Eckenroth, and the remainder of her estate in equal shares to her sister, Mrs. Hartnett, and her two nieces, with the right of survivorship. The brothers were not mentioned. The bank was named executor, and in this connection she stated that as soon as she returned from the hospital she intended to make another will so as to save the expense of executor's fees. After leaving the hospital and having apparently regained good health, she requested her niece Lucy Hartnett to arrange an appointment with a certain attorney whom Mrs. Easton had known for many years, for the purpose of having a new will drawn. There is no suggestion made that said attorney ever acted for any of the beneficiaries under the will or that they were intimately acquainted with him. Lucy made the appointment as requested, accompanied her aunt to the attorney's office, and was present during the conversation between Mrs. Easton and the attorney. Mrs. Easton again personally gave the directions as to the provisions of the will she desired to make. In doing so she handed the attorney a copy of the will drawn at the bank and instructed him to prepare the new will in all respects similar thereto, except that she wanted her two nieces, Lucy Hartnett and Margaret Eckenroth, to be named as executrices instead of the bank. The reason she gave therefor was that she wanted to relieve the estate of the payment of any executor's fees. The attorney fixed a time for the return of Mrs. Easton to execute the will. She arrived at the appointed time, accompanied by her niece, Margaret Eckenroth, and the attorney handed Mrs. Easton the document prepared by him. She read it carefully and stated that it was drawn in accordance with her desires; whereupon she executed the same in the presence of the attorney and his office stenographer, who acted as subscribing witnesses. Margaret Eckenroth was present during all of this time, but did not participate in any of the conversation carried on there, nor make any statements whatever regarding the subject-matter of the will. Mrs. Easton afterwards handed the will to Lucy Hartnett, with the request that she keep it in her safe deposit box at the bank, which she did; and it remained there until after the death of her aunt. This second will was executed September 18, 1928, 3 months subsequent to the signing of the first will, and 10 months before the testatrix died.

[5] It is our opinion that the foregoing facts fail as a matter of law, under the decisions above cited, to establish a case of undue influence, as that term has been defined and construed in those decisions, for the reason that no act or declaration is disclosed tending to show the exercise, or attempted exercise, of any pressure whatever by any of the beneficiaries to overcome the free agency or volition of the testatrix, or which constrained her to dispose of her estate in any manner contrary to her own inclination or judgment. Contestants have not pointed out any such testimony, nor have we been able to find any. Nor is there any testimony to show that any person at any time ever made any suggestion to the testatrix or in her presence as to how she should dispose of her estate; consequently there is a total absence of evidence tending to show even an attempted exercise of general influence. Nor was there any evidence introduced indicating that the testatrix was at any time suffering from a weakened mental condition from which it might be inferred that she was susceptible to subversion of freedom of will. On the contrary, as will be seen, the evidence shows without conflict the exercise on the part of the testatrix of the utmost freedom of thought and action.

[6, 7] Contestants call attention to certain testimony given by the wife of Joseph Dixon to the effect that the testatrix stated, after moving into the Hartnett home, that she had no privacy, that she referred to the home as "a crazy house," and stated that it made her nervous and "accounted for her condition." But it cannot be said that there is the slightest implication in any of these statements to justify the inference that any influence whatever was being exerted by any one to have her do something against her judgment or desires; and obviously the remarks had reference to the restricted accommodations of the Hartnett home, as compared with the home previously occupied by herself and husband. Testimony was given also by

two of the contestants to the effect that while visiting the testatrix at the Hartnett home they were never able to see her alone; that some member of the Hartnett family was always present. It does not appear, however, that they ever asked to see the testatrix alone, and it affirmatively appears that the members of the Hartnett family never denied them the privilege of doing so; furthermore, the evidence shows that before and after the making of each will, and before the testatrix was confined to the house during the three months preceding her death, she was in fact alone with contestants and the members of their families on numerous occasions. She visited their homes and attended the theater with them; and on one occasion at least, during the 3 months preceding the testatrix' death, the wife of one of the contestants stayed alone with the testatrix, at the request of Mrs. Hartnett, while she went shopping. And no testimony whatever was introduced to show, nor do contestants claim that on any of these occasions did the testatrix complain or indicate, that any person was persuading or attempting to influence her to do or refrain from doing anything against her own desires, or that she was being imposed upon or prevented from carrying out her own wishes, or for any reason was unable to do so. Even conceding, therefore, that the evidence justifies the inference that there was opportunity, coupled with motive, on the part of the Hartnett family, to exercise an influence over her, there is an entire absence of evidence indicating that any attempt was made so to do. Nor does the single fact that one of the beneficiaries accompanied the testatrix to the bank, and another to the attorney's office, when she directed the preparation of said wills and executed the same, afford legal ground for a finding that they were products of undue influence. Estate of Donovan, 114 Cal. App. 228, 299 P. 816, 819; Estate of Morcel, supra. As stated, the will now under attack was identical in its dispositive language with the former will, which was executed some 3 months before; consequently the subsequent will was a complete confirmation of the wishes of the testatrix as expressed in the first will, which of itself, under the authorities, may be taken as a circumstance tending to refute the charge of imposition or undue influence (26 Cal. Jur. 657) and to show a permanent and fixed state of mind on the part of the testatrix with respect to the disposition of her estate (Estate of Stump, 202 Cal. 308, 260 P. 543).

[8, 9] Contestants contend, however, that in any event the evidence is sufficient to establish a confidential relationship between Lucy Hartnett and the testatrix, which gave rise to a presumption of undue influence legally sufficient to create a conflict in the evidence and thus sustain the verdict. We are unable to sustain this contention. The legal doctrine sought to be invoked is stated in the Estate of Lances, 216 Cal. 397, 14 P.(2d) 768, 770, as follows: "Where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, the burden is upon him to show that the will was not induced by his undue influence. Estate of Shay, 196 Cal. 355, 363, 237 P. 1079; Estate of Gallo, 61 Cal. App. 163, 214 P. 496." But, as indicated by the foregoing statement, such presumption is not generated alone by the existence of a confidential relationship. Estate of Presho, 196 Cal. 639, 238 P. 944, 948. Such relationship "assumes probative importance when disclosed in conjunction with the facts that the provisions of the propounded instrument are unnatural or unjust, and that the alleged wrongdoer was active in procuring the writing to be executed. If the facts of injustice and activity on the part of the wrongdoer are not established, a denial of probate cannot be sustained." 26 Cal. Jur. 652, citing authorities. In other words, to use the language of the Supreme Court: "There must in addition be proof that the one occupying such relationship displayed activity in the preparation of the will to his undue profit" (Estate of Presho, supra), meaning that there must be proof that the will is unnatural. Moreover, it is well settled that collateral heirs, such as brothers and sisters, are not "natural objects of bounty" as that term is used in the interpretation of wills, and therefore, in cases such as this, where the next of kin are collaterals and one or more are unprovided for in the will, the pretermitted persons, in order to establish that the instrument is unnatural, must show affirmatively that they had peculiar or superior claims to the decedent's bounty; and, if no such claim is adduced, the instrument cannot be held to be unnatural. 26 Cal. Jur. 695, 696.

Even assuming, therefore, that the evidence in the present case is legally sufficient to support the contention that a confidential relationship existed between the testatrix and Lucy Hartnett on account of the latter's helpfulness in assisting her aunt to attend to the business matters above mentioned, there is no ground upon which it may be reasonably held that such helpfulness resulted in the procurement of an unnatural will. It is true, as contestants point out, a strong bond of affection existed between the testatrix and

them, but obviously it was no stronger than the one existing between the testatrix and the beneficiaries; and, in addition, it appears without conflict that the personal relationship which the testatrix always maintained with the beneficiaries was closer and more intimate and companionable than the one maintained with her brothers. Therefore, in view of the lifelong close association between the testatrix and her sister, and the fact that the Easton and the Hartnett families lived happily together in the same house for several years, and bearing in mind, too, that the testatrix knew at the time she made both wills of the nature of the fatal malady with which she was afflicted, and which doubtless brought to her mind the special care and attention her condition would necessarily eventually demand from Mrs. Hartnett and her daughters while she continued to live in their home, it cannot be reasonably said, in the absence of additional proof, that the desire on her part, as expressed in both wills, to leave her entire estate to them, was unnatural.

With respect to the question of presumption of undue influence, the situation here is essentially no different, in our opinion, from the one presented in the Estate of Donovan, supra. There the appeal was taken from a judgment of nonsuit. The testatrix, Mrs. Donovan, was a widow and the mother of five adult children. By deed and will she gave substantially all of her estate, including the portion inherited from her husband's estate, to her youngest daughter, Mrs. Ann J. Finney, in whose home Mrs. Donovan was confined for several months preceding her death, suffering from the effects of a broken leg. Mrs. Finney's husband was a practicing attorney, and at Mrs. Donovan's request he called in an attorney who was a friend of his to consult with her, and who afterwards drew the deed and the will. There was a lapse of about 2 months between the execution of each instrument, and Mrs. Finney and her husband were present on the two occasions when Mrs. Donovan gave the attorney the instructions as to the disposition of her estate and at the time of the execution of both instruments. The other children contested the will upon the ground of undue influence, and among the other contentions made was that a confidential relationship existed between Mrs. Donovan and the Finneys, and that therefore the activity of the Finneys in selecting the attorney, coupled with the fact that they were present during the conferences between the testatrix and said attorney and at the time of the execution of both instruments, gave rise to a presumption of undue influence which would have been legally sufficient to sustain a verdict setting aside the will. The court held, however, in conformity with the decisions heretofore cited, that those factors alone did not constitute undue influence. Moreover, in discussing the element of the alleged unnaturalness of the will, the court said: "Where the right of testamentary disposition exists, the owner of property should be permitted to say who should be the object of his bounty, and this right should not be limited or subjected to the views of others. Whether in the minds of others a will is just or unjust is a matter of opinion, and to permit a jury to determine the question without that substantial evidence which the law requires would be to permit a jury to make the disposition irrespective of the desires of a testator."

[10, 11] In the present case one of the contestants testified that he had loaned Mrs. Easton's husband $150 which had not been repaid, and that after Easton's death the testatrix "always said, * * * I will some day fix you up." But the fact that she did not repay the money during her lifetime, nor make suitable provision in her will for its repayment, does not furnish legal reasons for setting aside her will upon the ground of undue influence. The evidence also discloses that the lifelong friendship which had existed between the contestants and the Hartnetts terminated abruptly shortly after Mrs. Easton passed away. In this regard it appears that the brothers complained of what they considered was undue haste in removing Mrs. Easton's body from the Hartnett home to the undertaking parlor after they were notified of her death and before they arrived at the house. Their complaint brought forth some unpleasant words between one of the brothers and Mrs. Eckenroth, and during the conversation, Mrs. Eckenroth's husband, so the brother testified, threatened him with violence. But this unfortunate incident could have no legal bearing upon the question of whether Mrs. Easton was acting under undue influence when she made either of said wills, because, as stated, the quarrel took place after her death.

[12] Therefore, inasmuch as the evidence failed as a matter of law to meet the legal requirements for nullification of a will upon the ground of undue influence, as those requirements are fixed and declared by the decisions above cited, the verdict was against law and the trial court was justified in granting a new trial on that ground.

Contestants urge also that the notice of intention to move for a new trial was filed too late, and that therefore the trial court was without jurisdiction to grant an order in that behalf. They concede that said notice was given and the motion for new trial presented in conformity with the provisions of section 659 of the Code of Civil Procedure, as amended in 1929 (St. 1929, p. 841, § 3), and that said section as so amended was operative at the time the notice was given and the motion presented. But it is argued that the amendment of 1929 is unconstitutional, and that consequently said section as it existed prior to said amendment prevailed. It contained a provision requiring notice of intention to move for a new trial to be filed "within ten days after verdict, if the trial was by jury."

[13, 14] The title to the act (St. 1929, p. 839) amending said Code section read as follows: "An act to amend the Code of Civil Procedure by amending sections 650, 657, 659, 660, 953a and 953c thereof, and to add certain new sections thereto, to be numbered sections 659a, 661 and 662 respectively, relating to findings, judgments, new trials and appeals;" and the body of the act contained the nine amended Code sections relating to findings, judgments, new trials, and appeals. The ground upon which contestants seek to have the act declared unconstitutional is that the title embraced more than one subject, in violation of section 24 of article 4 of the state Constitution. There would seem to be ample authority for holding the contention untenable, because, as pointed out in the following cases, numerous provisions which are germane to and deal with one general object, if fairly indicated in the title, may be united in one act. Evans v. Superior Court, 215 Cal. 58, 8 P.(2d) 467; Tarpey v. McClure, 190 Cal. 593, 213 P. 983; In the Matter of the Application of Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Hill v. Board of Supervisors, 176 Cal. 84, 167 P. 514; Heron v. Riley, 209 Cal. 507, 289 P. 160; Law v. San Francisco, 144 Cal. 384, 77 P. 1014; Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42. But it is unnecessary to inquire further into the constitutional question, for the reason that even under the provisions of the Code section as it previously existed the notice of intention was served and filed within time because the period of time fixed thereby was tolled by the action of the trial court in entering judgment for proponents non obstante veredicto and by the appeal taken from the order made in that behalf. Estate of Caldwell, 216 Cal. 694, 16 P.(2d) 139.

The order granting a new trial is affirmed.

I concur: GRAY, Justice pro tem.

TYLER, Presiding Justice.

I dissent. The evidence shows that a trust relation existed between respondent Lucy Hartnett and the deceased. It further shows that, while deceased was suffering from the ailment which caused her death, she executed two wills, the first of which was substantially the same as the one in question. In the execution of both wills respondent Lucy Hartnett was present and took an active and important part in their preparation. She discussed the matter of the making of the wills with deceased and arranged for their execution, and was present when they were signed. After the will was executed, she took possession of the same and placed it in her safe deposit box. There is also evidence that deceased was never permitted to see her brother alone; some one of the beneficiaries being always present when he called. This and other evidence in the record surrounding the execution of the will is, in my opinion, amply sufficient to support the verdict setting aside the will on the ground of undue influence.

140 Cal.App. 333

PEOPLE v. McCARTHY.

Cr. 1384.

District Court of Appeal, Third District, California.

Aug. 11, 1934.

1. False pretenses ⇐49(1)

Evidence *held* to support conviction of grand theft for taking well-drilling outfit and equipment of value of $500, property of another, and appropriating it to defendant's own use, as against contention that there was no intent to defraud, no actual fraud, and no false pretense (Pen. Code, § 484).

Evidence showed that one S. owned well-drilling outfit and equipment and was indebted to defendant in sum of $81; that parties agreed that defendant should take possession for stipulated period and use outfit to recoup himself of such indebted-

ness; that defendant procured S. to sign bill of sale, which he recorded, and then borrowed $500, giving as security chattel mortgage on outfit in question.

2. Criminal law ⊂=254

In trial of criminal case to court without jury, question as to which witnesses should be believed was for trial court.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

A. F. McCarthy was convicted of grand theft, and he appeals.

Affirmed.

J. R. Thomas, of Ukiah, and Norman Johnson, of Fort Bragg, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was found guilty of the crime of grand theft upon an information charging that on or about the 28th day of June, 1932, in the county of Mendocino, he did feloniously take a certain well-drilling outfit and equipment of the value of $500, the property of one Walter J. Steiner, and appropriated the same to his own uses and purposes.

The cause was tried before the court sitting without a jury, and on the 9th day of May, 1934, after trial upon the information referred to, the court found the defendant guilty as charged. From the judgment thereafter entered upon such finding by the court the defendant appeals.

Upon this appeal no authorities are cited to support the contention of the appellant that the trial court erred in denying his motion to dismiss the information; nor are any legal grounds assigned why the court erred in so doing. For these reasons we do not feel compelled to enter upon a discussion of the alleged error, but, from a reading of the transcript, we are satisfied that the court did not err in denying the defendant's motion to dismiss.

[1] The appellant further contends that the finding of the defendant guilty by the court is not sustained by the evidence, in that there is no intent to defraud; that no actual fraud was committed; that no false pretenses were used; and that no fraud was accomplished by means of false pretenses, etc.

The record shows that, some time prior to the filing of the information herein, Walter J. Steiner was the owner of a certain well-drilling outfit and equipment, and at that time had become indebted to the defendant in the sum of approximately $81; that the defendant and Steiner had several conversations relating to the indebtedness just mentioned, and, after negotiations had been carried on for some time, the parties, according to the testimony of Steiner, reached the conclusion that an agreement should be entered into between the defendant and Steiner which would give the defendant possession of the well-drilling outfit for some four or five weeks, during which time the defendant was to use said well-drilling outfit, and in this manner, through compensation for the use of the drilling outfit, recoup himself of the indebtedness then owing by Steiner to the defendant. With this in view the defendant went to the city of Ukiah to consult an attorney, and came back, not with an agreement, but with a bill of sale purporting to convey the well-drilling outfit from Steiner, the owner, to the defendant, the contention of Steiner being, and which contention was accepted by the trial court, that the transaction just mentioned was had for the purpose of giving security only to the defendant, and not for the purpose of transferring the title to the property from Steiner to the defendant. After the paper was signed, which in terms purported to be a bill of sale, it appears that the defendant took the paper, went to a justice of the peace, and had the justice of the peace place a certificate of acknowledgment thereon in order that the instrument might be recorded. Whether ignorantly or intentionally or whether at the instigation of the defendant does not appear, the justice of the peace placed a certificate upon the bill of sale, reciting that Walter J. Steiner had personally appeared before him and executed the bill of sale. This, of course, was not true, and of which the defendant Steiner had knowledge. The bill of sale was then recorded. Some time after the transaction just mentioned, the defendant borrowed of one McKinley the sum of $500, and to secure the payment thereof gave a chattel mortgage on the outfit in question. The sum of money actually received by the defendant was $493, all of which was appropriated to the uses and purposes of the defendant.

The foregoing recital of the facts appearing in the record we think sufficiently lays the basis to justify the trial court in coming to the conclusion that the defendant intended to defraud Walter J. Steiner; that

he committed an actual fraud; that taking the property to use for four or five weeks in order to reimburse himself was merely a pretense for the purpose of gaining a color of title to the property in order that he might mortgage the same and obtain the money which we have just mentioned herein. It is evident from the recital that the defendant succeeded in accomplishing his fraudulent designs, and in securing for himself not simply a repayment, but a trifle over $400 in addition thereto.

The appellant argues that the circumstances present a case of embezzlement, but, under section 484 of the Penal Code as it now reads, an information charging grand theft includes the offense of embezzlement, and also the offense of obtaining property by false pretenses.

[2] The court in its memorandum of opinion preceding the rendition of judgment mentioned the fact of the bad reputation of the defendant for truth, honesty, and integrity, and accepted the version of the transaction given by Walter J. Steiner, all of which was a pure question for the trial court to determine.

Finding nothing of merit in the appeal, the judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

140 Cal.App. 642

WOODRUFF v. MARYLAND CASUALTY CO. et al.

Civ. 9564.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1934.

Hearing Denied by Supreme Court Nov. 8, 1934.

1. Attachment ⇐331

Where in undertaking on attachment in prior action surety agreed that, if defendant recovered judgment, plaintiff would pay costs awarded defendant and damages sustained by reason of attachment, and trial of action resulted in judgment by which neither party received affirmative judgment and each bore his own costs, attachment bond gave right of action.

2. Attachment ⇐331

Where prior attachment on claim is many times less than value of attached property, and is not used to interfere with business of attachment debtor, and subsequent attachment causes damage which was incurred, rule that prior attachment is proximate cause of debtor's loss does not obtain.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action on undertaking given to obtain writ of attachment by Leonard J. Woodruff against the Maryland Casualty Company and another. From the judgment, defendants appeal. On plaintiff's motion to affirm judgment or dismiss appeal.

Motion granted, and judgment affirmed.

Everett H. Smith, of Los Angeles, for appellants.

Edward Fitzpatrick, of Los Angeles, and Earl J. Opsahl, of Hollywood, for respondent.

CONREY, Presiding Justice.

Respondent moved for dismissal of the appeal or for affirmance of the judgment under the provisions of rule V, section 3. It is contended by respondent that the questions upon which the decision of the cause depends are so unsubstantial as to need no further argument.

An examination of appellants' opening brief and the statement of the grounds of appeal and of the questions involved leads us promptly to the conviction that the motion should be granted and that the judgment should be affirmed.

The undertaking on attachment in the prior action of Coleman v. Woodruff was a contract whereby the surety made its promise to the effect that, if the defendant recover judgment in the action, "the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of the said attachment, not exceeding," etc. The trial of that action resulted in a judgment that "the plaintiff takes nothing by his second amended complaint and the cross-complainant takes nothing by his cross-complaint and counter-claim. Each party bears his own costs."

[1] On this appeal it is now contended by appellants that the attachment bond gave no right of action when the plaintiff merely failed to prevail in the principal action, and the defendant did not obtain an affirmative judgment. We think that the point is obvious-

ly without merit. The most direct and immediate purpose of an attachment bond is that the owner of property shall be protected against seizure of his property at the instance of a plaintiff who has sued without a valid claim against the defendant.

[2] The second proposition stated by appellants is as follows: "When a prior, valid attachment on defendant's place of business exists at the time of the levy in the principal action, and remains in existence throughout and beyond the dissolution of the attachment in question, such prior attachment is the proximate cause of the loss or damage, if any." Conceding that this might be the general rule, such rule has no application in this case where it has been shown that, notwithstanding the existence of a prior attachment on a claim many times less than the value of the attached property, such prior attachment was not being used to interfere with the business of the attachment debtor and the subsequent attachment alone caused the damage which was incurred.

The third question presented relates merely to the weight and effect of certain evidence, and, when considered in connection with all of the evidence, furnishes no substantial ground of appeal.

The motion is granted and the judgment is affirmed.

We concur: YORK, J.; HAHN, Justice pro tem.

140 Cal.App. 569

LEROUX v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 5146.

District Court of Appeal, Third District, California.

Sept. 4, 1934.

Rehearing Denied Oct. 4, 1934.

Hearing Denied by Supreme Court Nov. 1, 1934.

Insurance ⇐435

One eating and sleeping in his brother's home while employed by brother during prune-picking season and returning to city of his residence as soon as he was able after accident was not "living on the premises or in the household of the employer," within clause of latter's liability policy exempting insurer from liability for injuries to employer's relatives living on premises or in household of employer (St. 1917, p. 831, as amended).

"Live" is defined as meaning to live in a place, is to reside there, to abide there, to have one's home; "living" as to abide, to dwell, to reside and literally signifies the pecuniary resources by means of which one exists; and "reside" as to dwell permanently or for a considerable time, to have a settled abode for a time, and persons who reside in a place usually include all those who are the actual stated dwellers there, even though they may have a technical domicile elsewhere.

[Ed. Note.—For other definitions of "Live; Living" and "Reside," see Words & Phrases.]

Proceeding by Robert Leroux, employee, to review an order of the Industrial Accident Commission of the State of California denying petitioner compensation under the Workmen's Compensation Act as against the Ætna Life Insurance Company, insurer of W. G. Leroux, employer.

Order annulled and set aside with direction.

Frank L. Murphy, of Sacramento, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for respondent Ætna Life Ins. Co.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a review of an order of the Industrial Accident Commission refusing to make an award of compensation against an insurance company for injuries received by the petitioner in the course of his employment while he was engaged in performing farm labor for his brother, W. G. Leroux.

The only question involved in this proceeding is whether the Ætna Life Insurance Company, which was the insurer of the petitioner's employer, is exempt from liability for the injuries sustained on account of the clause which was attached to the policy in the following language: "It is agreed that, anything in this Policy to the contrary notwithstanding, this Policy does not insure: As respects injuries (or death resulting therefrom) sustained by any of the following relatives of the employer or of his wife, i. e., * * * brother, * * * when any of the said relatives are living on the premises oc-

cupied by the employer and/or in the household of the employer, unless such relative is specifically named in the declarations or in endorsement attached to this Policy."

The petitioner is a widower fifty years of age. He served in France as an American soldier during the World War. His wife and child are dead. For several years after returning from the war he lived alone in the city of Sacramento, where he engaged in the furniture business, as a salesman of stocks and bonds and as a collector of bills. After 1929, when employment became difficult to secure, he worked as a farm hand for various orchardists in the vicinity of Sacramento. He did not own a home or household furniture, but rented rooms in different apartments in Sacramento, which he vacated while he was employed elsewhere outside the city. For more than ten years prior to the accident he registered for the purpose of voting and maintained a post office box in Sacramento. He testified in that regard: "My permanent address is Sacramento." He did say in the course of his cross-examination: "My home is any place where my hat is." This statement is clearly contrary to his repeated declarations and evident intention. His brother, W. G. Leroux, owned a prune ranch in Alexander Valley near Healdsburg, upon which he had resided with his family for many years. In September, 1931, the petitioner went from Sacramento to visit his mother, who lived at Healdsburg. While he was there he telephoned his brother asking him for employment as a farm hand. The brother hired him for the balance of the prune-picking season, which was about two months' duration, at the agreed wages of $4 a day, from which he was to repay his brother $1 a day for room and board. He was directed to load prune boxes on a truck. There is evidence indicating that the petitioner might have been retained after the prune crop was harvested, provided other service on the ranch was required. This subsequent employment was conditional, uncertain and lacked specific agreement of any sort.

The petitioner had never before worked for his brother and was never a member of his household. He had not even visited him for many years previously. He began his work of loading the truck on September 7. While he was thus engaged for about two days he ate his meals and slept in his brother's house. There is evidence that he slept there but a single night. On the second day of his employment he fell from the truck and dislocated his spine. He was seriously injured. For a few days thereafter he was treated by a local physician. He said that he then "wrote the insurance company I was not satisfied (with the treatment) and I would like to come to Sacramento *where I lived*, and they told me to report to Dr. Harris." In a week or ten days after the accident occurred he returned to Sacramento, where he was confined in the Sutter hospital for a period of time. He then secured private rooms on J street, where he has ever since lived. There is no substantial dispute regarding the foregoing facts.

Upon application to the Industrial Accident Commission for compensation, it determined that the petitioner sustained a fractured vertebra while he was engaged in the course of his employment with his brother, resulting in 42½ per cent. permanent disability; that the petitioner did *not* then reside on the premises of his employer; that the Ætna Life Insurance Company was the insurer of his employer; and that the policy contained the exemption clause above quoted. Thereupon the petitioner was awarded compensation in the sum of $2,616.30, being $15.39 a week for the period of 170 weeks, against both his brother and the insurance company. The cause was dismissed against Mr. Cadd for the reason that it appears he was not interested in the farming enterprise.

Upon subsequent application therefor by the Ætna Life Insurance Company a rehearing was granted. The award was set aside. The board adopted the foregoing findings of facts except that it was then determined that: "At said time [when the accident occurred] the employee was a brother of the employer and living in the household of the employer and as such the injured employee herein is *not* covered by Workmen's Compensation Policy of the Ætna Life Insurance Company." Compensation against the insurance company was accordingly refused, but it was awarded against the employer in the exact amount above specified. From the order denying compensation against the insurance company the petitioner instituted this proceeding.

We are of the opinion the board erroneously determined that the petitioner was "living in the household of the employer" within the meaning of that language as it is used in the exemption clause of the policy. We are satisfied the petitioner is entitled to compensation against the insurance company for injuries which he sustained, under the provisions of the Workmen's Compensation Act (St. 1917, p. 831, as amended). Taking the record as a whole, it seems unreasonable to conclude from the evidence adduced that the petitioner was actually "*living on the premises* occu-

pied by the employer and/or in the household of the employer" at the time of his accident.

The identical clause of the insurance policy which is involved in this proceeding was construed under similar circumstances in the case of Clark v. Industrial Accident Commission, 129 Cal. App. 536, 19 P.(2d) 44, 46, in which a hearing by the Supreme Court was denied. It was there held in the language of section 69(a) of the Compensation Act (St. 1917, p. 877) that: "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment."

It is further said in that regard that in accordance therewith the provisions of the contract limiting or avoiding liability must be construed strictly against the insurer and all ambiguity resolved against the insurer. It is there held in accordance with reason that in construing this clause of the policy each case must depend upon its own particular facts in determining whether the employee actually resides on the premises or in the household of his employer.

In the Clark Case, the claimant had previously resided with his father at Monticello. He was employed by his uncle to work on a harvester for specified wages which included his room and board. During his employment he actually ate his meals and slept in his uncle's home. An accident occurred and he was injured in the course of his employment. The court held he was not residing in the household of his employer in the sense in which that language is used in the exemption clause of the policy.

From the record in this case we are driven to the inevitable conclusion that the petitioner was not a member of his brother's household and did not live with him in the sense in which that term is used in the exemption clause of the policy. It is evident that the petitioner's eating and sleeping in his brother's house was merely temporary, transitory and incidental to his limited employment on the premises during the prune-picking season. It was in no sense his abiding place. In the case of Clark, supra, the term "living" as applied to the construction of this very exemption clause is defined as follows:

"Webster's New International Dictionary defines the word 'living' as meaning to abide, to dwell, to reside; and defines the word 'reside' as 'to dwell permanently or for a considerable time; to have a settled abode for a time.'

"Ballentine's Law Dictionary defines the word 'live' as meaning, 'to live in a place is to reside there, to abide there,' and defines 'reside' by saying, 'persons who are said to reside in a place usually include all those who are the actual stated dwellers there even though they may have a technical domicile elsewhere.'

"In Words and Phrases, First, Second, and Third Series, 'to live, to reside, to dwell, to have one's home, are usually equivalent and convertible terms.' "

Strictly speaking, the term "living" implies a state of existence. It signifies literally the pecuniary resources by means of which one exists. Crabb's English Synonyms, p. 486. The term has been distorted to include also the place where one abides. It, however, implies a fixed, regular, established place of abode or residence with the idea of at least relative permanency, as distinguished from mere temporary or transitory presence at a particular place for a brief time and a limited purpose.

The exemption clause in the policy which is involved in this case was properly adopted to prevent collusion between an insured person and blood relatives or members of his household. No such collusion is suggested in the present case. The employment of the petitioner is conceded. It is not denied that he was actually injured in the course of his employment. It would seem to require an unreasonable construction of the facts of this case to hold that the petitioner was actually "living on the premises or in the household" of his brother merely because the terms of his employment required him to eat his meals and sleep in the house for a brief period of time during the prune-picking season. He considered Sacramento his place of residence and his home. He had maintained his registration there for fifteen years for voting purposes. He also retained a post office box in that city during all that time. He always returned to Sacramento when his temporary employment outside of the city was completed. Conceding that one may have a permanent residence in one city and at the same time be deemed to be living in another place, the mere temporary presence in an employer's home, or the eating of meals and sleeping therein during a brief and limited employment does not constitute living on the premises or in the household within the meaning of the exemption clause of the contract. In this case the petitioner merely ate four meals and slept one night in his brother's home. He had never before stayed in

his house. The minute he was able to leave the premises after his accident occurred he went back to Sacramento. It would be a grave injustice and a violation of the reasonable construction of the contract to hold that under such circumstances an employee is a resident on the premises or a member of the household of his employer.

The order denying compensation to the petitioner against the Aetna Life Insurance Company is annulled and set aside, and the Industrial Accident Commission is directed to render an award in his favor upon the same terms and conditions under which compensation was awarded against the employer.

We concur: PULLEN, P. J.; PLUMMER, J.

140 Cal.App. 563

CONSOLIDATED FURNITURE MANUFACTURERS v. GOLDSTEIN et al.

Civ. 8592.

District Court of Appeal, Second District, Division 2, California.

Sept. 4, 1934.

Hearing Denied by Supreme Court Nov. 1, 1934.

1. Corporations ⇐379

Corporation cannot lawfully enter into copartnership agreement with individual unless expressly empowered to do so by charter.

2. Corporations ⇐379

Corporation without authority under charter to form partnership with another may be held liable as partner to prevent injustice.

3. Corporations ⇐379

In suit on open account, evidence *held* to justify conclusion that buyer induced shipments of goods on promise to form selling corporation, in which seller was to have controlling interest, and that no partnership was agreed upon or existed.

4. Corporations ⇐379

Buyer inducing manufacturer to sell him goods on promise to form selling corporation in which manufacturer was to have controlling interest, which he never fulfilled, could not evade suit for price on theory proposed incorporation created partnership.

5. Appeal and error ⇐996

Where two or more inferences may reasonably be deduced from evidence, appellate court may not substitute its deductions for those of trial court.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Suit by the Consolidated Furniture Manufacturers against Alfred Goldstein, doing business under the fictitious name of the Westland Import & Manufacturing Company, and another. From a judgment for plaintiff, defendant appeals.

Affirmed.

Daniel A. Knapp, of Los Angeles, for appellants.

Bicksler, Parke & Catlin, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff sued defendant for "balance due on open book account" for goods delivered by plaintiff's assignor to defendant. The answer was in effect a general denial. From judgment for plaintiff, defendant appeals.

Appellant contends that the evidence showed that plaintiff's assignor, Northwest Table Corporation and appellant, who was doing business under the fictitious name of Westland Import & Manufacturing Company, had entered into a partnership; that a proposed amended answer setting up the partnership relation should have been allowed by the court, and that judgment against him was erroneous because the action should have been for a partnership accounting and not for an open book account; and "if, as an alternative view, it be deemed the account was an agency account, is not the judgment vitally defective in that no proper credits are given to the agent and no proper balance struck?"

It appears that appellant wished to buy goods from the table corporation which the latter declined to sell to him because they expected to open a branch in this territory. After further negotiations, appellant agreed to form a corporation which would handle the sale of such goods, and the stock of which would be divided, with 49 per cent. going to appellant and 51 per cent. going to the table corporation, so that the latter would have the controlling interest. The evidence indicated that, on the strength of appellant's promise to form such a new corporation, the table company shipped goods to him which he received

and sold, without taking any steps toward fulfilling his promise. After his dealings resulted in a loss and this case was ready for trial, appellant advanced the view that, because of the proposed incorporation, the relationship of the table corporation to him was that of a partner. It is not claimed that there was an express oral or written partnership agreement, but appellant contends that it must be inferred from the acts and words of the parties. He placed especial reliance on a letter received from the table corporation written to him after the company experienced difficulty in collecting their account, offering to share the loss which he had incurred on condition that he pay the balance of his account with them.

[1, 2] A corporation cannot lawfully enter into a copartnership agreement with an individual unless expressly empowered to do so by the terms of its charter. McTigue v. Arctic Ice Cream Supply Co., 20 Cal. App. 708, 130 P. 165; Fee v. McPhee Co., 31 Cal. App. 295, 160 P. 397; Bates v. Coronado Beach Co., 109 Cal. 160, 41 P. 855. It has been intimated that a corporation thus incapable of becoming a partner may bind itself by contract for a joint adventure, the purposes of which are within those of the corporation (Keyes v. Nims, 43 Cal. App. 1, 184 P. 695); and, even where a corporation is without authority under its charter to form a partnership with another, it may be held liable as a partner to prevent injustice (Mervyn Inv. Co. v. Biber, 184 Cal. 637, 643, 194 P. 1037).

[3] In this case the trial court was justified in concluding that appellant induced the table corporation to ship him goods as a customer on his assurance that he would go ahead and form a corporation; and in further concluding that no partnership arrangement was agreed upon or existed; and in refusing by reason of these facts to allow appellant to file the proposed amended answer.

[4] The position in which appellant voluntarily placed himself contrary to his express agreement and against the wishes of the table corporation was one in which he could receive and retain the entire profits which he expected from the enterprise. When it became apparent that the venture was not profitable, the appellant could not abandon the position he had voluntarily assumed, and the trial court was justified, in view of the evidence, in permitting respondent to present its case on the theory that no partnership existed and that the action brought was appropriate.

[5] As to the other questions raised by appellant, they are matters in which the findings of the trial court are conclusive, having been made on conflicting evidence. Where two or more inferences may reasonably be deduced from the evidence, this court may not substitute its deductions for those of the trial court. Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332; Perham v. First National Bank, 87 Cal. App. 224, 261 P. 1064.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 520

In re ERICKSON'S ESTATE.

JANSSON et al. v. MONTEN.

Civ. 9322.

District Court of Appeal, Second District, Division 1, California.

Aug. 30, 1934.

Hearing Denied by Supreme Court Oct. 29, 1934.

1. Wills ⇐163(4)

Evidence that testator was old and feeble and suffering from disease, and that will was drawn by attorney named as one of residuary legatees raises presumption that will was procured by undue influence of such attorney, or will, at least, require proponent to show what did actually occur at time of execution and prior thereto, determinative of presence or absence of undue influence.

2. Wills ⇐163(4)

Presumption of undue influence by attorney who drew will naming him as legatee *held* also imputable to other legatees, so as to affect their legacies, without proof of common plan.

3. Wills ⇐163(4)

In will contest, evidence *held* sufficient to raise presumption of undue influence of attorney who drew will naming him as legatee, so as to require proponent to show actual occurrences at time of execution and prior thereto, determinative of presence or absence of undue influence.

4. Wills ⇐329(4)

In will contest, instructions throwing on proponents burden of proving by fair preponderance of evidence that there was no undue influence exercised in execution of will

and no undue influence exercised with respect to provisions of will *held* error.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by Frithiof Albin Jansson and another against Jenny H. Monton, as executrix, of the estate of John Erickson, and individually to set aside and revoke the probate of the will. From a judgment and orders for contestants, proponent appeals.

Judgment reversed; order overruling motion for judgment notwithstanding verdict affirmed; appeals from other orders dismissed.

Julius C. Kayser, Leonard B. Slosson, and Charles C. Montgomery, all of Los Angeles, for appellant.

Roscoe R. Hess and Oscar W. Houge, both of Los Angeles, for respondents.

CONREY, Presiding Justice.

John Erickson, bachelor, aged 72 years, a resident of Los Angeles county, died on the 31st day of August, 1930, leaving an estate in said county. He left a will which had been executed on August 2, 1930. This will was duly admitted to probate on September 16, 1930, and Jenny H. Monten, who was named in the will as executrix, became the duly appointed and qualified executrix thereof. In March, 1931, two heirs at law, for whom no provision had been made in the will, filed a petition to set aside and revoke the probate of the will. The contest was tried by a jury, to which certain special issues were submitted. The findings of the jury on these issues are set forth in the bill of exceptions as follows:

"'Was any part of the will of John Erickson, deceased, the result of undue influence used upon him by the defendant, William A. Monten?

"'Answer: Yes.

"'If your answer to the above question is in the affirmative, state what part or parts of said will was or were the result of undue influence used upon said John Erickson by said William A. Monten. (Indicate the part or parts by paragraph number of the will, a copy of which is annexed hereto.)

"'Answer: #2 #8 #9 #10,'

"and said Special Verdict having attached thereto a copy of said will, from which it appears therefrom that the said paragraphs #2 #8 #9 and #10, read as follows respectively.

"#2. 'I appoint Jenny H. Monten, or if she cannot act, William A. Monten, the executor of my will, without bonds.'

"#8. 'To my nephews and nieces in Sweden, being August Anderson and his brothers and sister, or brother and sisters, as the case may be (I do not know them well, but still desire to give them something) the sum of $4,000.00 in equal shares, to those who shall live at my death. If there be less than four, each shall receive $1,000.00.'

"#9. 'To any one who shall directly or indirectly contest or assist in contesting my will, I give nothing whatsoever.' and

"#10. 'All the residue and remainder of my estate I give to Jenny H. Monten, if she live at my death, and if not, to William A. Monten, otherwise to their children in equal shares. They have always been kind to me.'"

From the foregoing findings of the special verdict, the court drew its conclusions of law that contestants were entitled to judgment revoking the probate of the will with respect to the said paragraphs of the will numbered 2, 8, 9, and 10. Accordingly, judgment was entered and it is from this judgment that Mrs. Monten, as executrix, and also individually, appeals.

The grounds of appeal, as stated by appellant, are substantially as follows: That there was no evidence of undue influence as to the four clauses which the special verdict found were the result of undue influence on the part of William A. Monten; that the special verdict is based upon evidence of a prejudicial character erroneously admitted; that the special verdict is based upon erroneous instructions; that the special verdict is inconsistent with itself and with the pleadings, which in turn are not supported by the evidence.

In addition to the four paragraphs which were found to have been procured by means of undue influence used upon decedent "by the defendant William A. Monten," the will contained provisions for two small legacies to friends of the testator; also a gift of his residence and household goods to Rose Marie Gamradt, and (paragraph five), "to my long time friends, William A. Monten and Jenny H. Monten, I give each five hundred ($500.00) dollars."

The grounds of contest as stated in the petition to set aside and revoke the probate of the will were:

I. That the will was not executed by the decedent.

II. That the will was not executed in the manner required by law.

III. That the decedent, at the time of execution of the will, was not of sound mind, and was incompetent to make a will.

IV. "That William A. Monten and Jenny H. Monten are husband and wife, and both of them are attorneys at law duly licensed to practice law in all of the courts of the State of California. That about three days prior to the execution of said purported Will, the said Montens without any solicitation or request therefor on the part of the said deceased, visited the said deceased at his home, and ascertained from the said Rose Marie Gamradt that the deceased had never made a Will, and the said Montens thereupon conceived the plan of influencing the said deceased to make a Will contrary to his wishes and by which the said Montens and the said Rose Marie Gamradt would obtain the larger part of the Estate of said deceased at the time of his death. That in furtherance of said plan the said William A. Monten prepared an instrument for the deceased to sign, without any or specific directions therefor from the said deceased. That the said deceased placed trust and confidence in the said William A. Monten and Jenny H. Monten as legal advisers, and that the said William A. Monten and Jenny H. Monten abused the trust and confidence placed in them by the said deceased, and took advantage of the weakened mental and helpless physical condition of the said deceased, and dominated and controlled the said deceased, and subjected the said deceased to their wishes, and induced, persuaded, cajoled and forced the said deceased to sign the instrument above referred to, which is the instrument heretofore admitted to probate herein, and that said deceased did not execute said instrument voluntarily or of his own volition, and is a different instrument from one which the deceased would have signed had not the said William A. Monten overpowered and subjugated the mind and will of the deceased as aforesaid."

V. That the execution of the will was obtained by means of certain stated misrepresentations made by William A. Monten to decedent concerning the contents and effect of the will as written.

At the conclusion of the presentation of the evidence for contestants, the court granted a motion for nonsuit on the first, second, third, and fifth grounds of contest, on the ground of failure to support any of them by sufficient evidence. As to the first three, this was done by express consent of counsel for contestants, who also admitted that as to the fifth, "We have introduced no evidence."

After the introduction of evidence by the defendants, they moved for nonsuit on the fourth cause of action, which motion was denied. Thereupon the case was submitted to the jury, resulting in the verdict which has been quoted in the preceding part of this opinion.

From the statement thus far made, we must assume that the will was duly executed by a testator of sufficient testamentary capacity. The will was drawn by Mr. Monten, who undertook that duty as an attorney at law, acting as such attorney for the testator. The will contained two $500 legacies, one of them to the attorney, and the other to the attorney's wife—they being his "long time friends." That they were old friends, and particularly that friendly relations between decedent and Mrs. Monten and her father had existed for many years, are established facts. By necessary implications of the special verdict, the jury found that as to these legacies the charge that they were obtained by means of undue influence was not sustained by the evidence. And yet, by a singular inconsistency, the jury found, upon substantially the same evidence, that those portions of the will which made Mrs. Monten the residuary legatee and appointed her to be executrix of the will, were the result of undue influence used upon the testator by the said William A. Monten. In this connection it should be remembered that there is no evidence that Mrs. Monten or any of the parties in Sweden had any part in obtaining the legacies to them.

The property covered by the testamentary gift to Mrs. Gamradt had an appraised value of $3,150. Two small legacies amount to $300. The paragraph containing the gift of $4,000 to three nephews and a niece in Sweden, was by the verdict found to have been obtained by the undue influence of Mr. Monten. The entire estate was appraised at $18,003.66. The value of the residuary bequest to Mrs. Monten (before deduction of the expenses of burial of decedent and the expenses of administration, and the various taxes, and assuming that there were no other debts) would be about $9,500.

[1] Where there is evidence that the testator was old and feeble, and suffering from disease; and the will was drawn by the testator's attorney at law, and the attorney is named in the will as one of the residuary legatees; these are circumstances which will

raise the implication or presumption that the will was procured by the undue influence of the attorney, or will, at least, require the proponents to show what did actually occur at the time of its execution and prior thereto, so that the presence or absence of undue influence by him may be determined. Estate of Morey, 147 Cal. 495, 508, 82 P. 57. Numerous decisions are in the books to like effect.

[2, 3] We will agree, then, that William A. Monten, who drew the will of John Erickson, was in a relation of trust and confidence which subjects him to the rule stated in Estate of Morey, supra. It is contended, however, by appellant, Jenny H. Monten, that she is not, and that the Swedish legatees are not, subject to the presumption of undue influence exercised by William A. Monten, and that such presumption is not imputable to her or to them. To support the proposition that this presumption is not imputable to other legatees without proof of a common plan, appellant cites two decisions: Matter of Connor's Will, 230 App. Div. 163, 244 N. Y. S. 221, and Coghill v. Kennedy, 119 Ala. at page 641, 24 So. 459, 469. While these decisions do to some extent lean in the direction indicated, we find other decisions which, to our way of thinking, show convincingly that the opposite rule should prevail. Cheney v. Goldy, 225 Ill. 394, 80 N. E. 289, 116 Am. St. Rep. 145; Carroll v. Hause, 48 N. J. Eq. 269, 22 A. 191, 27 Am. St. Rep. 469. These decisions rest upon the reason that the undue influence overrides and destroys the true volition of the testator, so that the will is not really made by him. It is for this reason, and not merely to punish a wrongdoer, that a will obtained by means of undue influence is declared to be void. But, although the evidence was sufficient to raise the technical implication or presumption that certain of the provisions of the will were procured by undue influence of Mr. Monten, so that, as held in the Estate of Morey, supra, the proponents were required "to show what did actually occur at the time of its execution and prior thereto, so that the presence or absence of undue influence by him could be determined," there remains a further question concerning the burden of proof and the extent to which, under these circumstances, that burden must be carried by the proponents. The court's instruction No. 10 reads as follows:

"It is the general rule of law that in order to set aside a will for undue influence, there must be substantial proof by the contestants of a pressure which overpowered the volition of the testator at the very time the will was made.

"I instruct you, however, that there is an exception to this rule to the effect that where one who unduly profits by the will as a beneficiary thereunder, sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is shifted upon these seeking to support the will to establish by a preponderance of the evidence that there was no undue influence exercised in the execution of the will."

The court in its instruction No. 26 further instructed the jury as follows:

"The law does not prohibit an attorney from drawing a will in which he is named as a beneficiary, but declares that any benefits provided in such will for such attorney shall be presumed to have been the result of undue influence unless the attorney can satisfy the jury by a preponderance of all the evidence that no undue influence was used upon the testator. In other words, in the absence of any testimony, the presumption of undue influence would prevail and that part of the will which provides benefit for the attorney who drew it and for any other person who through such undue influence, if any, is a beneficiary thereunder, would have to be denied probate. The attorney must, however, overcome the presumption of undue influence by a preponderance of the evidence that no undue influence was used upon the testator to make the provision in the will for the attorney who prepared it, or for any other person named as beneficiary therein."

[4] We are satisfied that the court erred in the giving of these instructions and thereby throwing upon the proponents of the will the burden of proving by a preponderance of the evidence that there was no undue influence exercised in the execution of the will, and that there was no undue influence exercised with respect to the provisions of the will referred to in the instruction No. 26. In Scott v. Wood, 81 Cal. 398, 22 P. 871, 872, the Supreme Court pointed out clearly the distinction that exists between the use of the phrase "burden of proof" to signify the burden of proving or meeting a prima facie case, and the use of the same phrase to signify the burden of producing a "preponderance of the evidence." The court said: "And it is by no means safe to infer that because a party has the burden of meeting a prima facie case, therefore he must have a preponderance of evidence. It may be sufficient for

him to produce just enough evidence to counter-balance the evidence adduced against him." The court proceeded to fortify and explain this ruling with various illustrations and quotations from other cases. These quotations need not be repeated here.

The same distinction above noted was pointed out by the Supreme Court of New York and applied in the contest of a will in the case entitled Matter of Connor's Will, 230 App. Div. 163, 244 N. Y. S. 221, 223. Under circumstances similar to those in the case at bar, the court said: "Whether the attorney has explained satisfactorily or not, there still remains the question upon all the facts and circumstances whether the respondents have sustained the burden of proof on the question of undue influence."

There can be no doubt that these erroneous instructions to the jury, considered in the light of the evidence, were very prejudicial to appellant. It is far from certain that under proper instructions the jury would have rendered the same verdict against her.

For the foregoing reasons, the judgment is reversed. The order overruling the motion of appellant for judgment notwithstanding the verdict is affirmed. The appeals from the other orders mentioned in the notice of appeal are dismissed.

I concur: YORK, J.

HOUSER, J., deeming himself disqualified, takes no part in this decision.

140 Cal.App. 409

CAREY et al. v. DOUTHITT et al.

Civ. 1055.

District Court of Appeal, Fourth District, California.

Aug. 15, 1934.

1. Homestead ⇐43

Rule that statutory provisions relating to manner in which homestead right may be acquired are mandatory applies to provision that declaration of homestead must describe property claimed as homestead (Civ. Code, § 1263).

2. Homestead ⇐43

Sufficiency of declaration of homestead must be determined from statements expressly made therein, and cannot be affected by secret intentions of claimant (Civ. Code, § 1263).

3. Homestead ⇐43

Where wife's declaration of homestead failed to include description of premises, lien of judgment against husband applied to such premises, notwithstanding order made after recording of judgment purporting to permit filing of amended declaration of homestead with retroactive effect (Civ. Code, § 1263).

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by S. D. Carey and another, copartners doing business under the firm name and style of Carey Bros., against Wm. Douthitt, also known as Will H. Douthitt, and others. From an adverse judgment, plaintiffs appeal.

Reversed.

For prior opinion, see (Cal. App.) 34 P.(2d) 1060.

Hickcox, Trude & Robertson, of El Centro, for appellants.

C. L. Brown, of El Centro, for respondents.

BARNARD, Presiding Justice.

The respondents, as joint tenants, owned lots 7 and 10 of Crawford's subdivision No. 1, according to the map thereof recorded in Imperial county, and resided in a house situated upon lot 10 while the respondent husband conducted a junk business upon lot 7. In another action brought by these appellants against the respondent husband and another party, a writ of attachment was levied upon lot 7 of said property on May 19, 1931. On May 25, 1931, the respondent wife executed, acknowledged, and recorded a declaration of homestead upon lot 7 alone. On June 5, 1931, a judgment in the action referred to was entered in the superior court of Imperial county, and the same was duly entered in the judgment book and a transcript thereof recorded in the office of the county recorder. Thereafter, the present action was begun by these appellants for the purpose of determining what portion of the said lots 7 and 10 was subject to the lien of the judgment and for the purpose of quieting title to such portions thereof as might be found subject to the lien of said judgment. In their answer these respondents alleged that it was their intention and purpose to declare a homestead upon both lots and that the respondent wife had inadvertently

omitted any reference to lot 10 in the declaration of homestead filed by her. Among other things, the court found as follows:

"That at the time of the filing of said declaration of homestead the said Edna Douthitt intended to claim said lot ten on which their dwelling house and other improvements were located, and on which she and her said family were actually living as their home, as well as lot seven, but through mistake and inadvertence she named in her said declaration only said lot seven. That she ought to be allowed to make and file an amended declaration as and of the date when her declaration was originally filed with said lot ten described therein, and added thereto."

"That at the time of the commencement of said action by plaintiff against said Will H. Douthitt and George W. Lindsay until and at the time of the issuance and levy of the attachment therein on lot seven and at all times subsequent thereto, said plaintiffs in said action, had reasons to know and did know, that said Edna Mary Douthitt and her said family actually resided wholly upon said lot ten and that at all times subsequent to the filing of said declaration of homestead the said plaintiffs had reason to know and did know, that the said Edna Mary Douthitt had inadvertently made a mistake in the omission of said lot ten from said declaration of homestead."

A judgment was entered permitting the respondent wife "to execute and file her amended declaration of homestead in her own behalf and in behalf of her said family, upon said lots 7 and 10, and as of the date of the execution and filing for record of her said declaration of homestead on said lot 7," and decreeing that the judgment which had been secured by these appellants attached to and upon an undivided one-half interest in said lot 7, and that the same did not affect any part of the said lot 10. From this judgment and decree this appeal is taken upon the judgment roll alone.

The appellants contend that the findings do not support the judgment and that the court erred in deciding that a declaration of homestead may be amended by adding other land thereto after a judgment lien has attached to the additional land.

[1, 2] It is well settled that the statutory provisions relating to the manner in which a homestead right may be acquired are mandatory. Bullis v. Staniford, 178 Cal. 40, 171 P. 1064. A declaration of homestead must contain a description of the premises in connection with which the right is claimed. Civ. Code, § 1263. The statutory requirements must be strictly complied with, and the provision that a declaration of homestead must contain a description of the property upon which a homestead is claimed is as mandatory as any of the other provisions of the section. Jones v. Gunn, 149 Cal. 687, 87 P. 577, 578. The sufficiency of a declaration of homestead must be determined from the statements expressly made therein, and cannot be affected by any secret intentions which may have been in the mind of the claimant. "The legislature has prescribed certain formalities and conditions which are essential to the 'selection' of a homestead, and these formalities and conditions cannot be disregarded by courts." Reid v. Englehart-Davidson, etc., Co., 126 Cal. 527, 58 P. 1063, 1064, 77 Am. St. Rep. 206.

[3] In Jones v. Gunn, supra, the court said: " 'While it is true that homestead and exemption laws are remedial, and, generally, must be liberally construed in order to effect the purposes intended thereby, yet it is equally true that homesteads and homestead exemptions are the creatures of statute, and that the failure to comply with any statutory requirement essential to a valid declaration of homestead cannot be supplied by liberal construction.' " Much less may a homestead exemption be created by judicial decree for a particular parcel of land, in the absence of compliance with any one of the statutory requirements in so far as that parcel is concerned. At the time the appellants' judgment became a lien on the respondent husband's interest in lot 10, no homestead exemption applied thereto as a result of the declaration filed, and it follows that the situation could not be changed by an order of court purporting to permit the filing of an amended declaration with retroactive effect.

While there is no definite finding on the subject, apparently lot 7 was not such a part of the premises used for home purposes as to be available for a homestead declaration.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

FRANCIS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.* DELOREY v. SAME.

Civ. 9634, 9662.

District Court of Appeal, Second District, Division 2, California.

Aug. 9, 1934.

Hearing Granted by Supreme Court Oct. 8, 1934.

1. New trial ⇐114

Requirement that motion for new trial shall be heard and determined by judge who presided at trial, except in event of his absence or inability, is not directory only (Code Civ. Proc. § 661).

2. Contempt ⇐60(3)

In contempt proceedings against attorneys for making motion for new trial before another judge while judge before whom case was tried was available therefor, evidence *held* not to support conclusion that attorneys other than one making arrangements for hearing were in contempt, where it was not shown that they knew matter was before other judge without consent of first judge (Code Civ. Proc. § 661).

3. Contempt ⇐54(4)

Affidavit in contempt proceedings against attorneys for making motion for new trial before another judge while judge before whom case was tried was available therefor, which contained no allegation that first judge was not fully advised as to what was happening or that it was not done with his consent and approval nor that attorneys other than one making arrangement for hearing knew of contemptuous arrangement *held* not to charge contempt (Code Civ. Proc. § 661).

4. Contempt ⇐54(4, 5)

In charging indirect contempt, affidavit should charge a contempt on its face, and, if it fails so to do, any judgment based thereon is void and will be so declared on certiorari, and absence of essential facts in affidavit cannot be cured by proof on hearing or found by court in decree adjudging accused guilty of contempt.

Petitions by George H. Francis and E. H. Delorey and another against the Superior Court in and for the County of Los Angeles and another, for a writ of review and certiorari to review proceedings in which petitioners were adjudged guilty of contempt of court.

Judgments and orders annulled and fines paid under protest ordered returned.

Richard H. Cantillon, of Los Angeles, for petitioner George H. Francis.

Frank L. Simons and A. L. Bartlett, both of Los Angeles, for petitioners E. H. Delorey and Boyd C. Barrington.

Libby & Sherwin and Warren E. Libby, all of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

Petitions were filed herein to review proceedings in the superior court of Los Angeles county in which petitioners were adjudged guilty of contempt of that court and fined $500 each, in default of payment of which each was ordered committed to the custody of the sheriff to be imprisoned "at the rate of one day for each $2.00 of said fine." To avoid being so imprisoned such fines were paid under protest by each petitioner.

It is urged that the affidavit upon which the order to show cause against petitioners was issued is insufficient to warrant the issuing thereof and the conducting of a hearing thereon.

[1] The affidavit was made by Edward S. Shattuck, a deputy city attorney of Los Angeles, and recited the history of the condemnation case of City of Los Angeles v. Horn, case No. 305574 of the files of the superior court of Los Angeles county, in so far as it applies to the defendant Simon Verghis therein named. It shows that said defendant filed an answer in said case on July 28, 1930, through his attorney, petitioner E. H. Delorey; that thereafter and before trial other attorneys were substituted in the place and stead of said Delorey; that thereafter said case was tried in department 11 of said court before the Honorable Emmet H. Wilson, sitting without a jury, as to the parcel in which said Verghis was interested, resulting in an interlocutory judgment awarding the latter the sum of $1; that thereafter a new trial was granted on motion of petitioner Boyd C. Barrington and the case as to such parcel was set for trial on November 27, 1931, on notice served on said E. H. Delorey; that said retrial came on before said Honorable Emmet H. Wilson, petitioners Delorey and Barrington representing Verghis, and the city attorney, through his deputy Thurmond Clarke, representing plaintiff; that the award to said Verghis was at that time reduced to nothing; that the records of said action "disclose that no further action of any kind or character was taken with reference to the interest of the defendant Simon Verghis" in said proceeding un-

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⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 43 P.2d 300.

til June 7, 1932, when a motion for a new trial as to such interest was made before the Honorable Lewis Howell Smith, a judge of said court, and granted on stipulation of the parties, petitioners Delorey and Barrington representing Verghis and petitioner Francis, deputy city attorney, representing the plaintiff, and that immediately, "upon stipulation of counsel," said cause was called for retrial, Charles G. Frisbie was sworn and testified for said defendant and an award of $2,500 was made in favor of Verghis on July 10, 1932; that said award was thereafter paid to petitioner Delorey, as assignee of Verghis, and said interlocutory judgment was satisfied by Delorey; that on said "7th, 8th, 9th and 10th days of June, 1932, Hon. Emmet H. Wilson was sitting in Department 4" of said court "and was at all times during said days available for his usual duties"; that all of said facts "were at all times known" to petitioners; and "that they and each of them, with full knowledge of said facts, intentionally did the acts disclosed by said records."

It will be seen at once that the act intended to be charged as contemptuous was the making of the motion for a new trial before another judge while the judge before whom the case was tried was available therefor, contrary to the provisions of section 661 of the Code of Civil Procedure, which says, so far as pertinent here: "The motion for a new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge, or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge."

Petitioners urge that such requirement is directory only and cite as authority for such contention the case of Pappadatos v. Superior Court, 209 Cal. 334, 287 P. 342. That was an application for a writ of prohibition to restrain further proceedings in the trial court after a motion for a new trial was granted. It is true the motion there was made before a judge other than the one who tried the case, but the question involved did not turn on that fact, and it does not appear that the judge before whom the case was tried was available. The court simply held that the word "shall" in the last paragraph of such section (not quoted here), requiring the motion to be "orally" argued or submitted without oral argument, as the judge may direct, not later than ten days before the expiration of the time within which the court has power to pass on the same, if heard by a judge other than the judge who tried the case, was directory only, and that failure to comply with it did not invalidate the proceedings. In such case the motion was submitted about three days prior to the expiration of the period within which the court had power to act thereon. An examination of the points and authorities filed with the petition for the writ shows that such is the only point urged therein, no attempt being made to show that the judge who tried the case was available.

[2] We cannot, therefore, agree that the part of the section quoted has been held to be directory only. But in our opinion even if held to be mandatory, the only effect would be to make the proceedings void. From that alone it would not necessarily follow that petitioners were contemptuous. We think it cannot be gainsaid that if petitioners had gone to Judge Wilson and explained to him that in their opinion a great injustice had been done a litigant because he was unable to get his proof before the court, and that the city was willing that justice be done by stipulating that a new trial could be had, and that if Judge Wilson had been of the opinion that the matter should be heard, but had no time for it and had told them to go before any other judge with it, that no contempt could possibly have been involved, even assuming that such action would have been a violation of a mandatory provision of the code and in consequence the proceeding was void. The evidence shows that no attempt was made to have a hearing before Judge Wilson. It also shows that whatever arrangements were made to have the motion heard before Judge Smith were made by petitioner Delorey, and that neither petitioners Barrington nor Francis knew where it was to be heard, until the arrangement had been perfected. They then met together in the chambers of Judge Smith, where apparently the only thing discussed was whether the motion would be stipulated to by the plaintiff. Finding that that would be done, Judge Smith consented to hear it and did so. Even the evidence does not show that petitioners Barrington and Francis knew that the matter was before Judge Smith without the consent of Judge Wilson having been first obtained; so even assuming that the evidence supports a conclusion that the action of petitioner Delorey was contemptuous, it does not support such a conclusion as to the other two.

[3] Turning then to the affidavit, we find it contains no allegation to the effect that Judge Wilson was not fully advised at all times as to what was happening, or that it was not all

done with his consent and approval. In our opinion some such statement was necessary in order to show upon the face of the affidavit that a contempt was committed, even as to petitioner Delorey, who made the arrangement; and certainly it would have to charge the other two with knowledge of what Delorey did or with participating in the contemptuous arrangement, before a contemptuous act could be said to be properly charged as against them.

[4] In a contempt of the kind charged here, it is jurisdictional that the affidavit should charge a contempt on its face, and if it fails so to do any judgment based thereon is void and will be so declared upon certiorari. Frowley v. Superior Court, 158 Cal. 220, 228, 110 P. 817; Hutton v. Superior Court, 147 Cal. 156, 159, 81 P. 409, 410. The absence of essential facts in the affidavit cannot be cured by proof on the hearing or "found by the court in its decree adjudging the accused guilty of contempt. The proceedings are void ab initio." Hutton v. Superior Court, supra.

Judgments and orders annulled, and it is ordered that the fines paid under protest be returned to the respective petitioners.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 635

BROOKS v. CITY OF MONTEREY.

Civ. 9264.

District Court of Appeal, First District, Division 2, California.

Sept. 13, 1934.

Hearing Denied by Supreme Court Nov. 8, 1934.

1. Automobiles ⇨287

In action for death of motorist in plunge of automobile over precipice at terminus of street which was allegedly in dangerous and defective condition, deceased could be contributorily negligent though he was intoxicated.

2. Automobiles ⇨287

In action for death of motorist in plunge over precipice at terminus of street, finding that deceased was negligent, after findings that deceased was intoxicated and that street was in dangerous and defective condition and partly lighted, *held* not error, as against contention that under such conditions deceased could not be negligent.

Appeal from Superior Court, Monterey County; James L. Atteridge, Judge.

Action by Agnes I. Brooks, as administratrix of the estate of Egbert William Brooks, deceased, against the City of Monterey. Judgment for defendant, and plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; SPENCE, Justice pro tem. not participating.

W. H. Metson and E. B. Mering, both of San Francisco, and Charles B. Rosendale, of Salinas, for appellant.

Bardin, Harrington & Bardin, of Salinas, and Argyll Campbell, of Monterey, for respondent.

STURTEVANT, Justice.

This is the second appeal in the above-entitled action. The facts are fully set forth in the opinion determining the first appeal. Brooks v. City of Monterey, 106 Cal. App. 649, 290 P. 540. When the case went back for a new trial, the hearing was had on the same pleadings before the trial court sitting without a jury. The trial court made findings in favor of the defendant, and from the judgment entered thereon the plaintiff has appealed and has brought up the judgment roll. In her pleading, among other things, the plaintiff alleged:

"4. That prior to the great oil fire which occurred in the City of Monterey on the 14th, 15th and 16th of September, 1924, said Reeside street at said abrupt termination was protected against said precipice by a barrier across said street; that said fire consumed said barrier, and said barrier was not replaced until some time after the 11th day of October, 1925.

"5. That during all times from the 16th day of September, 1924, until the 11th day of October, 1925, and for several days thereafter said terminal of said Reeside street was unlighted, unguarded, and without barriers, signs, notices, watchman, or any protection against said precipice, and by reason of being unlighted, unguarded, and without barriers, signs, notices or any protection against said precipice, was in a dangerous and defective condition, as herein alleged. That during all of said times R. M. Dorton was city manager of said City of Monterey, and Manuel S. Perry was the street superintendent of said City of Monterey and that during all of said time said R. M. Dorton and said Manuel S. Perry, and the council of the said

City of Monterey had authority and the power to remedy such condition and during all of said time said R. M. Dorton and said Manuel S. Perry and said council had knowledge and notice of said dangerous and defective condition of said Reeside street and during all of said time said R. M. Dorton and said Manuel S. Perry and said council failed and neglected for a reasonable time and at all times after acquiring such knowledge and receiving such notice to remedy such condition, and failed and neglected for a reasonable time and at all times after acquiring such knowledge and receiving such notice to take such steps as might be reasonably necessary to protect the public against said dangerous and defective condition and each and all of said parties failed to remedy or to take steps to remedy such condition."

No allegation of defective plan or plans was pleaded. In its answer the defendant pleaded the contributory negligence of the plaintiff.

In its findings, among other things, the trial court found: "7. As to the alleged contributory negligence of said decedent the court finds: That the said Egbert William Brooks was at the time and place alleged in said third amended complaint driving the said automobile upon Reeside street, a public highway in the City of Monterey, County of Monterey, State of California, while he was then and there under the influence of intoxicating liquor; that he was then driving said automobile at an excessive rate of speed, and in a reckless manner, and that said Egbert William Brooks failed to use due care or caution under the circumstances for the protection of himself and said automobile, and that said Egbert William Brooks was generally negligent and careless in and about the operation and control of said automobile at said time and place, and so carelessly, negligently, and improperly managed said automobile that by reason thereof said automobile was propelled across said Reeside street to the left hand side of said street in the direction in which said Egbert William Brooks was then and there traveling, and upon a portion of the sidewalk on said left hand side of said Reeside street, and by want of due care in the management of said automobile by said Egbert William Brooks, and by reason of the negligent and careless management and control of said automobile by said Egbert William Brooks said automobile was propelled over the said embankment into the Bay of Monterey, thereby losing the life of said decedent which said acts of carelessness and negligence on the part of said Egbert William Brooks proximately contributed to his death."

The plaintiff claims that the court erred in holding that intoxication was a defense in an action to recover damages resulting from the dangerous and defective condition of the public highway. An examination of the finding made by the trial court discloses that it did not so hold.

[1] It is next asserted that after holding that the termination of Reeside street was in a dangerous and defective condition, the court erred in holding that there could be contributory negligence on the part of the deceased when he was intoxicated. The plaintiff cites and relies on Barry v. Terkildsen, 72 Cal. 254, 13 P. 657, 1 Am. St. Rep. 55. The citation does not support the contention.

It is next claimed that after holding that the street was in a dangerous and defective condition, that it was paved and partly lighted, the court found that a reasonably prudent man would have discovered the declivity in time to save himself and that this was error. As quoted above the findings of the court were not as contended.

[2] The plaintiff next asserts that: "After finding that the deceased was intoxicated; that Reeside street was in a dangerous and defective condition; and that the street was paved and partly lighted, the court found that the deceased was negligent. This is error on its face because where these conditions existed the deceased cannot be negligent." In support of the claim the plaintiff cites Barry v. Terkildsen, supra, and Brooks v. City of Monterey, supra. Neither citation supports the contention. Curtis v. Kastner (Cal. Sup.) 30 P.(2d) 26, filed after the briefs in the instant case, but cited at the time of the argument, states the rule to the contrary.

It is next claimed that the court erred in rendering judgment for the defendant because the street was maintained upon a plan of construction that was defective and in the nature of a nuisance and that where the defect is in the nature of a nuisance there can be no defense of contributory negligence. The pleadings in the instant case did not tender an issue to the effect that the street was maintained upon or constructed upon a defective plan, and the court made no finding on the subject.

The last point made by the plaintiff is that in the opinion rendered on the first appeal it was held that the intoxication of the deceased was no excuse for the negligence of the defendant and that mere abstraction and

lack of attention cannot be assigned as contributory negligence and that such is the law of the case and the court erred in not following that law. As shown above, the finding of the court was not based solely on intoxication, but on many facts (45 C. J. 997), and it was entirely within the doctrine of Brooks v. City of Monterey, supra.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

140 Cal.App. 609

PEOPLE v. QUINONES.

Cr. 1788.

District Court of Appeal, First District, Division 2, California.

Sept. 12, 1934.

1. Weapons ⇨8

Homemade instrument consisting of alternate strips of sheet lead and gum tape in shape of bracelet of size to fit over four finger knuckles and described by policeman of many years' experience as pair of metal knuckles *held* "metal knuckles" within statute making their possession a felony (St. 1925, p. 542, § 1).

"Knuckle" is piece of metal, usually brass, worn over knuckles in order to protect them in striking a blow and to make the blow more effective.

[Ed. Note.—For other definitions of "Knucks; Knuckle," see Words & Phrases.]

2. Criminal law ⇨448(7)

In prosecution for possessing metal knuckles, statement of policeman of many years' experience that instrument found in accused's room was pair of metal knuckles authorized introduction of instrument in evidence; statement being statement of facts and not conclusion (St. 1925, p. 542, § 1).

3. Weapons ⇨17(4)

Evidence that police officer found metal knuckles in bureau drawer in room occupied by accused who had just left it at order of officer, and that upon their exhibition to him accused stated knuckles belonged to him, sufficiently established possession requisite to conviction for possessing metal knuckles (St. 1925, p. 542, § 1).

4. Criminal law ⇨406(3)

In prosecution for possession of metal knuckles, where evidence showed that police officer who had just found knuckles in accused's room exhibited them to accused, admitting evidence that accused on exhibition of knuckles stated they belonged to him *held* not error (St. 1925, p. 542, § 1).

5. Criminal law ⇨395

Where police officer who found metal knuckles in accused's room had right to make search without warrant, sustaining objection to questioning officer as to whether he had warrant when he entered building *held* not error.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Eddie Quinones was convicted of possessing a set of metal knuckles, and he appeals.

Affirmed.

Nathan C. Coghlan and William Ferriter, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

The defendant was informed against by the district attorney, he entered a plea of not guilty, and on the trial the jury returned a verdict against him. He made a motion for a new trial, but his motion was denied. He has appealed from the judgment and the order denying his motion.

[1] By section 1 of chapter 339, p. 695, of the Statutes of 1923, amended by St. 1925, p. 542, § 1, it is made a felony if any "* * * person who within the State of California * * * possesses any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles. * * *" In the instant case it was alleged that the defendant possessed "metal knuckles." The first point made by the defendant is that the evidence does not establish the existence in this case of an "instrument or weapon of the kind commonly known as metal knuckles." This contention is based on the fact that the instrument introduced in evidence as Defendant's Exhibit 1, which has been certified up with the record, is not all metal. We have examined it. It is what might be termed homemade. It consists of alternate strips of sheet lead and gum tape, making a set of knuckles somewhat in the shape of a bracelet and of size to fit over four finger knuckles. It will be conceded

at once that the instrument is neither all metal nor is it all cloth. The excerpt quoted from the statute contains nothing showing that the words "metal knuckles" was intended by the legislature to refer to something that was entirely composed of metal. Similar statutes have been adopted in other jurisdictions. In those same jurisdictions it has been held that the name in the statute is used in a generic sense. Patterson v. State, 3 Lea (71 Tenn.) 575; Harris v. State, 22 Tex. App. 677, 3 S. W. 477; Louis v. State, 36 Tex. Cr. R. 52, 35 S. W. 377, 61 Am. St. Rep. 832. One of the common English meanings of "knuckle" is "a piece of metal, usually brass worn over the knuckles in order to protect them in striking a blow and to make the blow more effective." Cent. Dict. If it be claimed that the expression needs the interpretation of an expert such interpretation was present in the instant case. When Inspector McMahon, a policeman of many years' experience, was on the stand, he was asked what he found in the room of the defendant. His answer was, "A pair of metal knuckles." Under these circumstances we think the point may not be sustained.

[2] It is next contended that the knuckle was not admissible because no testimony was introduced to prove it was the kind of instrument the possession of which is denounced by the law. As we understand the point, it is that Officer McMahon but expressed his conclusion when he designated the instrument found as "metal knuckles." The claim is, in our judgment, ultra-critical, and in the absence of a showing to the contrary it must be assumed that the inspector of the police department, when giving his testimony, merely stated facts and did not express his conclusion.

[3, 4] In the next point it is claimed that there was no evidence of possession shown excepting the extrajudicial statement of the defendant. Continuing, the defendant argues that until the corpus delicti was established the statements made by the defendant should not have been received in evidence against him. Conceding the law to be as claimed, we think that the record does not sustain the point. Officer McMahon, together with some of his assistants, went to the house and to the particular flat. As they did so the defendant came out of a certain room. Officer McMahon directed the defendant to go into another room with some of the police officers. As they did so Officer McMahon entered the room which the defendant had just come out of. In a short period of time McMahon came out with the knuckles in his hand. He testified that he found the knuckles in a bureau drawer in the room the defendant had just left. The uncontradicted evidence was that the defendant occupied that particular room in that particular flat in that particular house. Such facts were clearly some evidence of possession on the part of the defendant. As soon as McMahon came out with the knuckles in his hand he approached the defendant, exhibited the knuckles, and inquired to whom they belonged. Whereupon the defendant replied, as testified to by Officer McMahon, that they belonged to him. In receiving that evidence at that particular time we see no error in the proceeding.

It is next asserted that actual, immediate, lawful possession is contemplated by the statute and that such possession was not proved. As indicated above, we think that there was evidence of the possession contemplated by the statute.

[5] The last point made is that the trial court erred in sustaining an objection to the question as to whether Officer McMahon held a warrant when he entered the building. He argues that he had a right to uncover by cross-examination any interest, malice, or hatred, and to expose to the jury the lawlessness of the witness in his treatment of the defendant. All that Inspector McMahon did, as shown by the record, he had a right to do under the facts disclosed, whether he held a warrant or did not hold one. It follows that the court did not err in sustaining the objection.

We find no error in the record.

The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

NORTON v. BARANOV et al.*

Civ. 8618.

District Court of Appeal, Second District, Division 2, California.

Sept. 12, 1934.

Rehearing Denied Oct. 8, 1934.

Hearing Granted by Supreme Court Nov. 8, 1934.

1. Courts ⇐472(7)

Superior court of Los Angeles county had no jurisdiction of action against residents of San Diego city to recover $400 for accounting services, justice's court of San Diego township having exclusive jurisdiction (Code Civ. Proc. §§ 76, 832; Const. art. 6, §§ 5, 11a).

2. Courts ⇐37(1)

Fact that both parties to action within justice court's exclusive jurisdiction proceeded without objection in superior court until defendants moved to set aside judgment for plaintiff and dismiss action did not confer jurisdiction on latter court (Code Civ. Proc. §§ 76, 832; Const. art. 6, §§ 5, 11a).

3. Courts ⇐23

Parties' consent alone will not confer on court jurisdiction of cause exclusively within another court's jurisdiction.

4. Judgment ⇐346

Judgment, invalidity of which is apparent from judgment roll, may be vacated on motion made at any time.

5. Appeal and error ⇐346(1)

Appeal within statutory time from order denying motion to set aside void judgment *held* proper, though motion was made after time for appeal from judgment.

6. Appeal and error ⇐1176(1)

Appellate court must consider appeal from order denying motion to vacate void judgment after expiration of time for appeal therefrom, reverse such order, if erroneous, and remand cause for entry of order vacating judgment.

Appeal from Superior Court, City and County of Los Angeles; Thomas C. Gould, Judge.

Action by Thomas S. Norton, Jr., against Nathan F. Baranov and another, copartners, doing business under the firm name of Baranov & Bennett, who filed a cross-complaint, joining other persons as cross-defendants. Judgment for plaintiff, and from an order denying defendants' motion to set aside the judgment and dismiss the action, they appeal.

Reversed.

Alvin B. Baranov, of San Diego, for appellants.

Frank Mergenthaler, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff sued defendants, residents of the city of San Diego, for $400 for accounting services. Defendants answered and filed a cross-complaint joining other persons as cross-defendants. At the time of trial defendants' request for continuance was denied, the case was tried and judgment was rendered for plaintiff. More than sixty days after entry of judgment defendants filed their "notice of motion to set aside judgment and for dismissal," on the ground that the trial court was without jurisdiction. The motion was heard and denied, and within ten days thereafter defendants appealed from the order denying said motion.

[1-3] From the judgment roll it appears that the trial court was without jurisdiction by reason of the fact that defendants were residents of San Diego city and the jurisdiction was in the justice's court of San Diego township. Code Civ. Proc. § 832, and section 76 (then in effect); Const. art. 6, §§ 5 and 11a. The fact that both parties proceeded without objection in the superior court of Los Angeles county until defendants made the motion now in question did not confer jurisdiction on that court. As was said in Shipp v. Superior Court, 209 Cal. 671, 289 P. 825, 827: "* * * either the superior court has or has not jurisdiction and either the justice's court has or has not jurisdiction. If the justice's court has jurisdiction, that jurisdiction is exclusive. (Citing cases.) Consent of the parties, of course, will not alone confer jurisdiction of a cause belonging exclusively in another court." Since the subject-matter of this action was within the exclusive jurisdiction of the justice's court of San Diego township, the trial court was without jurisdiction. Van Horn v. Justice's Court, 216 Cal. 235, pages 241 and 242, 13 P.(2d) 704.

[4, 5] The invalidity of the judgment being apparent from the judgment roll, it may be vacated on motion made at any time. Morgan v. Clapp, 207 Cal. 221, 277 P. 490; Capital Bond, etc., Co. v. Hood, 218 Cal. 729, 24 P.(2d) 765. Since the trial court had power to set aside its void judgment upon the motion herein made, an appeal from its order denying such motion is proper if taken within the time provided by law, as was done in this case.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 50 P.2d 67.

[6] Respondent refers us to the case of Lawson v. Guild, 215 Cal. 378, at page 381, 10 P.(2d) 459, 460, wherein it was stated: "An appeal will not lie from an order refusing to vacate a final judgment if the grounds upon which the party sought to have the same vacated existed before the entry of judgment and were available on appeal from the judgment," and contends that the rule quoted effectually disposes of this appeal. It is obvious, however, that the same principle which allows a trial court to vacate its void judgment long after the time for appeal has expired, and the judgment would in the usual case have become final, requires us to consider the appeal from the order of the trial court denying such motion; and where it appears, as it does in this case, that such denial was erroneous, it is the duty of this court to order its reversal and remand the cause so that the lower court may enter the proper order vacating the judgment.

Order appealed from reversed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 644

CHAPMAN et al. v. GOLDBERG.

Civ. 9607.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1934.

1. Appeal and error ⇐854(6), 933(1)

Presumption is that order granting new trial is correct, and order will be affirmed if it may be sustained on any ground.

2. New trial ⇐71

Where evidence in automobile collision case was conflicting as to defendant's alleged negligence and as to plaintiffs' alleged contributory negligence, order granting defendants new trial *held* not abuse of discretion.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Joe Chapman and Mary Chapman, his wife, and Marion Chapman, a minor, by Joe Chapman, his guardian ad litem, against Ben Goldberg. From an order granting defendant's motion for a new trial, plaintiffs appeal. On respondent's motion to dismiss appeal or affirm order granting new trial.

Order granting new trial affirmed.

Sheridan, Orr Drapeau & Gardner, of Ventura, for appellants.

David Tannenbaum, of Los Angeles, and David French, of Santa Barbara, for respondent.

CONREY, Presiding Justice.

This is a motion by respondent to dismiss appeal or affirm the order granting defendant's motion for a new trial. The action was brought to recover damages for injuries suffered by the plaintiffs, by reason of alleged negligence of the defendant in the operation of an automobile, whereby the defendant's automobile came into collision with an automobile operated by the plaintiff Joe Chapman.

The accident occurred at a time when the plaintiffs, traveling in a westward direction, were making a left turn for the purpose of entering into a service station. At and before the moment of collision, the defendant's automobile was traveling in an eastward direction on the same highway. The case was tried before a jury, which rendered its verdicts in favor of the plaintiffs. The court granted the defendant's motion for a new trial upon the ground that the verdicts were against law, and upon the further ground that the evidence was insufficient to sustain the verdicts.

[1] An order granting a motion for a new trial will be affirmed if it may be sustained on any ground; and, upon an appeal from an order granting a new trial, the presumption is in favor of the order. Weaver v. Shell Oil Co., 129 Cal. App. 232, 18 P.(2d) 736.

[2] The statement of the evidence as set forth in appellants' brief is alone sufficient to show that there was a substantial conflict in the evidence concerning the alleged negligence of the defendant, as well as in the evidence concerning the alleged contributory negligence of the plaintiff. The plaintiffs have failed to establish their claim of abuse of discretion on the part of the trial court in granting the motion.

The order granting motion for a new trial is affirmed.

We concur: YORK, J.; HAHN, Justice pro tem.

140 Cal.App. 622

IRVIN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9913.

District Court of Appeal, Second District, Division 2, California.

Sept. 12, 1934.

Judgment ⇐878(1)

Where plaintiff sought joint judgment for $7,000 and interest against three defendants but default judgment was duly entered for $3,500 and interest against two defendants and for $3,500 and interest against third defendant, and the two defendants paid the amount of the judgment against themselves, third judgment debtor was not entitled to have full satisfaction of judgment entered without payment of the amount of judgment entered against him (Code Civ. Proc. §§ 578, 675).

Petition by V. R. Irvin against the Superior Court of California in and for Los Angeles County, for a writ of mandate directing respondent to make an order satisfying of record the judgment in a certain action.

Writ denied.

Goudge, Robinson & Hughes and Charles M. Fueller, all of Los Angeles, for petitioner.

Walter H. Hewicker, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Petitioner asks a peremptory writ of mandate directing respondent superior court "to make its order satisfying of record the judgment in the action Phil Norton, Plaintiff, v. V. R. Irvin, Hugh Evans, Hugh Evans & Co., Inc., a Corporation, Defendants, action number 333,086, and the whole thereof."

In that action plaintiff Norton brought suit against the defendants asking judgment for rescission of an agreement with them and for $7,000, plus interest against them and each of them. All defendants were served, and, upon their failure to answer, the default of each was entered and judgment was thereafter rendered rescinding the agreement and awarding plaintiff $3,500, plus interest, against defendants Hugh Evans and Hugh Evans & Co., Inc., and further awarding plaintiff $3,500, plus interest, against defendant Irvin, who is petitioner here. On January 28, 1932, a week after the date of the judgment, Norton filed a "partial satisfaction of judgment," setting out that defendants Hugh Evans and Hugh Evans & Co., Inc., had paid in full the judgment against them in the sum of $3,500, plus interest, and directing the clerk "to enter full satisfaction of the judgment against the defendants, Hugh Evans and Hugh Evans & Co., Inc., a corporation." On April 23, 1934, a writ of execution was issued against the property of defendant Irvin, petitioner herein. On July 30, 1934, petitioner served and filed his notice of intention to apply for the writ of mandate here being considered.

Petitioner does not assert that the judgment in the above-mentioned case has not become final. He contends, however, that judgment was for no more than $3,500 and that the satisfaction by Hugh Evans and Hugh Evans & Co., Inc., was satisfaction of the entire judgment. His view is that, since the complaint asked for a joint judgment for $7,000 and the judgment rendered was on default of defendants, there could not be several judgments for $3,500 against Irvin and for $3,500 against his codefendants.

Code of Civil Procedure, § 675, provides for the entry of satisfaction of judgment, by order of court in cases in which a judgment is satisfied in fact. "The order is to be made only where the judgment has in fact been satisfied." State Bank of Lansing v. McLaury, 175 Cal. 31, 32, 165 P. 7. Petitioner states that "the judgment has been satisfied as a matter of law, by the filing of the satisfaction of judgment" above referred to. The contrary appears to be true.

The trial court is authorized by Code of Civil Procedure, § 578, when the justice of the case requires it, to determine the ultimate rights of the parties on each side, as between themselves. Petitioner here allowed his default to be entered, made no complaint as to the judgment, and now seeks to compel the trial court to enter a satisfaction of judgment contrary to the express terms of the judgment itself. His contention that such a several judgment against him for a sum less than that asked for in the complaint by way of a joint judgment, where he has allowed his default to be entered and has made no complaint as to the judgment, is not supported by any authority cited.

In Kirtley v. Perham, 176 Cal. 333, 168 P. 351, 354, the complaint set out a joint liability, but the trial court gave judgment against each defendant for his proportion thereof. While the pleadings might have been amended during the trial of the case, this was not done. On appeal the court said: "While this may be a technical variance, so far as the

mere form of words is concerned, it is not fatal. It was clearly within the power of the court to give such judgment under the provisions of sections 578, 579, and 580 of the Code of Civil Procedure, and as it was in accordance with the facts and beneficial, rather than prejudicial, to the defendants, it does not constitute a cause for a reversal of the judgment." By parity of reasoning, there is nothing in the record here which would justify the issuance of the writ of mandate as prayed.

Writ denied.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 607

PEOPLE v. CHOY SUN.

Cr. 1373.

District Court of Appeal, Third District, California.

Sept. 11, 1934.

Criminal law ⇐1182

Where transcript on appeal was filed and cause was regularly placed on oral calendar and no brief was filed in behalf of appellant or appearance made for him at time case was called for trial, conviction was affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Choy Sun was convicted of violation of the Narcotics Act. From the judgment of conviction and an order denying motion for new trial, he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sacramento county of a felony, to wit, violation of "an act to regulate the sale, possession, distribution and use of habit forming, narcotic and other dangerous drugs and substances, and providing penalties for the violation thereof," approved May 4, 1929 (St. 1929, p. 380), and acts amendatory thereof.

The transcript on appeal was filed in this court May 11, 1934. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on September 11, 1934. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

140 Cal.App. 487

In re FRITZ' ESTATE.

MULLER v. STIEGELER.

Civ. 9554.

District Court of Appeal, First District, Division 2, California.

Aug. 29, 1934.

Rehearing Denied Sept. 28, 1934.

1. Executors and administrators ⇐495(4)

Joint bank account of decedent and executor constituted no part of assets of decedent's estate, and hence executor was entitled to no commissions or fees thereon.

2. Executors and administrators ⇐506(3)

Executor's claim for money expended for burial expenses of decedent *held* properly disallowed, where conflicting evidence justified finding that executor's agreement to pay such expenses was consideration for decedent's creation of joint bank account with executor.

3. Executors and administrators ⇐510(4)

Executor's claim that interest should have been allowed him on money advanced on behalf of estate *held* properly rejected where he made no claim for interest when he restated account and appealed only from portions of order sustaining certain objections to account.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Lisetta E. Fritz, deceased. After a previous appeal, the executor restated his account and objections were filed thereto. From a part of an order

allowing certain objections, C. Alvin Muller, executor of the estate of Lisetta E. Fritz, deceased, appeals, opposed by Anna Dorothee Stiegeler.

Affirmed.

Lynn W. Culp, Sr., and Crozier C. Culp, both of Oakland, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondent.

SPENCE, Justice.

This is a second appeal involving the orders settling the accounts of the executor in the above-entitled estate. After the remittitur went down following the first appeal, the executor restated his account. Objections were filed thereto, and, after a hearing was had, the court settled said account, allowing certain objections and disallowing certain other objections. This is an appeal by the executor from that part of the order "sustaining the objection to the allowance of commission to the executor and statutory fees to the attorneys for the executor on that certain joint tenancy account referred to as Savings Account No. 7517, in the Bank of California, in amount of $1,428, and in ordering a reduction in said commission to the executor and regular statutory attorney fees, each, in the amount of $28.56; also that part of said order and judgment sustaining the objections to allowance to executor of burial expenses in the amount of $835, and disallowing said amount of $835 paid by the executor as burial expenses of the testatrix and charged by the executor to said estate."

[1] Most of the essential facts are set forth in the opinion on the first appeal [In re Estate of Fritz, 130 Cal. App. 725, 20 P.(2d) 361], and need not be repeated here. Upon restating his account, appellant claimed commissions and fees upon the amount represented by the joint account standing in the names of the deceased and the appellant in the Bank of California. This account was at all times claimed by appellant as his own by right of survivorship, and his claim with respect to said account was sustained upon the prior appeal. Said account constituted no part of the assets of the estate, and we find no merit in appellant's contention that he was entitled to commissions and fees thereon.

[2] Certain further facts should be stated in connection with the appeal from that portion of the order disallowing the amount of $835 paid by appellant as burial expenses. The joint account in the Bank of California was created in 1928. Thereafter the deceased made her will, which was later admitted to probate herein and which contained the following provision: "My money standing in my name and the name of C. Alvin Muller is all my own but as Mr. C. Alvin Muller is my executor, I added his name to my Bank Book in the Bank of California on California St. near Sansome St. for his convenience so that he can pay all honest debts of my funeral," etc. In the account which was before the court on the first appeal, appellant listed three items totaling $835 paid out as burial expenses, and he followed said items with the following statement: "These last three items, constituting the total burial expenses, were paid out of said joint tenancy account standing in the name of Lisetta E. Fritz and C. Alvin Muller, reported by bank book 7517, Bank of California, in the amount of $1,428, in accordance with the verbal agreement of the said Lisetta E. Fritz, deceased, and C. Alvin Muller, entered into at the time said joint tenancy was made, and referred to in the Will of said deceased, and are, therefore, not charged to the estate of said deceased." Upon restating his account after the first appeal, appellant claimed credit for said items against the estate. Objections were filed to said items, and in answer thereto appellant alleged that the foregoing statement embraced in the original account and relating to said agreement was erroneous, in that it referred to the joint account in the Bank of California rather than to the joint account in the Central Savings Bank of Oakland. It will be remembered that upon the hearing of the original account the court found that the signature of the deceased was obtained by fraud on the joint tenancy agreement creating the last-mentioned joint account, and that the court's order directing appellant to account for the amount thereof was affirmed on appeal.

We find no merit in appellant's contention that the trial court erred in sustaining the objections to the items for burial expenses upon the settlement of the restated account. Respondent cites In re Estate of Grant, 131 Cal. 426, 63 P. 731, and other authorities, and claims that this matter was conclusively determined upon the settlement of the original account, but it appears unnecessary to discuss this point. Assuming, without deciding, that there had been no conclusive determination thereof, a question of fact was presented to the trial court. Appellant testified that his agreement with the deceased related to the other joint tenancy account. Respondent introduced in evidence all the files in the proceeding which included the admission of appellant found in his original account re-

garding his verbal agreement made at the time that the joint tenancy account in the Bank of California was created. Upon this conflict in the evidence, the trial court was warranted in concluding, in accordance with appellant's admission previously made, that said agreement on the part of appellant was the consideration for the creation of said joint tenancy account in the Bank of California. The objections to said items were therefore properly sustained.

[3] It is further contended by appellant that interest should have been allowed to him on certain money which he claims to have advanced on behalf of the estate. We find no merit in appellant's argument in support of this contention, but it is a sufficient answer to point out that appellant made no claim for interest when he restated his account and that he has appealed only from the portions of the order above set forth.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

140 Cal.App. 389

PEOPLE v. BILL.

Cr. 1380.

District Court of Appeal, Third District, California.

Aug. 13, 1934.

1. Indictment and Information ⇐110(30)

Information which, after quoting title of act, charged in language of act felonious possession of a "preparation of cocaine," sufficiently informed defendant that he was charged with felonious possession of "cocaine," each of which was penalized by the act (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496; Pen. Code, §§ 950–952).

2. Indictment and Information ⇐108

Information which, after quoting title of act, alleged date it was approved and that defendant feloniously had in his possession a preparation of cocaine contrary to act, *held* not defective for failure to allege amendments where act and amendments penalized possession of any cocaine (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

3. Poisons ⇐9

Information charging felonious possession of a preparation of cocaine *held* not defective for failure to allege that defendant did not hold a physician's prescription therefor, since prescription exempting one from penalty was matter of defense (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

4. Poisons ⇐9

In prosecution for felonious possession of a preparation of cocaine, affirmative proof by state that defendant did not have physician's prescription therefor was unnecessary, since prescription exempting one from liability was matter of defense (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

5. Criminal law ⇐304(3)

In prosecution for felonious possession of a preparation of cocaine proof by state that cocaine is a habit-forming drug was unnecessary, since it is common knowledge, of which court will take judicial notice, that inordinate use of cocaine is habit-forming (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

6. Poisons ⇐9

Where information charged felonious possession of a "preparation of cocaine," proof of felonious possession of "cocaine" *held* not fatal variance, since statute penalized possession of either and defendant was not misled (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

7. Poisons ⇐9

Proof that cocaine was found in defendant's room and that defendant admitted it was his, and asserted that another person in the room had nothing to do with it, *held* sufficient to sustain verdict that cocaine was in defendant's possession (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

8. Criminal law ⇐808½

In prosecution for felonious possession of a preparation of cocaine, instruction that defendant was charged with violation of Narcotic Drug Act, giving its title, approved on certain date, and acts amendatory thereof, and giving jury forms of verdicts referring similarly to the act, *held* not error, since purpose was merely to identify act and amendments did not change nature of offense charged (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

9. Criminal law ⇐824(2)

In prosecution for felonious possession of a preparation of cocaine, failure to instruct jury, in absence of request therefor, as to meaning of "possession" and "habit-forming narcotic," *held* not error, since such

words are well understood by persons of average intelligence (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

10. Poisons ⇐4

Where cocaine is in joint possession of two persons, each of them is guilty of violating statute prohibiting "possession" of narcotic drugs (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

[Ed. Note.—For other definitions of "Possession," see Words & Phrases.]

11. Poisons ⇐9

In prosecution for felonious possession of a preparation of cocaine, packages of cocaine, identified as such by chemist, found in defendant's hotel bedroom and lavatory and admitted to belong to defendant, *held* properly admitted (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

12. Criminal law ⇐1169(3)

In prosecution for felonious possession of a preparation of cocaine where defendant admitted that cocaine found in his hotel room belonged to him and asserted that another person found there had nothing to do with it, permitting such person to testify she did not know why she had been released *held* not error (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

13. Criminal law ⇐730(7)

In prosecution for felonious possession of a preparation of cocaine, prosecutor's argument that another person found in defendant's room had gone there to get a shot *held* harmless, if not justified, in view of court's instruction to disregard (St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

14. Criminal law ⇐982

Hearing or granting of motion by one convicted of a crime for probation rests in sound discretion of trial judge (Pen. Code, § 1203, as amended by St. 1931, p. 1633).

15. Criminal law ⇐982

Summary denial by trial judge of motion for probation by one convicted of felonious possession of a preparation of cocaine without reference to probation officer for investigation and recommendation *held* not abuse of discretion (Pen. Code, § 1203, as amended by St. 1931, p. 1633; St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496).

16. Criminal law ⇐1218

Whether person convicted of felonious possession of a preparation of cocaine shall be sentenced to county jail or state prison rests in sound discretion of trial judge (St. 1929, p. 385, § 7).

17. Criminal law ⇐1218

Sentence of one convicted of felonious possession of a preparation of cocaine to state prison instead of to county jail *held* not abuse of discretion (St. 1929, p. 385, § 7).

18. Criminal law ⇐576(4)

Where defendant was not brought to trial within 60 days after filing of information because trial was continued on motion of defendant's counsel in open court, when defendant was present and made no objection, defendant waived right to be tried within such period (Pen. Code, § 1382, subd. 2).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

J. L. Bill was convicted of the felonious possession of cocaine, and he appeals.

Affirmed.

Clifford A. Russell and Archibald M. Mull, Jr., both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of having possession of cocaine contrary to the provisions of the California Statutes of 1929 (Stats. 1929, p. 380, as amended, vol. 2, Deering's Gen. Laws of 1931, Act 5323, p. 3007), regulating the sale or possession of habit-forming narcotics.

On appeal it is asserted there is a fatal variance between the allegations of the information which charge him with the possession of "a *preparation* of cocaine" and the proof that the substance which was found in his hotel room consisted of clear cocaine rather that a preparation thereof; that the evidence fails to show the defendant was *possessed* of the narcotic; that the prosecution failed to allege or prove that the defendant was not authorized by a written prescription to possess the drug; that the court erred in giving to the jury certain instructions and that the district attorney was guilty of prejudicial misconduct in the course of the trial.

[1] The information sufficiently charges the defendant with the offense of having possession of cocaine contrary to the provisions of the statute above referred to. The information refers to the act by quoting the title thereof and then alleges that the defendant, on the 26th day of January, 1934, in the coun-

ty of Sacramento, Cal., "did then and there willfully and unlawfully and feloniously have in his possession a preparation of cocaine; contrary to the form, force and effect of the statute. * * *" The act provides that: "It shall be unlawful for any person * * * to have in their or his possession any cocaine, * * * or any of the salts, derivatives or compounds of the foregoing substances or any preparation or compound containing any of the foregoing substances or their salts, derivatives or compounds excepting upon the written order or prescription of a physician. * * *" St. 1929, p. 380, § 1, as amended by St. 1931, p. 1496.

The information is couched in the language of the statute and conforms to the provisions of sections 950–952 of the Penal Code. It sufficiently informs the defendant that he was charged with the unlawful possession of cocaine.

[2] The information was not defective for failure to allege that the Narcotic Drug Act under which the defendant was charged with the "unlawful and felonious" possession of cocaine was amended in 1931 and again in 1933 (Stats. 1931, p. 1496; Stats. 1933, p. 781), since it did specifically set forth the title to the act, and alleges that the statute was approved May 4, 1929. The original act of 1929 and also the act as amended by each successive legislature made it unlawful for a person to *have in his possession any cocaine.* In neither of the amendments to the statute was the offense changed in that regard. The only object in referring to a statute under which one is charged with an offense is to inform him of the specific crime with which he is accused. In the present case the defendant could have had no doubt regarding the specific offense with which he was charged. A reference to subsequent amendments of the statute would have furnished him with no further information in that regard.

[3, 4] The information is not defective because it fails to allege that the defendant did not hold a physician's prescription authorizing him to have possession of the cocaine. Nor was it necessary for the prosecution to affirmatively prove that the defendant held no such prescription. The exception which exempts one from criminal liability for possessing narcotic drugs as provided for by statute is a matter of defense. In re Lord, 199 Cal. 773, 250 P. 714, 716; Ex parte Hornef, 154 Cal. 355, 97 P. 891; People v. Moronati, 70 Cal. App. 17, 232 P. 991; People v. Kinsley, 118 Cal. App. 593, 5 P.(2d) 938; People v. Ruddick, 107 Cal. App. (Supp.) 785, 793, 288 P. 45. The information alleges that the defendant was willfully, unlawfully and feloniously possessed of the cocaine. If the accused person is *unlawfully* possessed of a narcotic drug, it follows that he does not hold a physician's prescription therefor. The possession of a prescription for the drug makes it lawful for him to have the cocaine. The exception to the statute which authorizes the possession of the drug is not a necessary part of the offense defined therein, but provides conditions under which one is excused therefrom. It furnishes a defense which is peculiarly within the personal knowledge of the accused. It would be extremely difficult for the prosecution to affirmatively prove the negative condition which exempts one from criminal liability under this statute. For that reason the law neither requires the allegation in the information of this exception nor affirmative proof thereof on the part of the prosecution. The opinion in the Lord Case, supra, says in that regard: "The authorities in this state are without conflict 'that such exceptions and provisos were to be negatived in the pleading only where they are descriptive of the offense or define it, and that where they afford matter of excuse merely they are to be relied on in defense.'"

The foregoing declaration of principle is not in conflict with the case of Morrison v. People of State of California, 291 U. S. 82, 54 S. Ct. 281, 285, 78 L. Ed. 664, upon which the appellant in this case relies. That case is readily distinguishable from the case at bar. In that case the appellant was charged with a conspiracy to violate the California Alien Land Law (St. 1921, p. lxxxiii, as amended), by placing an alien Japanese citizen who was ineligible to citizenship in the United States in possession of agricultural land in California. Primarily it is lawful for any individual to own and possess real property. The very gist of the offense prohibited by the Alien Land Law is that one who is ineligible to citizenship in the United States may not own or possess land in California. Mr. Justice Cardozo in delivering the opinion of the Supreme Court said in that regard: "In the law of California there is no general prohibition of the use of agricultural lands by aliens, with special or limited provisos or exceptions. To the contrary, it is the privilege that is general, and only the prohibition that is limited and special."

In the present case the statute which is enacted under the police powers of the state render it unlawful for all persons to sell or

possess narcotic drugs, except when they hold valid prescriptions therefor for medicinal purposes. In other words, the general act prohibits all individuals from selling or possessing the drugs. It is only by virtue of the exception to that law that one is permitted to possess the drug when he holds a prescription therefor.

[5] The appellant asserts the judgment is not supported by the evidence for the reason that the prosecution failed to affirmatively prove that cocaine is a "habit forming drug." There is no merit in that contention. The title to the Narcotic Drug Act is the only place where that term is used. It is unnecessary to affirmatively prove that cocaine is a habit-forming drug. It is common knowledge that the inordinate use of cocaine tends to establish one of the most tenacious and harmful habits known to man. The use and harmful effect of cocaine and kindred drugs have increased in America to an alarming extent. Regarding the effect of the use of cocaine it is said in volume V of The Americana: "Cocaine is sometimes used in the treatment of the morphine habit, not infrequently with the result that the victim only exchanges one form of bondage for another no less pernicious. Many persons innocently acquire the cocaine addiction through the medium of various nostrums ostensibly intended for the cure of nasal catarrh, hay fever, etc. The temporary alleviation of his symptoms produced by the compound induces the sufferer to continue its use until he is fairly in the grip of a servitude leading to certain destruction unless its fetters are cast off by the exercise of almost superhuman fortitude. The cocaine habitue has to suffer from progressive loss of flesh and strength, digestive and circulatory disorders, trembling of the limbs, insomnia, headache, vertigo, etc. Hallucinations and even outbreaks of maniacal fury are not unusual and there is complete decadence of the mental and moral qualities. The cocaine fiend respects no convention or obligation, and will lie, steal, or use any other base means to gratify his passion for the drug, being lost to all considerations of duty or social position."

Courts will take judicial notice of the fact that the inordinate use of cocaine tends to create an irresistible craving and forms a habit for its continued use until one becomes an addict thereof, just as courts will take judicial notice of the fact that whisky, rum, brandy, and gin are intoxicating liquors without the necessity of specifically proving that fact. 2 Wharton's Criminal Law, p. 1975, § 1796.

[6] It is claimed there is a fatal variance between the allegation of the information which charges the defendant with the "possession of a preparation of cocaine," and the proof adduced which merely shows that the drug was cocaine. We are of the opinion this criticism is not well founded. The statute prohibits the sale or possession of cocaine or any derivative, compound, or preparation thereof. The offense and the penalty therefor are the same regardless of whether the sale or possession of the prohibited substance consists of a pure drug or a compounded preparation thereof. "Cocaine" is a vegetable alkaloid which is extracted from the coca shrub. The juice of the shrub is subjected to chemical change by boiling and evaporation until it crystallizes in minute prisms. The exact composition of cocaine naturally differs somewhat. The base of the substance popularly known as cocaine is hydrochloride of the true alkaloid of the leaves of the coca shrub. Many other compounds are prepared from that base. But in any form in which they may exist, so long as they are compounded from the cocaine base, the sale or possession of the substance is prohibited by law. The defendant is not misled or prejudiced by the fact that the proof shows that he was unlawfully possessed of a preparation of cocaine containing a larger proportion of that drug than he was charged with holding.

[7] The evidence is sufficient to have warranted the jury in holding that the cocaine was found in the possession of the defendant. While there is a conflict of evidence, the record shows that the officer went to the defendant's room No. 9 in the Japanese hotel El Paso in Sacramento, where he found the defendant and a white girl by the name of Evelyn Moore. She was lying on the bed in that room. One package of cocaine was found on the bed, and five other packages of cocaine were discovered on the window sill in the lavatory on the same floor of the hotel. The officer exhibited these packages to the defendant and charged him with operating a narcotic plant and threatened to search a room which the defendant admitted he had occupied at the Fairmont Hotel. It was claimed by the officer that Evelyn Moore was implicated with the defendant in disposing of the cocaine. The defendant replied:

"You have got all the stuff, right there, that I got. * * * That is all I have got; that is just what I had left, * * * when I

quit. * * * She (Evelyn Moore) has got nothing to do with this. * * * It is mine; it isn't hers. * * *

"Q. Both the stuff in the lavatory and on the bed? A. Yes."

[8] The court did not err in instructing the jury that the defendant was charged with a violation of the Narcotic Drug Act which was identified by quoting verbatim the title thereof and adding thereto the following language, "approved May 4, 1929, and acts amendatory thereof." The act was in fact approved May 4, 1929. Neither of the subsequent amendments changed the nature of the offense with which the defendant was charged. The reference to the Narcotic Drug Act was merely for the purpose of identifying the statute under which the defendant was charged. A reference to the date of its approval and to the amendments thereof was probably unnecessary but harmless. Nor did the court err in furnishing to the jury forms of verdicts which referred to the act under which the defendant was charged by the use of the challenged language, "approved May 4, 1929, and acts amendatory thereof."

[9, 10] It is contended the court erred in failing to instruct the jury regarding the definition of the word "possession" and the term "habit forming narcotic." The court did fully and fairly instruct the jury upon the general principles of law applicable to the charge of unlawfully possessing cocaine. The portion of the act applicable to the charge against the defendant was read to the jury. No proposed instructions defining the word "possession," or the term "habit forming narcotic," were offered by the defendant. No instruction upon any specific subject was offered by the defendant. Both the word "possession" and the term "habit forming narcotic" are well understood by all persons of average intelligence. The record leaves no reasonable question regarding the fact that the defendant was actually possessed of cocaine. It was found in the hotel room occupied by him and he admitted that it belonged to him. Even though the cocaine was found in the joint possession of the defendant and Evelyn Moore, he would be guilty of violating the statute prohibiting the possession of narcotic drugs. People v. Le Baron, 92 Cal. App. 550, 268 P. 651, 269 P. 476. Regarding the necessity of offering instructions upon any special defense or point relied upon by the defense, it is said in People v. Scofield, 203 Cal. 703, 709, 265 P. 914, 917: "'It is the duty of the court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, when they are not proposed or presented in writing by the parties themselves. But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them.'"

We are of the opinion the court did not err in failing to instruct the jury on its own motion regarding the definitions of the word "possession" and the term "habit forming narcotic."

[11] The court did not err in admitting in evidence the packages of cocaine which were found in the bedroom of the defendant and in the lavatory. The defendant admitted that they belonged to him. After an examination of the contents of the packages and an analysis thereof, a chemist testified that they contained cocaine. This rendered them competent evidence so as to entitle them to be admitted in evidence.

[12] It was not prejudicial error to permit Evelyn Moore to answer the question: "Why were you released from custody?" Her answer to that interrogatory was: "I don't know why." It is claimed her arrest and subsequent discharge from custody furnish incompetent evidence which might have led the jury to believe she did not have the custody of the cocaine. But that is immaterial, since the defendant admitted the packages belonged to him, and at least one of them was found in his immediate presence in his hotel room.

[13] It was not prejudicial misconduct on the part of the district attorney to have said in the course of his argument to the jury: "It was Bill's stuff, and she (Evelyn Moore) was up there buying it from Bill, and getting a shot to help herself." Upon objection to that argument, and on motion to strike it from the record, the court instructed the jury to disregard the statement in the following language: "In so far as the statement made by the district attorney that she went up there to get a shot, *and what he said in connection with it*, you will disregard it." In view of the entire record, we are not prepared to say it was not legitimate argument for the district attorney to assume that Evelyn Moore was in the defendant's bedroom to purchase some of the cocaine or even to procure "a shot" of the drug. At least, the statement was harmless, for the jury was directed to disregard it.

[14, 15] Finally, it is contended the court abused its discretion in refusing to hear a motion for or to grant probation to the defendant. The hearing or granting of a motion for probation of one who has been tried and convicted of a crime rests in the sound discretion of the trial judge. There was no abuse of discretion on the part of the trial judge in summarily denying the motion for probation without submitting the matter to the probation officer for investigation and recommendation. The judge had heard the evidence in the case and was familiar with the entire record. Section 1203 of the Penal Code, as amended in 1931 (St. 1931, p. 1633), provides in that regard: "After the conviction by plea or verdict of guilty of a public offense in cases where discretion is conferred on the court * * * as to the extent of the punishment the court, upon application of the defendant or of the people or upon its own motion, *may summarily deny probation*, or at a time fixed may hear and determine in the presence of the defendant the matter of probation of the defendant and the conditions of such probation, if granted."

Under section 7 of the Narcotic Drug Act (St. 1929, p. 385), the defendant was sentenced to imprisonment in the state prison at San Quentin, for the term prescribed by law. That section as it was originally enacted and as amended prescribed the penalty applicable to this case for violation of the act in the following language: "Any person convicted under this act for having in possession any of the drugs or substances mentioned in section 1 of this act, or their salts, derivatives, or any preparation thereof, * * * shall upon conviction for the first offense be punished by imprisonment in the county jail or in the state prison for not more than six years. * * *"

[16, 17] It rested in the sound discretion of the trial judge to determine whether the defendant should be punished by imprisonment in the state prison or only in the county jail. There appears to have been no abuse of discretion on the part of the judge in determining that this defendant should be punished by imprisonment in the state prison.

[18] There is no merit in the appellant's contention that his case was not brought to trial within sixty days after the filing of the information against him as provided by section 1382 of the Penal Code, for the reason that he was personally present in court with his attorney when the case was set for trial, and it was continued to a later date at his own request. Subdivision 2 of section 1382 of the Penal Code provides in that regard a cause must be dismissed by the court: "2. If a defendant, *whose trial has not been postponed upon his application*, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

The information in this case was filed February 14, 1934. The cause was first set for trial for March 20, 1934. On the last-mentioned date the defendant was present in court with his attorney and "on motion of counsel for said defendant" the cause was reset for trial for April 16th, at which time the case was actually tried. By the express terms of the statute, the defendant waived his right to a dismissal of the action for failure to bring the cause to trial within sixty days from the filing of the information, by procuring a continuance of the time for trial at his own request. It is immaterial that the motion for a continuance was made by the attorney for the defendant. The defendant was present in court when the motion was made and failed to object thereto. In the absence of opposition thereto, it must be deemed that the motion for a continuance was made by the defendant's attorney at his request. At least he was present and acquiesced therein by failure to object to the granting of the motion. When a defendant is present in open court with his attorney and fails to object to a continuance of the time of trial to a date beyond the limitation prescribed by section 1382, supra, he waives his right to a dismissal of the action on that ground. People v. Standley, 126 Cal. App. 739, 15 P.(2d) 180; In re Scott, 81 Cal. App. 577, 254 P. 596; Ex parte Apakean, 63 Cal. App. 481, 218 P. 768.

The defendant appears to have had a fair trial, and there was no miscarriage of justice in his conviction.

The judgment and the orders are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

1 Cal.2d 461

WILLETT v. JORDAN, Secretary of State.

S. F. 15232.

Supreme Court of California.

Sept. 5, 1934.

1. Common law ⇐9
Equity ⇐54

"Doctrine of relation," which was promulgated to promote justice, is of both equitable and legal cognizance, and applies where party invoking it has an antecedent right, and two or more steps are essential to complete a particular transaction, and there is no other remedy.

[Ed. Note.—For other definitions of "Relation (In Contract, Conveyance, or other Transaction)," see Words & Phrases.]

2. Statutes ⇐35½

Where, on August 7th, last date for filing of certificates concerning signatures to proposed initiative measure, there was required number of signatures of qualified voters on petition, but through mistake of county clerk the certificates filed with secretary of state showed fewer signatures than required number and on August 11th amended certificates, correcting error, were filed, amended certificates related back to August 7th, hence proponents of measure were entitled, in view of ample time remaining, to have measure placed on ballot at November general election (Gen. Laws 1931, Act 4811; Const. art. 4, § 1).

3. Parties ⇐38

Generally, intervention will not be allowed where it would retard principal suit, or require a reopening of the case for further evidence, or delay trial of action, or change position of original parties.

4. Mandamus ⇐153

Intervention in original proceeding for writ of mandate *held* not allowable where party seeking to intervene sought to defeat rights asserted by petitioner, and facts pleaded, even if true, would not be a bar to relief prayed for by petitioner.

In Bank.

Original petition by Russell C. Willett for a writ of mandate to be directed to Frank C. Jordan, Secretary of State of the State of California, to compel respondent to recognize certificates as amended and place initiative measure on ballot at the ensuing general election, and a petition in intervention by Percy Purviance. On respondent's general demurrer to petition for writ of mandate. Peremptory writ to issue as prayed and petition in intervention dismissed.

Frank L. Guerena, of San Francisco, for petitioner.

M. Jos. McGranahan, of San Francisco, and U. S. Webb, Atty. Gen., and Robt. W. Harrison, Chief Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is a proceeding in mandamus. The petitioner is the president of the state board of chiropractic examiners. He is one of the proponents of a proposed initiative measure to amend the Chiropractic Act approved by the electors of the state at the general election on November 7, 1922 (Deering's Gen. Laws 1931, Act 4811). Acting with other proponents he caused a petition, in sections, to be prepared and circulated among the qualified electors of the state for signatures sufficient to place the measure on the ballot at the ensuing general election. This petition was circulated in forty-two counties of the state, including the county of Alameda. On or before August 7, 1934, the county clerks and registrars of voters certified to the respondent herein the result of their examinations of the sections of said petitions filed in their respective counties. On August 7th the respondent announced that the certificates then on file in his office showed that 108,108 qualified electors of the state had signed said petition and that the signatures of 110,811 qualified electors were necessary to place said measure on the ballot at the general election to be held November 6, 1934.

On August 3 and 7, 1934, the county clerk of Alameda county certified to the respondent that the signatures of 16,024 qualified electors appeared on the sections of said petition filed in his county. Four days later, on August 11th, said county clerk ascertained that a mistake had occurred in checking the signatures to said petition on file in his office and that there were actually 19,751 signatures of qualified electors on said petition on August 7, 1934, instead of 16,024, as certified by him to the respondent. Accordingly said county clerk on August 11th transmitted to the respondent a certificate wherein he recited that through inadvertence said mistake had been made; that in fact there were on file in his office, prior to his original certificates, sections of said petitions containing 19,751 signatures of qualified electors of said county, and amending his original certificates as of the date thereof so as to show the true status of said petitions filed in his office within the time required by law.

The petition herein seeks to compel the respondent to recognize the certificates as amended and place the initiative measure on the ballot at the ensuing general election. The respondent has refused to recognize the amended certificates without an order of court directing him to do so, on the ground that under section 1 of article 4 of the Constitution the last day for the filing of such certificates in his office was August 7th in order that the measure be placed on the ballot at the next general election.

A general demurrer has been interposed to the petition herein. The facts hereinbefore related are disclosed by the petition and are undisputed. It therefore appears that the petitioner and those interested with him in the presentation of the proposed measure have done everything required of them to be done and within the time provided by law in order to place said measure before the electors of the state at the general election next November. The respondent does not contend, in fact he concedes, that if he is required to act in accordance with said amended certificates, there will be ample time to make the necessary arrangements for placing the measure on the ballot at said election. No prejudice to any one will ensue if that is required to be done which would have been done but for the mistake and inadvertence of the county clerk, for the petitioner and his associates were in no wise at fault in the presentation of the sections of the petition to said county clerk.

[1, 2] The petitioner invokes the doctrine of relation. This doctrine is of both equitable and legal cognizance. Peyton v. Desmond (C. C. A.) 129 F. 1, 11. It was promulgated for the purpose of promoting justice or preventing injustice and is applicable when several proceedings are essential to complete a particular transaction. Gibson v. Chouteau, 13 Wall. (80 U. S.) 92, 20 L. Ed. 534. When it is invoked the doctrine must be based on some antecedent lawful right (United States v. Atchison, T. & S. F. Ry. Co. (C. C.) 142 F. 176, 187), and when there is otherwise no remedy. James v. Nunley, 6 Ind. T. 336, 97 S. W. 1028; see 53 Cor. Jur., pp. 1185–1186 and cases there cited. Although applied usually in private transactions, no good reason has been advanced, and none appears, why this doctrine should not be applied in an initiative proceeding, as was done in Hinkley v. Wells, 57 Cal. App. 206, 209, 206 P. 1023. All of the essentials of its application appear to be present in this proceeding. No private rights are involved and none are prejudiced. To refuse its application under the facts here disclosed would countenance a palpable injustice to those who, at great expense and effort, did all that was required of them by law and had established the antecedent right to have their petitions recognized as sufficient. The correction of the admitted mistake of the public officer, the county clerk, and the amendment of the original certificates by him must therefore be deemed to date back to the time of the filing of the certificates originally filed in the office of the respondent. When this is done the duty of the respondent is plain.

A petition in intervention was filed on behalf of Percy Purviance, who alleges that he "is a party interested in this proceeding as one licensed under the Chiropractic Act" and "will be directly affected by the results" thereof. He denies that the error of the county clerk was through inadvertence and alleges that 25 per cent. of the signatures covered by the amendment to the certificates were not of qualified electors of said county. In effect he seeks to have this court order a re-examination of the records of Alameda county to ascertain the facts.

[3, 4] Assuming, without deciding, that the intervener would have the right in any event to inject himself into this proceeding, it is clear that he has not stated a case wherein his intervention should be allowed. "It is the general rule that an intervention will not be allowed when it would retard the principal suit, or require a reopening of the case for further evidence, or delay the trial of the action, or change the position of the original parties." Hibernia, etc., Society v. Churchill, 128 Cal. 633, 61 P. 278, 279, 79 Am. St. Rep. 73; 20 Cal. Jur., p. 518. If the intervention should take the form requested, a defeat of the purpose and rights of the proponents of the measure would be the inevitable result.

Furthermore, if what the intervener alleges be true, namely, that 25 per cent. of the signatures certified by the amendment were, as claimed, improperly certified, there would still be nearly one hundred qualified signatures more than sufficient to place the measure on the ballot. The petition in intervention is dismissed.

Let a peremptory writ issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SPENCE, Justice pro tem.; TYLER, Justice pro tem.

1 Cal.2d 476

EAST BAY MUNICIPAL UTILITY DIST. v. DEPARTMENT OF PUBLIC WORKS et al.

S. F. 15056.

Supreme Court of California.

Sept. 11, 1934.

Rehearing Denied Oct. 11, 1934.

1. Constitutional law ⇐62

Legislature may delegate to bureaus and commissions exercise of certain amount of discretion respecting matters which require findings of fact and deducing of conclusions therefrom in same manner as judicial processes are employed by courts.

2. Constitutional law ⇐79

That public agent exercises judgment and discretion in performance of his duties does not make his action or powers "judicial" in their character.

[Ed. Note.—For other definitions of "Judicial Act," see Words & Phrases.]

3. Constitutional law ⇐62

If acts to be done are of legislative cognizance and not of judicial power, then it is proper to delegate, within certain limits, such legislative functions to an administrative agency.

"Judicial act" determines what the law is, and what the rights of parties are with reference to transactions already had, while "legislative act" prescribes what the law shall be in future cases arising under it, and wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions.

[Ed. Note.—For other definitions of "Legislative Act," see Words & Phrases.]

4. Waters and water courses ⇐133

State water authority cannot arbitrarily reject applications for use of unappropriated waters (St. 1921, p. 443, § 15).

5. Waters and water courses ⇐133

Legislature may prescribe reasonable conditions and priorities in distribution of public waters of state, notwithstanding filing of application would, under certain conditions, be sufficient foundation for justiciable issue as against some other claimant, and state water authority should be allowed to impose, in public interest, restrictions and conditions (St. 1921, p. 443, § 15).

6. Mandamus ⇐87

When application is filed for state waters and all statutory prerequisites are present, water authority may not arbitrarily refuse permit, but may be compelled by mandamus to issue it, but, unless all conditions are present, water authority may grant qualified permit consonant with such conditions, or may, if justified, reject application (St. 1921, p. 443, § 15).

7. Waters and water courses ⇐133

Provision in permit issued by state water authority that right to store and use water for power purposes under permit shall not interfere with future appropriation of water for agricultural or municipal purposes *held* not invalid as exercise of "judicial function" (St. 1921, p. 443, § 15).

In Bank.

Mandamus proceeding by the East Bay Municipal Utility District, a municipal utility district of the State, against the Department of Public Works and others.

Petition dismissed, and petition of intervener disallowed.

T. P. Wittschen, L. W. Irving, and Harold Raines, all of Oakland, for petitioner.

U. S. Webb, Atty. Gen., and C. C. Carleton, Spencer Burroughs, and Henry Holsinger, all of Sacramento, for respondents.

Virgil M. Airola, of San Andreas, and Glenn West, of Lodi, amici curiæ.

Joseph R. Huberty, of San Andreas, for intervener Calaveras Public Utility Dist.

PRESTON, Justice.

Proceeding in mandamus. The issue is presented by the petition, answer thereto, and demurrer to the answer. Petitioner is a public corporation, and respondents are the statutory successors of the commission created by the Water Commission Act (St. 1913, p. 1012, as amended, Deering's Gen. Laws 1931, vol. 3, p. 4998, Act 9091; Pol. Code, §§ 348–359b, 363–363g and section 363gg as added by St. 1933, p. 2151).

Acting upon information which would justify the preferment of irrigation and domestic uses over power use of the unappropriated waters of the Mokelumne river, respondents inserted in the permit issued to petitioner for the utilization of such waters the following condition: "The right to store and use water for power purposes under this permit shall not interfere with future appropriations of said water for agricultural or municipal purposes." Respondents assert that under sec-

tions 15 and 20 of said act as amended this discretionary administrative power was conferred upon them.

Section 15 (St. 1913, p. 1021) as amended in 1921 (St. 1921, p. 443) reads as follows: "The state water commission shall allow, under the provisions of this act, the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. It is hereby declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. In acting upon applications to appropriate water the commission shall be guided by the above declaration of policy. The commission shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest."

Petitioner insists that to insert the above-quoted provision in the permit was to exercise a judicial function, which could not be done by said state agency under the decisions of this court. Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874; Mojave Irr. Dist. v. Superior Court, 202 Cal. 717, 262 P. 724; Yuba River, etc., Co. v. Nevada Irr. Dist., 207 Cal. 521, 279 P. 128.

[1] Said amended section 15 has not as yet been interpreted by this court, although its present rendering was in existence when the case of Tulare Water Co. v. State Water Comm., supra, was decided. There the court quoted the original section, but did not consider it as amended. It should also be noted that early in the history of our jurisprudence it was recognized that the legislative department of the government should be allowed to delegate to bureaus and commissions the exercise of a certain amount of discretion respecting matters which required findings of fact and the deducing of conclusions therefrom, in much the same manner as judicial processes are employed by the courts.

This situation was well described in the case of Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348, 349, as follows: "* * * It has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Union Bridge Co. v. U. S., 204 U. S. 364, 27 S. Ct. 367, 51 L. Ed. 523."

This principle has been applied to various statutes as will be disclosed by the following, among other, cases: Ex parte Whitley, 144 Cal. 167, 179, 77 P. 879, 1 Ann. Cas. 13; Tarpey v. McClure, 190 Cal. 593, 600, 213 P. 983; People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A. L. R. 1186; Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784; People v. Globe Grain & Mill. Co., 211 Cal. 121, 294 P. 3; Carter v. Stevens, 211 Cal. 281, 295 P. 28; In re Weisberg, 215 Cal. 624, 632, 633, 12 P.(2d) 446.

[2, 3] But the above observations only partially determine the question here presented. "The fact that a public agent exercises judgment and discretion in the performance of his duties does not make his action or powers judicial in their character." Quinchard v. Board of Trustees, 113 Cal. 664, 670, 45 P. 856, 857. Underlying the question before us is the distinction between the exercise of judicial and legislative power; for, if the acts to be done are of legislative cognizance, then it is proper to delegate, within certain limits, such legislative functions to an administrative agency.

The opinion of Mr. Justice Field in the Sinking Fund Cases, 99 U. S. 700, 761, 25 L. Ed. 496, sets forth this distinction as follows: "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

This definition was approved by this court in the case of People v. Oakland Board of Education, 54 Cal. 375, 377, where in about the year 1880, the board of education of Oakland displaced the McGuffey series of readers in the public schools with the Appleton series. After quoting the above language of Justice Field, the court there continued as follows: "The Board acted upon the proposition before it as one of policy or expediency, aiming to adopt that which, in its judgment, would be best for the constituency which it represented. Its action was then political or legislative, and was in no proper sense judicial in its character. It is conceded that the Board exercised its judgment in the action which it took, but this it was called to do in the exercise of its legislative functions. It is apparent that the exercise of judgment is not the criterion by which this proceeding must be viewed to determine its character. To render it the exercise of a judicial function, its judgment must act in a matter which is judicial in the sense above indicated."

To the same effect see Wulzen v. Board of Supervisors, 101 Cal. 15, 24, 35 P. 353, 40 Am. St. Rep. 17; also the Quinchard Case, supra, where, speaking of the nature of the action of the board in the initiation of a street improvement proceeding, the court said (113 Cal. pages 669, 670, 45 P. 856, 857): "The judgment which they exercise in ordering the improvement is not a determination of the rights of an individual under existing laws, but is the conclusion or opinion which they form in the exercise of the discretionary power that has been intrusted to them, and upon a consideration of the public welfare and demands for which they are to provide. This discretion and opinion is a part of the legislative power that has been conferred upon the city, and is of the same character as that exercised by the legislature itself in providing for the general welfare of the state, and is equally independent of supervision by the judiciary." See, also, Mabray v. School Board, 162 Miss. 632, 137 So. 105, 106.

[4, 5] Under the statute before us, unless and until the statutory requirements and conditions are met, the applicant obtains no property right or any other right against the state. If the statutory prerequisites are not present, the application may be rejected in its entirety or, as here done, a permit may be issued with qualifications as to use of the water, and under neither hypothesis would it be the exercise of judicial authority. Of course, it must always be kept in mind that the state authority cannot arbitrarily, and upon caprice only, reject an application. Clearly, the manner in which the unappropriated waters of the streams of the state shall be distributed among the applicants therefor involves questions of policy, and the Legislature, in the interest of the public welfare, may prescribe reasonable conditions and priorities in such distribution. This is true even though the filing of an application would, under certain conditions, be a sufficient foundation for a justiciable issue as against some other claimant. Where the facts justify the action, the water authority should be allowed to impose, in the public interest, the restrictions and conditions provided for in the act.

[6, 7] The cases of Tulare Water Co. v. State Water Comm., supra, and Mojave Irr. Dist. v. Superior Court, supra, are not at all at variance with this conclusion. The point emphasized in those cases is that the issuance of such permits is not the exercise of a judicial function, and therefore is not reviewable by a court proceeding, either general or under special act of the Legislature.

The case of Yuba River, etc., Co. v. Nevada Irr. Dist., supra, holds no more than this: That an applicant who has complied with the statute has sufficient legal status, although no permit may have yet issued, to authorize him to institute a court action to determine conflicting claims between himself and other claimants to the water subject to appropriation. But this holding is far from being an adjudication of the question before us. As already noted, when an applicant files his application and all the prerequisite facts set forth in the statute are present, the state agency may not arbitrarily refuse the granting of the permit, but may be compelled by mandamus to issue it; but, unless all the conditions are present, the water authority may grant a qualified permit consonant with such conditions or may, if justified, reject the application altogether.

These views make it unnecessary to consider the effect upon petitioner's application of the Statutes of 1927, c. 286, p. 508, which authorize the department of finance to make filings on unappropriated waters on behalf of the state for use in carrying out its plans and purposes to conserve the water resources of the state. Likewise it is unnecessary to consider whether the relation to the state of all unappropriated waters has been changed by section 3, article 14, of the Constitution, interpreted along with section 11 of the Water Commission Act, as construed in the case of Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 695, 22 P.(2d) 5.

It follows from the above that the petition must be dismissed, and it is so ordered. The petition of intervener is disallowed.

We concur: WASTE, C. J.; CURTIS, J., SHENK, J., I. F. THOMPSON, J., SEAWELL, J.

1 Cal.2d 489

MORTENSEN v. FAIRBANKS et al.

L. A. 14697.

Supreme Court of California.

Sept. 14, 1934.

1. Negligence ⇐72

Person suddenly confronted with unexpected danger without fault on his part is required to use such means for avoiding danger as would be used by person of ordinary prudence under similar circumstances, and he is not held to that strict accountability which would require that course chosen be most judicious one.

2. Negligence ⇐136(28)

Reasonableness of effort of person suddenly confronted with unexpected danger without fault on his part to avoid injury after discovery of danger is question for jury.

3. Appeal and error ⇐1064(2)
Trial ⇐194(16)

Instruction that motorist could not be found contributorily negligent even though, in his effort to extricate himself from apparent danger by driving ahead, he had failed to act as careful and prudent person would have acted under similar circumstances, *held* prejudicially erroneous as misstating law and as withdrawing from jury issue as to reasonableness of plaintiff's conduct.

4. Trial ⇐296(4, 5)

Defect of instruction on degree of care required of motorist in his effort to extricate himself from position of imminent peril was not cured by general and correct statements of law at beginning of instruction or by other instruction having to do with negligence generally, where two correct instructions on degree of care required of defendant when in imminent danger created in minds of jurors impression that different degree of care was required of plaintiff than of defendant seeking to avoid imminent peril (Const. art. 6, § 4½).

5. Appeal and error ⇐1064(1)

Instruction which erroneously indicated that plaintiff's conduct was not negligent in character, although it failed to measure up to degree of care required by exigencies of occasion, *held* reversible error.

In Bank.

Appeal from Superior Court, City and County of Los Angeles; Warren V. Tryon, Judge.

Action by La Vaughn L. Mortensen against F. C. Fairbanks and others. From a judgment for the plaintiff, the defendants appeal.

Reversed.

For prior opinion, see 28 P.(2d) 941.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for appellants.

Wheeler & Wackerbarth, Henry O. Wackerbarth, and Henry E. Carter, all of Los Angeles, for respondent.

WASTE, Chief Justice.

Judgment went for the plaintiff in this action to recover damages for personal injuries incurred as the result of a collision of automobiles at a five-point intersection of thoroughfares in the city of Los Angeles. The defendants have appealed.

There is evidence from which the jury might have reasonably concluded that plaintiff first entered the intersection at a proper rate of speed and that the defendant Cornelia Fairbanks, a minor, had entered the intersection at an excessive rate of speed and without otherwise exercising that degree of care essential to the proper operation of an automobile. However, there is also evidence tending to show that plaintiff while aware of defendant's alleged careless and negligent approach to the intersection had continued in his endeavor to traverse the same and, in an attempt to avoid a collision, accelerated his automobile in the hope of passing beyond the path of defendant's car. The effort was futile. Throughout the trial of the cause and upon appeal the defendants have urged that plaintiff was guilty of contributory negligence in the operation of his automobile and they point specifically to the asserted impropriety of plaintiff's conduct in speeding up his car in an attempt to get beyond the path of defendant's car. This, they contend, was not the course that a reasonable and prudent person would have pursued finding himself in a like position of imminent peril. On the con-

trary, they urge that a reasonable and prudent person under like circumstances would have undertaken to stop his car in the manner and within the distance which plaintiff testified he could have stopped, had he been so inclined, immediately prior to the collision. Defendants insist that the issue as to the reasonableness and prudence of plaintiff's conduct in the face of imminent peril should have been submitted to the jury under proper instructions. They then refer to an instruction, given at the request of plaintiff, which, in effect, directed that if the jury should find from the evidence that the plaintiff had entered the intersection in a lawful manner and at a lawful speed, and after so entering had observed for the first time that he was placed in a position of apparent danger as a result of the defendant's car being operated in a negligent manner and at an unlawful rate of speed, and if they should find that in an effort to extricate himself from such danger the plaintiff "failed to act in such manner as a careful and prudent person would have done under the circumstances, then it was not negligence or contributory negligence on his part in driving ahead in an effort to get out of the path of the car driven by the defendant, Cornelia Fairbanks."

Defendants contend that this instruction is prejudicially erroneous in that it informed the jury that one facing an imminent peril need not exercise reasonable care under the prevailing circumstances and also took from the jury the issue as to the propriety and reasonableness of plaintiff's conduct under such circumstances.

[1, 2] We are of the opinion that the instruction is objectionable on both grounds. The rule is now well settled that a person suddenly confronted with an unexpected danger, without any fault on his part, is only required to use such means for avoiding the danger as would be used by a person of ordinary prudence under similar circumstances, and he is not held to that strict accountability which would require that the course chosen be the most judicious one. McPhee v. Lavin, 183 Cal. 264, 268, 191 P. 23; McLaughlin v. L. A. Ry. Corp., 180 Cal. 527, 532, 182 P. 44; Tousley v. Pac. Elec. Ry. Co., 166 Cal. 457, 463, 464, 137 P. 31; Carnahan v. Motor Transit Co., 65 Cal. App. 402, 411, 224 P. 143. The reasonableness of his effort to avoid the injury after discovery of the danger is a question of fact for the jury, to be determined by them in view of all the circumstances. Hoff v. L. A. Pac. Co., 158 Cal. 596, 601, 112 P. 53; Kearney v. Castellotti, 55 Cal. App. 541, 544, 203 P. 1029.

[3] The quoted portion of the instruction complained of informed the jury, in effect, that plaintiff could not be found guilty of contributory negligence even though in his effort to extricate himself from an apparent danger by driving ahead he had failed to act in such manner as a careful and prudent person would have acted under similar circumstances. This is obviously a misstatement of the law as to the care required of one confronted with a situation of imminent peril and, in addition, withdrew from the jury the issue as to the propriety and reasonableness of plaintiff's conduct under the circumstances.

[4, 5] Having in mind section 4½ of article 6 of the Constitution, we are still unable to say that the error and prejudice created by this instruction was cured by certain general and correct statements of law appearing at the beginning thereof or by other instructions having to do with negligence generally. This was the only instruction given by the court below having to do with the degree of care required of *plaintiff* in his effort to extricate himself from a position of imminent peril. But two other instructions on the doctrine were given and each had to do with the care required of *defendant*, when in imminent danger. These latter instructions contained correct statements of the law, but served only to emphasize the error and prejudice of the former by creating in the minds of the jurors the impression that a different degree of care was required of the plaintiff and defendant, respectively, when seeking to avoid an imminent peril. It is inconceivable that the jury was uninfluenced in an action in which contributory negligence was an issue by an instruction which erroneously and definitely indicated that plaintiff's conduct was not negligent in character even though it failed to measure up to the degree of care required by the exigencies of the occasion.

For this reason, and without considering the propriety of another instruction objected to, the judgment must be, and it is hereby, reversed.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.; SPENCE, Justice pro tem.

140 Cal.App. 698

PEOPLE v. BIANCHI et al.

Cr. 1356.

District Court of Appeal, Third District, California.

Sept. 17, 1934.

Criminal law ⇐539(2)

Under statutes providing that testimony of witness cross-examined by defendant on former trial was admissible where witness could not be produced at trial, and that term defendant used as designation of party prosecuted should include plural, admission of testimony of defendant who was cross-examined by other defendants and acquitted on former trial and was unavailable at subsequent trial of other defendants *held* not error (Pen. Code, §§ 7, 685, 686).

Appeal from Superior Court, Yolo County; Neal Chalmers, Judge.

Louie Bianchi and others were convicted of the crime of assault with intent to commit rape, and they appeal.

Affirmed.

Ray T. Coughlin, of Sacramento, and A. G. Bailey, of Woodland, for appellants.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The appellants herein stand convicted of the crime of assault with intent to commit rape. At a former trial they, together with one Bartels, had been tried, which trial resulted in an acquittal for Bartels, but as to the guilt or innocence of these appellants the jury were unable to agree.

During the second trial the district attorney offered as part of his case the testimony of Bartels as given at the first trial. To this offer the defendants interposed objections that it was irrelevant, incompetent, immaterial, and hearsay, and was not testimony offered on behalf of the people nor of the defendants then on trial, it being testimony offered on behalf of defendant Bartels in his own defense, and did not come within the provisions of section 686 of the Penal Code. The objection was overruled and the testimony admitted, which appellants now claim constitutes reversible error.

Section 686 of the Penal Code reads in part as follows:

"In a criminal action the defendant is entitled: * * * To provide witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, * * * and except also that in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who cannot, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted."

In contending that the testimony of Bartels is inadmissible, we believe able counsel for appellants are giving to this section a strained construction. Clearly the proffered testimony was not hearsay. Bartels testified in open court in the presence of these appellants, who not only had an opportunity to cross-examine him, but actually did so. It is not the language nor the purpose of this section to require that the testimony should have been introduced by or on behalf of all of the defendants in the action. Its object is to make certain that any testimony which was given at a former trial and offered in evidence at a subsequent trial could only be admitted if the parties against whom it was to be admitted had an opportunity, either personally or by counsel, to cross-examine the witness on the former trial.

It is well stated in Wigmore on Evidence, vol. 3, § 1370, that: "The Hearsay rule excludes testimonial statements not subjected to cross-examination. When, therefore, a statement has already been subjected to cross-examination and is hence admitted—as in the case of a deposition or testimony at a former trial,—it comes in because the rule is satisfied, not because an exception to the rule is allowed. The statement may have been made before the present trial, but if it has been already subjected to proper cross-examination, it has satisfied the rule and needs no exception in its favor."

Also, under the provisions of section 685 of the Penal Code, it is provided that a party prosecuted in a criminal action is designated in this Code as a defendant, and section 7 of the same Code provides that words used in the singular number includes the plural; therefore the use of the word "defendant" in section 686 of the Penal Code includes the plural thereof, and, whenever testimony is introduced on behalf of any of the defendants if there is more than one on trial, it

may be introduced at a subsequent trial if the witness has been submitted to the objecting defendants for cross-examination, and he cannot be produced in person as provided under the conditions of section 686 of the Penal Code.

All of the conditions precedent having been complied with, we find no error in the ruling complained of, and the judgments and orders are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

140 Cal.App. 649

PEOPLE v. ENRIGHT et al.

Cr. 1342.

District Court of Appeal, Third District, California.

Sept. 13, 1934.

Criminal law ⇐678(1)

Where several separate acts were established to have been committed by each defendant with aid of others and in their presence on same occasion so as to constitute one felonious act, and indictment charged defendants with one offense of rape, failure to require people to elect on which act they would prosecute *held* not error, since all defendants were principals (Pen. Code, §§ 31, 261).

Appeal from Superior Court, Yolo County; Neal Chalmers, Judge.

Thomas Enright and others were convicted of rape, and they appeal.

Affirmed.

Ray T. Coughlin, of Sacramento, and A. G. Bailey, of Woodland, for appellants.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellants were indicted for rape, and from a judgment based upon a verdict of guilty they prosecute this appeal.

Inasmuch as it is not contended that the evidence is insufficient to support the verdict, we need not set forth the evidence in any detail except as it is necessary to make clear the point urged for reversal.

The complaining witness had, in company with several of her companions, visited a resort in a little town not far from Sacramento. At the same place were gathered some of the local hoodlums of the neighborhood. Apparently the complaining witness did not like the looks of those present, and left in her car for her home. Upon reaching her destination, she found in her bag a key to the automobile of one of her group who had remained at the party. She returned and delivered the key to its owner, and, when again leaving for her home, three young men forced themselves into her car, took possession thereof, and forcibly compelled their victim to accompany them to a secluded spot, where more than one of the young men committed the offense denounced in section 261 of the Penal Code.

The point urged in this appeal is that the indictment charges but one offense, whereas the evidence tended to prove the commission of two or more separate and distinct acts, either one of which would support the charge of rape, and therefore it is argued the prosecution should have been required to inform the defense upon the proof of which specific offense it intended to rely for conviction.

Appellants here, as did the defense in the case of People v. Fontana (Cal. App.) 32 P. (2d) 160, 161, rely strongly upon the case of People v. Castro, 133 Cal. 11, 65 P. 13, but the court there clearly pointed out the distinction in the following language: "This case does not present circumstances like the case of People v. Castro, 133 Cal. 11, 65 P. 13, relied upon by the appellants, where several different acts of intercourse by the same defendant took place upon different dates, and were proved at the trial over his objection. Only one principal act is charged against each of the appellants in this case, and evidence of the commission of a separate offense by their associate was admitted in evidence without objection."

In fact, the circumstances in the instant case are so similar to the case of People v. Fontana, supra, that we can affirm this case upon the reasoning and authorities there cited.

The acts here complained of were perpetrated on the same occasion and within a few moments of each other, constituting one continuous felonious act. Inasmuch also as the three defendants were all present aiding and abetting in the commission thereof, they were all guilty as principals therein. Section 31,

Pen. Code; In re Kantrowitz, 24 Cal. App. 203, 140 P. 1078; People v. Macchiaroli, 54 Cal. App. 665, 202 P. 474.

The judgments and order should therefore be affirmed, and it is so ordered.

We concur: PLUMMER, J., R. L. THOMPSON, J.

140 Cal.App. 706

BELDEN v. CALIFORNIA FIREPROOF STORAGE CO. et al.

Civ. 8001.

District Court of Appeal, Second District, Division 1, California.

Sept. 18, 1934.

Hearing Denied by Supreme Court Nov. 16, 1934.

1. Appeal and error ⇐762

Defendant erroneously predicated its appeal on belief that complaint was for rescission of contract, where reply brief set forth enough of complaint, which was not in appellant's brief, to show that cause of action was for damages for fraudulent representations in sale of stock.

2. Appeal and error ⇐1010(1)

Judgment justified by trial court's findings, warranted by sufficient evidence, will be affirmed.

Appeal from Superior Court, City and County of Los Angeles; K. S. Mahon, Judge.

Action by Lee Belden against the California Fireproof Storage Company and another. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Clarke & Bowker and Faries, Williamson & Musick, all of Los Angeles, for appellant.

Louis F. Labarere and John A. Cronin, both of Los Angeles, for respondent.

YORK, Justice.

[1] Appellant evidently predicates its appeal upon the fact that it believed the complaint to be one for rescission. Counsel did not set forth the complaint in their brief, but sufficient of it is set forth in respondent's reply brief to show that the cause of action is one for damages suffered by reason of the sale of stock to plaintiff by fraudulent representations, because in law the stock was void and issued without a permit. It is not a case of rescission of the contract of sale in any sense of the word.

[2] As to the other questions raised by appellant, we think it enough to say that there was sufficient evidence to justify the findings of the trial court and that the findings were ample to justify the judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

140 Cal.App. 734

MARTINSEN et al. v. FORD MOTOR CO. et al.

Civ. 8562.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1934.

Appeal and error ⇐78(3)

Order sustaining demurrer to complaint without leave to amend is not appealable (Code Civ. Proc. § 963).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by F. Martinsen and others against the Ford Motor Company and others. From a ruling sustaining demurrers to the complaint without leave to amend, plaintiffs appeal, and defendants move to dismiss the appeal.

Appeal dismissed.

Charles Rollinson and William E. Reiley, both of Los Angeles, for appellants.

Williamson & Wallace, of San Francisco, for respondents.

SCOTT, Justice pro tem.

Defendants' demurrers to plaintiffs' second amended complaint were sustained without leave to amend on May 24, 1932. On May 27 plaintiffs gave notice of appeal "from the ruling of the court in sustaining demurrers of defendants to second amended complaint without leave to amend." On May 31 the trial judge signed the judgment in favor of

defendants. On June 2 plaintiffs again gave notice of appeal, not from the judgment, but from the ruling sustaining the demurrers.

Following the filing of briefs herein, respondents moved to dismiss the appeal on the ground that it was taken from a nonappealable order.

"An order sustaining a demurrer without leave to amend is not appealable." Christensen v. Lucerne Holding Co., 134 Cal. App. 215, 25 P.(2d) 261; Sturgeon v. City of Hawthorne, 106 Cal. App. 352, 289 P. 229; Cornic v. Stewart, 179 Cal. 242, 176 P. 164; Code Civ. Proc. § 963.

Appeal dismissed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 683

PEOPLE v. ROBLES.

Cr. 302.

District Court of Appeal, Fourth District, California.

Sept. 15, 1934.

Criminal law ⇐1071, 1081

Where oral notice of appeal was given but no written notice nor application stating in general terms ground of appeal and points relied upon were filed within five days after giving of notice of appeal, appeal was dismissed (Rules for Supreme Court and District Courts of Appeal, rule 2, § 7).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Roso Robles was convicted of "the infamous crime against nature," and he appeals. On motion to dismiss defendant's appeal.

Appeal dismissed.

J. H. Hearn, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

Appellant was convicted of the offense denominated "the infamous crime against Nature" in the superior court of Orange county and judgment was pronounced on June 29, 1934. On this same date he gave oral notice of appeal. No written notice of appeal was filed nor was an application stating in general terms the ground of appeal and the points upon which appellant would rely filed by him as required by section 7 of rule II of the Rules for the Supreme Court and District Courts of Appeal. Respondent now moves to dismiss the appeal for failure to file the above-mentioned application. Since section 7 of rule II specifically provides that if the application is not filed within a period of five days after notice of appeal is given "the appeal shall be dismissed," it follows that the motion must be granted and the appeal dismissed. People v. Lewis, 219 Cal. 410, 414, 27 P.(2d) 73; People v. Sullivan, 123 Cal. App. 436, 11 P.(2d) 420; People v. Schroeder, 112 Cal. App. 550, 297 P. 105; People v. Davis, 103 Cal. App. 318, 284 P. 516.

The appeal is therefore dismissed.

We concur: BARNARD, P. J.; MARKS, J.

140 Cal.App. 727

LOS ANGELES COUNTY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9849.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1934.

Rehearing Denied Oct. 17, 1934.

Hearing Denied by Supreme Court Nov. 16, 1934.

Master and servant ⇐364

Deceased who registered as an unemployed person with county stabilization bureau, who had worked four days and was on his way to work on fifth day on relief project when he was killed, *held* not "employee" within Compensation Act, where work was form of charity and was paid for, at least in part, by federal government, though deceased and his wife possessed realty, automobile, and money (St. 1917, p. 831, as amended).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Petition by the County of Los Angeles for a writ of review to review an order of the Industrial Accident Commission of the State

of California which awarded compensation to Hermanne Hauser in a proceeding under the Workmen's Compensation Act against the petitioner and another, as alleged employers.

Award annulled.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, both of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent commission.

Robert A. Levi and A. E. Coppleman, both of Los Angeles, for respondent Hermanne Hauser.

SCOTT, Justice pro tem.

Respondent Hermanne Hauser was awarded compensation for the death of her husband, Jacob E. Hauser. Deceased had registered as an unemployed person with the Los Angeles County Stabilization Bureau, filling out certain blanks on a form card, including "will do *anything*" and "extent of need *very*"; words italicized being filled in by the person registering the applicant, upon information furnished by the latter. Work for seven days at 40 cents per hour was provided, the "work order" being headed "Employment stabilization bureau, Los Angeles County relief projects." Deceased had worked four days and was on his way to work on the fifth day when his automobile rolled back and over the bank of a private road which he was traversing, and his death ensued.

Deceased was not an employee under the Workmen's Compensation Act (St. 1917, p. 831, as amended) so as to justify the award. The work was a form of charity administered by an enlightened county government in a way designed to preserve self-respect in the recipient. It was paid for at least in part by federal funds made available for this purpose.

It is urged that deceased and his wife owned real estate, including their home, had an automobile and money in the bank, and for that reason would not be applicants for charity. Nevertheless, deceased applied for the work order, indicated that he was very much in need of it, accepted work side by side with the indigent, and was paid out of the same fund. McBurney v. Industrial Accident Commission (Cal. Sup.) 30 P.(2d) 414, clearly establishes that these more needy citizens, by virtue of their extremity which forced them to accept this relief work, would not be employed so as to make them subject to the provisions of the Workmen's Compensation Act. The position of deceased is comparable with that of petitioner in the above case, except that here the applicant received relief work which might have been denied if his true financial status had been disclosed.

The other questions raised need not be discussed, because of our views on the above matter.

Award annulled.

We concur: CRAIG, Acting P. J.; DESMOND, J.

1 Cal.App.2d 1

PEOPLE v. LAWYER.

Cr. 1810.

District Court of Appeal, First District, Division 2, California.

Sept. 20, 1934.

1. Criminal law ⇐1037(1), 1129(1)

Accused could not complain on appeal of alleged misconduct of district attorney in closing argument, where he offered no objection in trial court and made no assignment of error.

2. Criminal law ⇐1037(2)

Accused could not complain of alleged misconduct of district attorney in closing argument where he asked no admonition to jury, in absence of showing that admonition would not have cured possible effect of such remarks.

3. Criminal law ⇐1119(4)

Accused could not complain on appeal of alleged prejudicial remarks of district attorney made in response to statements in argument of accused's counsel, where he failed to include such argument in transcript (Rules of Supreme Court and District Courts of Appeal, rule 2, § 7).

4. Criminal law ⇐720(8)

In prosecution for stealing a cow, district attorney's remarks asking why accused had any use for saddle horse when he had no cattle, and that accused was dealing in cattle business but dealing in some one else's cattle, and was not dealing in any cattle belonging to accused, *held* not misconduct.

Appeal from Superior Court, Contra Costa County; T. D. Johnston, Judge.

Walter Lawyer was convicted of grand theft, and he appeals.

Affirmed.

Booth B. Goodman, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant was convicted on the charge of grand theft, and he has appealed from the final judgment of conviction and the order denying his motion for a new trial.

Defendant was accused of stealing a cow belonging to one George McCoy, a farmer residing near Pittsburg in Contra Costa county. On January 23, 1934, Mr. McCoy had ten cows and four calves. On the morning of January 24 he found that one of his cows had disappeared. The missing cow was a large "brockel face" cow with a tear on her left ear. This cow had been raised by Mr. McCoy and was well known to the family and neighbors. Search of the ranch proved futile and an examination was made of the fences. The gate which was farthest from the farm house was found to have been closed in a manner different from the manner in which Mr. McCoy had ever closed it. Fresh tracks were found near the gate. Mr. McCoy and a neighbor traced the tracks of a small horse leading from said gate to the pasture and also traced the tracks of the same horse together with the tracks of a cow leading back from the pasture to said gate. From the gate these tracks led along a road to a point where automobile tracks were found. At this point there was a mark that looked as though some weight had been put upon a board. Here the tracks ended. On February 16, Mr. McCoy, accompanied by others, located the cow at appellant's place near Newark in Alameda county. They also found there a sorrel horse whose tracks corresponded to those found at Mr. McCoy's place. There were certain peculiarities to these footprints which offered a means of identification. There was also found on appellant's place a Cadillac car with a stock trailer attached. This trailer was large enough to hold three small animals or two large ones and it could easily have carried a cow and a saddle horse. When the cow was returned to the McCoy ranch she immediately went to her calf which tried to suck her, but the cow was then dry. Numerous witnesses, including the members of the McCoy family and several others, identified the cow as the one belonging to Mr. McCoy. Upon the cow was found the brand "WL," which brand was not upon the cow prior to her disappearance. Several witnesses testified that this was a fresh brand. The defendant claimed the cow as his own, but gave conflicting statements regarding the manner in which he had acquired her. Upon the trial evidence was introduced by the defense for the purpose of showing that the cow belonged to defendant and also for the purpose of proving an alibi. The defendant did not take the stand. His alibi witnesses were his wife and sister-in-law, while others gave testimony tending to prove defendant's ownership.

[1, 2] The question of the sufficiency of the evidence to sustain the conviction is not raised upon this appeal. In fact, counsel for appellant concedes that the evidence for the prosecution was strong, but he claims that the evidence for appellant was likewise strong. It may also be stated that appellant does not attack the instructions or the rulings upon evidence. The sole ground urged for reversal is that of alleged misconduct upon the part of the district attorney in his closing argument to the jury. Twenty incidents of alleged misconduct are set forth in appellant's brief. It is found upon examination of the transcript, however, that as to fifteen of these incidents, appellant offered no objection in the trial court, made no assignment of error, and asked no admonition of the trial court to the jury. Practically all of the remarks referred to appear to fall within the legitimate bounds of argument to the jury, but in any event appellant has failed to show that an admonition to the jury would not have cured the possible effect of the alleged improper arguments. Under these circumstances and in the absence of objections or request for an admonition in the trial court, appellant may not be heard to complain of such alleged misconduct for the first time upon appeal. 8 Cal. Jur. 508.

[3] The remaining incidents, involving remarks which were objected to in the trial court, obviously appear, with one possible exception, to disclose remarks made in response to statements made in the argument of appellant's counsel. The same may be said of certain of the remarks involved in the fifteen incidents referred to above. But appellant has failed to include in his transcript on appeal the argument of appellant's counsel as required by section 7 of rule II of the Rules of the Supreme Court and District Courts of Appeal. That section provides: "Whenever such statements, opinions

or arguments were made in response to any statement made by or on behalf of the defendant, such latter statement shall also be transcribed." In the absence of a compliance with the provisions of said rule, we cannot say that any of said remarks, as set forth in appellant's brief, constituted prejudicial misconduct. People v. James, 133 Cal. App. 751, 24 P.(2d) 859; People v. Bragdon, 103 Cal. App. 20, 283 P. 881.

[4] One remark of the district attorney to which an objection was made may not have been provoked by or have been made in response to any statement of appellant's counsel. The district attorney said: "What has he got any use for a saddle horse, when he hasn't got any cattle? He is dealing in the cattle business, it is true, but dealing in someone else's cattle. He is not dealing in any cattle belonging to Walter Lawyer." Counsel for appellant then said: "I assign those remarks as deliberate prejudicial misconduct. If he is talking about McCoy's cow, all right, but he is telling the jury something that is absolutely untrue." We find no misconduct in the foregoing remarks. There was ample evidence to show that appellant was guilty of the theft of Mr. McCoy's cow and that he had equipment at hand to facilitate such thefts. Under the circumstances revealed by the record herein, we believe that these remarks fell within the scope of legitimate argument to the jury. 8 Cal. Jur. 263.

The judgment and order denying a new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

1 Cal.App.2d 5

GALLUCCI v. SAN DIEGO ELECTRIC RY. CO.

Civ. 1082.

District Court of Appeal, Fourth District, California.

Sept. 20, 1934.

1. Street railroads ⇐95(1)

Street car motorman *held* not negligent in death of child who was killed by street car, under evidence showing that motorman immediately upon seeing child, who ran towards street car, sounded bell and applied emergency brakes in attempt to stop, but that it was impossible to stop car in time to have avoided accident.

2. Appeal and error ⇐694(1)

Findings of trial court trying case without jury, in absence before reviewing of evidence taken in trial court, are conclusive.

3. Street railroads ⇐95(1)

Street railroad *held* not liable for death of child who was killed by street car because bushes, shrubbery and flowers surrounding track concealed child from view of motorman, where such plants were planted, maintained, and owned by city.

4. Appeal and error ⇐1071(6)

Judgment for defendant would not be reversed on ground that trial court failed to find on defenses of contributory negligence, where finding absolving plaintiff's decedent and his parents of contributory negligence could not affect judgment.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Joseph Gallucci against the San Diego Electric Railway Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. J. Collard, of San Diego, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, and V. F. Bennett, of San Diego, for respondent.

MARKS, Justice.

Plaintiff is the father of George Gallucci, who was killed in a street car accident on Orange avenue in the city of Coronado. George was six years and seven months old at the time of his death. The case was tried before the court without a jury and findings were made absolving the defendant from negligence. This appeal is taken from the judgment and is presented on the judgment roll.

[1] The trial court found the following facts: That Orange avenue was a main traveled thoroughfare of the city of Coronado; that defendant maintained a single electric railway track in its center over which it operated its electric cars; that on each side of the rails, parallel to and about fifteen feet distant from them, the city of Coronado had constructed and maintained cement curbs and had planted and maintained shrubbery, bushes, and flowers between the curbs and

the tracks; that at the time and place of the accident the shrubbery and bushes on the west side of the tracks grew to a height of about four feet eight inches "and from that point easterly toward said track said bushes and shrubbery grew thickly and continuously and sloped down to within about two feet of the west rail of said track"; that on the 3d day of September, 1931, at about the hour of 6 o'clock in the afternoon, defendant was operating one of its street cars in a southerly direction along and upon its track at an ordinary and reasonable rate of speed toward the place of the accident; that George Gallucci ran at a rapid pace in an easterly direction, between street intersections, toward the tracks, through the shrubbery and into the right front portion of the street car; that he was killed; that the shrubbery obstructed the view and prevented the motorman from seeing George until he was close to the tracks; that the motorman saw George when the street car was close to the point where George would cross the tracks; that the motorman immediately sounded the bell and applied the emergency brakes in an attempt to stop; that George did not stop, but continued to run towards the street car track; that it was impossible to stop the street car in such a short distance; that the motorman operating the street car, and defendant, were not negligent in any respect; and that the car was not operated carelessly, negligently, or recklessly before or at the time and place of the accident.

[2] The findings thoroughly negative negligence on the part of the motorman and the defendant, and, in the absence of the evidence taken in the trial court, are final and conclusive in this court.

[3] Appellant urges that the real cause of the accident was the height and density of the bushes and shrubbery through which George passed and which concealed him from the view of the motorman. He argues that this created a condition of danger which should have been apparent to the defendant. It should be sufficient answer to this argument to state that the shrubbery, bushes, and flowers were planted, maintained, and owned by the city of Coronado and not the defendant.

[4] The answer alleged contributory negligence on the part of George, his mother, and plaintiff. The trial court failed to find on these defenses. In his reply brief appellant urges this as a ground for reversal of the judgment. A finding absolving each of the three from contributory negligence could have no effect on the judgment, for without negligence on the part of the defendant a judgment against it could not be supported simply because the child and his parents were not guilty of contributory negligence.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

140 Cal.App. 735

NEUHAUS v. NORGARD et al.

Civ. 5175.

District Court of Appeal, Third District, California.

Sept. 19, 1934.

Rehearing Denied Oct. 19, 1934.

Hearing Denied by Supreme Court Nov. 16, 1934.

1. Landlord and tenant ⇐291(1)

Statutory amendment that lease shall not be forfeited in unlawful detainer action if landlord's notice to pay rent or give up possession does not state election of landlord to declare forfeiture *held* to require only that language used in notice shall indicate intention to forfeit or terminate the lease (Code Civ. Proc. § 1174).

2. Landlord and tenant ⇐109(4)

Surrender of premises by tenant before expiration of term is not effective unless there is acceptance by landlord.

3. Landlord and tenant ⇐184(2)

Landlord's notice to pay rent in arrears within three days or deliver up possession or lessors would institute legal proceedings to recover possession with treble rent *held* sufficient to evidence intention to terminate lease unless rent was so paid, so that, where landlord re-entered and took possession, tenant was entitled to recover deposit (Code Civ. Proc. §§ 1161, 1174).

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by E. I. Neuhaus against Chris Norgard and another, and cross-complaint by defendants. Judgment for plaintiff, and defendants appeal.

Affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Mannon & Brazier, of Ukiah, for appellants.

Taft & Spurr, of Ukiah, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendants for the recovery of the sum of $850. From this judgment the defendants appeal.

The record shows that on or about the 7th day of December, 1931, the parties to this action entered into a certain lease whereby the defendants leased to the plaintiff certain garage property situate in the city of Ukiah, for a period of five years at a monthly rental of $225, payable in advance, which was subsequently reduced to $150 per month for a specified time. At the time of the execution of the lease the plaintiff deposited with the defendants the sum of $1,000 as security for the payment of the specified rent. It is for the recovery of this sum that this action is prosecuted.

The record further shows that the plaintiff experienced difficulty in making payments of the monthly rental referred to; that default occurred in such payments; and that the defendants finally served upon the plaintiff the following notice, to wit:

"To Ernest Neuhaus, tenant in possession:

"You are hereby required to pay the rent of $150.00 which fell due on December 1st, 1933, pursuant to the provisions of the lease dated January 1st, 1933, executed by Chris Norgard and Cecelia F. Norgard as lessors and you as lessee, which is the amount of the rent now due and owing to said lessors, and you are hereby required to pay the same within three days from date hereof, or to deliver up possession of the said premises to the said lessors, or the said lessors will institute legal proceedings against you to recover possession of said premises with treble rent.

"Said premises are situate at the southwest corner of State and Stevenson Streets, City of Ukiah, County of Mendocino, State of California, and are more particularly described in said lease, which said description is hereby referred to and incorporated herein.

"Dated: December 2nd, 1933.

"Chris Norgard

"Cecelia F. Norgard."

This notice was served upon the plaintiff on the 2d day of December, 1933. While there is some testimony in the record to the effect of the lease being terminated by mutual agreement, in connection with the notice which we have just set forth the court made the following finding: "That it is not true that said lease was terminated as of the 21st day of November, 1933; that it is true that said lease was terminated as of December 5th, 1933, and that it is true that ever since the 5th day of December, 1933, the defendant and cross-complainants have been in the sole and exclusive occupancy and possession of said premises; that it is not true that neither the said lease nor the aforesaid provisions thereof have been in force and effect since the 21st day of November, 1933; that it is true that neither the said lease nor any of the provisions thereof have been in force or effect since the 5th day of December, 1933."

The question presented for our consideration is whether the notice served upon the plaintiff by the defendants to pay rent or surrender the premises evidenced an intention to terminate the lease. If so, the judgment should be affirmed.

[1] On the part of the appellants, it is contended that the language used in the notice is not sufficient to evidence such an intention, basing their argument in support thereof upon the amendment approved April 30, 1931, Statutes 1931, page 447 of section 1174 of the Code of Civil Procedure. The amendment to the section referred to is as follows: "If the notice required by section 1161 of the code states the election of the landlord to declare the forfeiture thereof, but if such notice does not so state such election, the lease or agreement shall not be forfeited."

In making this contention, the appellants apparently overlooked the force and effect of the language used in the Codes, which has been construed by this court as hereinafter set forth. The notice served upon the plaintiff states that an action will be instituted against the plaintiff in the event he does not either pay rent or surrender the premises in such form as to enable the defendants to secure a judgment against the plaintiff for treble rent, which necessarily calls the plaintiff's attention to the fact that the action will be based upon the second paragraph of section 1174 of the Code of Civil Procedure, wherein it reads as follows: "Judgment against the defendant guilty of the forcible entry, or forcible or unlawful detainer may be entered in the discretion of the court either for the amount of the damages and rent found due, or for three times the amount so found."

While the language of section 1174 of the Code of Civil Procedure now requires a statement of an election to forfeit or terminate the lease, it does not state, as apparently contended for by the appellants, that any different language shall be used to evidence such

an intention than that used in the notice presented for our consideration in this case. All that the amendment requires is that language shall be used indicating such an intention. This court, as above stated, has twice held such language as appears in the notice in this case sufficient to evidence such an intention.

In Costello v. Martin Bros., 74 Cal. App. 782, 241 P. 588, 589, the notice held sufficient to evidence an intention to terminate the lease, in so far as material here, is worded as follows: "To Martin Bros., Tenant in Possession: You are hereby required to pay, within three days after the service on you of this notice, the rent of the premises hereinafter described. * * * Or to deliver up possession of the said premises within said three days, * * * or I shall institute legal proceedings against you to recover possession of said premises, with treble rents."

In the action entitled Busch v. Strauss, 103 Cal. App. 647, 284 P. 966, the notice held sufficient to indicate an intention to terminate the lease reads as follows: "Now therefore, you will please take notice; that you are required to pay the said December, 1924, and January, 1925, installments of said rent * * * to the undersigned, or deliver up possession of said premises on or before three (3) days after the date of the service of this notice upon you. You are further notified that in the event you fail to make said payment or deliver up possession of said premises within the said three (3) day period, the undersigned will institute legal proceedings for unlawful detainer against you for the recovery of said premises and treble rents."

The notice in the instant case and the notice in the Busch Case are identical in substance and differ in wording only in that the character of the action "unlawful detainer" is mentioned in the Busch Case. It may be further mentioned that a hearing of the case of Busch v. Strauss in the Supreme Court, after judgment in the District Court of Appeal, was denied. It thus appears that the courts of this state have adjudicated what language is sufficient to indicate an intention to terminate a lease when a notice is given to pay rent or to surrender the premises, and that the amendment of section 1174 of the Code of Civil Procedure, approved April 30, 1931, supra, only follows what has already been held language sufficient to effect a termination of the lease. The different cases having to do with this subject are so well set forth and analyzed in an opinion written by the learned judge of the trial court that we adopt the same as a portion of the opinion of this court, to wit:

[2, 3] "I am satisfied from the evidence that some time between the 11th and the 27th days of November the plaintiff removed from the leased premises, but he was still in possession by his subtenant Weber as late as December 5th. Plaintiff was not in possession, directly or indirectly, after the 5th day of December. His conduct was a surrender of the premises, but a surrender is not effective, unless there is an acceptance by the landlord. 15 Cal. Jur. 795, 796. In the absence of such acceptance, the landlord may nevertheless terminate the tenancy for default in payment of rent by appropriate proceedings. Such proceedings are ordinarily instituted by a notice requiring payment of rent or surrender of the premises. But such notice alone does not effect a forfeiture, nor even indicate an intention to do so on the part of the landlord. Burke v. Norton, 42 Cal. App. 705, 184 P. 45; Brown v. Lane, 102 Cal. App. 350, 283 P. 78; Security, etc., v. Kost, 96 Cal. App. 626, 274 P. 608; Stich v. Gordon, 126 Cal. App. 434, 14 P.(2d) 835.

"If, however, the notice contains a statement that would indicate an intention on the part of the landlord to terminate the lease by forfeiture, or to insist on a right to re-enter, if the rent be not paid, the case is different.

"The lease in evidence gave to the defendants the right of re-entry on default of the tenant in the following language: 'If the rent above reserved or any part thereof shall be in arrears or unpaid on any day of the payment thereon when the same ought to be paid as aforesaid, or if default shall be made in any of the covenants and agreements herein contained on the part of the lessee to be kept or performed, then in such event, it shall and may be lawful for said lessors, their heirs and assigns, into and upon said demised premises and every part thereof wholly to re-enter and the same to have again, repossess and enjoy as in their first and former estate, anything hereinabove contained to the contrary thereof in any wise notwithstanding.' The notice served on plaintiff on December 2, 1933, stated that: 'You are hereby required to pay the same (rent in arrears) within three days from date hereof, or to deliver up possession of the said premises to the said lessors, or the said lessors will institute legal proceedings against you to recover possession of said premises with treble rent.'

"A similar notice was given in Costello v. Martin, 74 Cal. App. 782, 241 P. 588, 589, and the court there said: 'On the defendants' default in payment of rent, at least two courses were open to plaintiff. He had the option to sue directly for the installments of rent then

due, allowing the lease to continue in force, or to terminate the lease in the event of nonpayment after demand and notice. He elected to pursue the latter course, and by the foregoing notice he gave the defendants the option of paying the amount due within the time prescribed or surrendering possession. The defendants exercised the option given them by the notice by vacating the premises. Had they failed to avail themselves of either option, it is to be inferred from the contents of the notice that the plaintiff would have commenced an action of unlawful detainer against them.'

"In Wickstrom v. McGrath, 86 Cal. App. 651, 261 P. 326, 327, the notice read as follows: 'Within three days after the service on you of this notice, you are hereby required to pay the rent of the premises hereinafter described, * * * amounting to the sum of $816, * * * or you are hereby required to deliver up possession of the herein described premises within the said three days after service on you of this notice, * * * or I shall institute legal proceedings against you to recover possession of the said premises.' The court there said: 'This notice was both a demand to pay the rent and a notice to quit possession in the event of failure to pay the rent, or legal proceedings would be instituted.'

"In Busch v. Strauss, 103 Cal. App. 647, 284 P. 966, the contention was made that the notice served on the tenant was not given with the intention of terminating the lease. The court said: 'The notice expressly provides that, upon the lessee's failure to pay the rent demanded or to deliver possession, the lessor "will institute legal proceedings for unlawful detainer against you for the recovery of said premises and treble rents." This language clearly evinces an intention to terminate the lease.'

"The notice in the case at bar is in almost the exact language of the notice in Busch v. Strauss, supra.

"In Brown v. Lane, 102 Cal. App. 350, 283 P. 78, cited by defendants, the notice contained nothing indicating an intention to terminate the lease. The same is true in Phillips-Hollman v. Peerless, etc., 210 Cal. 253, 291 P. 178, also relied on by defendants.

"The defendants contend that the 1931 amendment to section 1174, Code of Civil Procedure, changes the rule laid down in Wickstrom v. McGrath, supra, and like cases. The notice required given in this case, if we follow Wickstrom v. McGrath, supra, was the notice referred to in the amendment to section 1174, Code of Civil Procedure.

"Defendants contend that Costello v. Martin, supra, Wickstrom v. McGrath, supra, and Busch v. Strauss, supra, have been impliedly overruled by Phillips-Hollman v. Peerless, supra, and Treff v. Gulko, 214 Cal. 591, 7 P.(2d) 697. The notice in the Phillips Case, as above stated, contained no language that might be construed as indicating an intention to terminate the existing lease. In Treff v. Gulko, supra, the action was not between the parties to the lease, but between the original lessor and an assignee of the original lessee. It was held that such assignee was not liable for rent, in the absence of fresh contractual stipulations between the lessor and himself. That case does not purport to give further remedies to a lessor than is given in Costello v. Martin, supra, and kindred cases. It merely gives him certain alternatives in the event of a termination of the lease. A reference to the language at page 598 of 214 Cal., 7 P. (2d) 700 in the reported case makes this clear."

No other questions materially affecting the judgment being presented for our consideration, it follows that the judgment must be, and the same is hereby, affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

140 Cal.App. 657

HINE v. STATE LIFE INS. CO. OF INDIANAPOLIS, IND.

Civ. 4987.

District Court of Appeal, Third District, California.

Sept. 14, 1934.

1. Insurance ⇐144(1)

Bonus contract by which insured, as inducement for his policy, was to receive certain percentage of cash premiums insurer received from policies written in California through year 1921 *held* not construable to include percentage of premiums collected from policies written in 1922 and thereafter, by correspondence in which insured decided to exercise option to continue policy as paid-up insurance and insurer stated bonus agreement would be paid up, because correspond-

ence related only to policy and original bonus agreement and did not express any intention to make new bonus agreement.

2. Insurance ⇐138(2)

Bonus agreement by which insured would receive certain percentage of cash premiums insurer received from policies written in California would be contrary to law, if made after 1917, under statute prohibiting insurance companies from offering special inducements not set out in policy for acceptance of insurance contracts (Pol. Code, § 633b).

3. Evidence ⇐448

Where terms of insurance policy and bonus agreement were unequivocal, statements of insurer's actuary interpreting insured's legal rights under contract would not affect those rights.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Thomas W. Hine against the State Life Insurance Company of Indianapolis, Ind. From the judgment, the plaintiff appeals.

Affirmed.

Nelson & Ricks, of Eureka, for appellant.

Eugene S. Selvage and A. G. Bradford, both of Eureka (Francis V. Keesling and Garton D. Keyston, both of San Francisco, of counsel), for respondent.

DEIRUP, Justice pro tem., delivered the opinion of the court.

This is an action to recover from the respondent certain sums of money, claimed to be due to appellant under bonus contracts executed as an inducement for the acceptance of a policy of insurance.

On February 24, 1902, respondent issued to appellant a policy of life insurance in the sum of $10,000, which is still in force. The policy is of the type known as a 20-payment, deferred dividend life policy; that is to say, the respondent agreed in the policy that, if the appellant paid the annual premiums for 20 years, he would then be entitled to receive all dividends that had accrued up to the end of said 20-year period and would be insured for the balance of his life without the payment of any premiums. The policy gave to appellant certain other privileges. He could leave the dividends with the respondent as paid-up life insurance; or he could withdraw not only the dividends but the cash surrender value as well and terminate the contract, or convert the cash value into an annuity. If he elected to keep the insurance in force, he would receive dividends annually and would have the right at any time to surrender the policy and collect its cash surrender value, which increased from year to year.

As an inducement for appellant to accept the policy, the respondent issued to him two special agreements, called "D. of I." contracts. Each of these contracts designated appellant as a member of the "Department of Information and Inspection" of respondent and provided for the payment to him "as compensation for his services * * * each year during the continuance of this contract, one sixtieth of one per cent of all premiums it (i. e. the respondent) receives in cash, during the preceding year, on insurance it shall write in the State of California from the date of this contract up to and including the year 1921, so long as premiums shall be received as above." There being two such contracts, the percentage to which appellant became entitled was one-thirtieth of 1 per cent. of all such premiums on California insurance.

Appellant paid the 20 annual premiums called for by the policy contract. The policy matured on February 24, 1922. On January 25th of that year appellant wrote a letter to respondent, asking for a statement of the options to which he would become entitled upon the maturity of the policy. The letter was answered by C. H. Beckett, respondent's actuary. Appellant wrote for further information and received a reply in detail from Beckett. Appellant then withdrew the accrued dividends, allowing the insurance contract to continue as a paid-up life policy.

Until the maturity of the policy appellant received annually under the "D. of I." contracts one-thirtieth of 1 per cent. of the premiums that were paid to respondent on insurance written in California. The percentage for 1921 was $155.42, which was paid along with and in addition to the accrued dividends on the policy. After the maturity of the policy, respondent paid or tendered to appellant annually such percentages of its premiums on insurance written in California before February 24, 1922. The sums paid or offered decreased as policies written before 1922 matured or were terminated. Appellant refused to accept the payments that were tendered for the years 1929 to 1932, inclusive, claiming that he was entitled to receive the "D. of I." percentage on all premiums paid on insurance written in California after, as well as before, the year 1922 and brought this ac-

tion to recover the full amount of such percentages. The trial court allowed judgment only for the sums tendered and refused. Appellant has appealed from the judgment, the record consisting of the judgment roll.

Appellant's claim is based on the letters that passed between him and respondent's actuary just before the maturity of the policy. They are set out in the findings of the court. The statements on which appellant relies are as follows:

In his reply to appellant's first inquiry, the actuary wrote on January 27, 1922:

"The policy is now fully paid up, and no further premium payments are required. During the first period of 20 years, your policy was a deferred dividend policy, but if it is continued in force, dividends would be credited to it annually, beginning February 24, 1923, and you would also retain your interest in the California D. of I. contract. Your policy would be in accordance with the following table. * * * A paid up participating policy is a very valuable asset, and we congratulate you upon being the possessor of such a contract." Appellant then wrote that he "had practically decided to cancel this policy and take the cash value," but before deciding definitely what to do, "I wish you to answer the following questions categorically, so that I may know that I fully understand the situation." He then asked about the cash surrender value and later said:

"3. Should I decide to continue the policy, is my understanding correct that my California D. I. will be continued during the time that I carry the policy as paid up insurance and that those dividends will be based as heretofore on the amount of business done in the State, so in case of increase in the amount of business done here, the California D. I. will be correspondingly increased."

To this the actuary replied:

"Third, you are correct in your understanding that if you continue the policy the California D. of I. contract commissions would be paid up, and the amount that would be paid depends on our California business, as you will find in our California contract. Of course, these commissions increase very rapidly. You have a policy of very great value, and it appears to us that under no consideration would you think of losing it. * * * We would certainly advise you to continue the policy for it appears to us, that any other course would be almost unthinkable."

In the last letter in the series appellant stated that he had decided to continue the insurance for $10,000 and withdraw the accrued dividends and the "D. of I." commission then due, and added: "I now understand that I am to continue the policy as paid up, withdrawing each year the dividends in cash and the Cal. D. I. Cons. as stated in the fourth paragraph of your letter."

[1, 2] Appellant's sole contention on this appeal is that the parties, in their correspondence, entered into a new contract by which the terms of the original "D. of I." agreements were so amplified as to include a percentage of premiums collected from insurance written in California after February 24, 1922. The consideration for the new contract was (he claims) his leaving with the respondent the cash value of the policy. It will be noted, however, that the insurance contract was primarily for the life of the appellant and that the right to withdraw the cash value and terminate the contract was an alternative option. It will be noted also that there is no suggestion that appellant agreed to leave the cash value with the respondent for any period of time. He merely refrained from withdrawing it on February 24, 1922, retaining the right to draw it out with its accumulations at any time thereafter and to cancel the policy.

The trial court found "that said correspondence did not modify said 'D. of I.' contracts nor create a new contract between plaintiff and defendant." That finding is undoubtedly correct. The correspondence does not indicate an intention on the part of either of the parties to make a new contract or to modify their existing rights in any respect. All of the questions and answers relate to the policy and the original "D. of I." contracts. There is no expression of any desire to make a new bonus agreement. In fact, such an agreement, if made, would have been contrary to law, for insurance companies were prohibited in 1917 from offering special inducements not set out in the policy, for the acceptance of insurance contracts (Pol. Code, § 633b).

[3] The statements that were made by the actuary amounted only to his interpretation of the legal rights of the appellant. Inasmuch as the terms of the original contracts are unequivocal, his interpretation did not affect those rights. Hughes v. Pacific Wharf Co., 188 Cal. 210, 205 P. 105.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

140 Cal.App. 725

LUDERS v. SECURITY TRUST & SAVINGS BANK.

Civ. 8830.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1934.

Executors and administrators ⟸225(3)

Claim against executor based on testatrix' violation of agreement to bequeath her estate to claimant, which was rejected, *held* not "contingent" within statute so as to permit maintenance of claim against executor within two months after claim became due because at time of rejection there was pending action by claimant seeking to enforce against executor a trust arising out of alleged agreement, since claimant could not change nature of existing claim by prosecuting doubtful action (Code Civ. Proc. § 1498).

[Ed. Note.—For other definitions of "Contingent Claim," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Grace Luders against the Security Trust & Savings Bank, as executor of the estate of Marie Lagier, deceased. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

Frank G. Tyrrell, of Los Angeles, for appellant.

Harry A. Chamberlin, of Los Angeles, for respondent.

CONREY, Presiding Justice.

Administration of the estate of Marie Lagier, deceased, has been pending in the superior court since the probate of the will and appointment of executor on June 16, 1927. On July 21, 1927, the plaintiff presented to the executor for approval a creditor's claim and the same was rejected by the executor on July 30, 1927, notice thereof being given to plaintiff on August 1, 1927. This action to recover on such rejected claim was commenced by complaint filed June 27, 1932. Pursuant to the order sustaining demurrer to the complaint, judgment was entered in favor of the defendant. From this judgment plaintiff has appealed, and the appeal is presented on the judgment roll.

At the time of the presentation and rejection of said claim and until August 14, 1931 (when the present Probate Code became effective), the proceedings required to establish a creditor's claim were defined by the Code of Civil Procedure, which provided that upon rejection and notice of rejection of a creditor's claim against a decedent's estate, "the holder must bring suit in the proper court against the executor or administrator within three months after the date of service of such notice if the claim be then due or within two months after it becomes due, otherwise the claim shall be forever barred." Code Civ. Proc. § 1498.

Appellant attempts to avoid the application of the prescribed limitation to the facts of this case by the assertion that when presented the claim was contingent and not due, and that the action was commenced within two months after the claim became due. This contention presents the only issue necessary to be determined on this appeal. The facts upon which appellant bases her contention that the claim was contingent are set out in the claim which was presented and which is a part of the complaint in this action. In effect, the claim was that in executing her last will and testament which has been admitted to probate, the decedent violated an agreement which she had made with the plaintiff that she would devise and bequeath her entire estate to the plaintiff; that at the time of the presentation of the claim, there was pending and undetermined an action wherein this plaintiff was seeking to enforce against the executor and other parties in interest a trust arising out of the above-mentioned agreement, and to compel a conveyance of said estate to the plaintiff. By reason of the pendency undetermined of said action, the plaintiff, in presenting her said claim as well as in prosecuting the present action, has insisted that these facts gave to her claim a contingent nature which excused the commencement of this action until the judgment in the other pending action became final. That other controversy terminated in a judgment against the plaintiff, which judgment was affirmed and became final on the 2d day of May, 1932, when the Supreme Court denied a rehearing thereof. This action was commenced within two months after that date. The decision on appeal in that action, Luders v. Security Trust & Savings Bank et al., will be found in 121 Cal. App. 408, 9 P. (2d) 271.

We are of the opinion that the claim was not contingent, but on the contrary, if valid at all, was absolute at the time it was presented. There was extraneously a contingency created by the claimant when she com-

menced the action to enforce the alleged trust. But that contingency was merely an incident to her own voluntary acts in proceeding upon the theory which she adopted in attempting to enforce that remedy. She could not change the nature of the existing claim by prosecuting a doubtful action, other than an action upon the rejected claim.

For the foregoing reasons the judgment is affirmed.

I concur: YORK, J.

HOUSER, J., deeming himself disqualified, takes no part in this decision.

140 Cal.App. 720

PEOPLE v. GUITERREZ.

Cr. 2578.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1934.

1. Criminal law ⇐1170½(5)

In assault and battery prosecution, denying cross-examination of victim whether he was drunk, *held* not prejudicial error, notwithstanding evidence of intoxication would have been material as having a bearing on victim's mental condition, where there was no attempt to support question by facts tending to prove that victim had been intoxicated.

2. Assault and battery ⇐92

Nature of stab wound which destroyed eye was sufficient to prove that assault was committed with deadly weapon, notwithstanding there had been no direct testimony that knife was seen in hand of accused at time of assault.

3. Criminal law ⇐1038(1)

Accused could not complain of refusal of requested instructions where accused's counsel made no argument concerning such instructions and made no attempt to show that subject of requested instructions was not completely and correctly covered by given instructions.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Jose Guiterrez was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

David C. Marcus, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

Defendant appeals from a judgment whereby he was convicted of the crime of assault with a deadly weapon. He also gives notice of appeal from an order denying his motion for a new trial, but the record does not show that there was any motion for a new trial. We therefore treat the appeal as being solely an appeal from the judgment.

[1, 2] The evidence shows that without provocation the defendant struck his victim, one Wenasleo Trujillo, with a knife, and that by this wound Trujillo was deprived of the sight of one eye. The first point presented is that the court erred in sustaining an objection to the following question addressed to Trujillo on cross-examination: "Q. Were you drunk?" The objection was that the question was immaterial. The objection was sustained. Evidence that the witness was intoxicated would have been material, because it would have had a bearing upon the mental condition of the witness, and in that respect might have aided in testing the reliability of his testimony. But the rejection of this one question, without any attempt to support it by facts tending to prove that the witness had been in an intoxicated condition, is not prejudicial error. Counsel for appellant made no offer of proof of the fact, beyond the one apparently incidental question. The testimony of the witness and of corroborating witnesses very positively established the fact of the assault. And the nature of the stab wound which destroyed the eye was sufficient to prove that the assault was committed with a deadly weapon, even if there had been no direct testimony that a knife was seen in the hand of the defendant at the time of the assault.

[3] Appellant in his brief has set forth a number of instructions requested by him and which were by the court "refused except as covered by other instructions." Counsel for appellant made no argument concerning these instructions, but contented himself with the bald assertion that defendant was materially affected and prejudiced by failure to give them. No attempt has been made to show that the subjects of these instructions were not completely and correctly covered by the

instructions which were actually given to the jury.

There being no merit in the appeal, the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

140 Cal.App. 354

MAURICE MERCANTILE CO. v. AMERICAN EMPLOYERS' INS. CO.

AMERICAN EMPLOYERS' INS. CO. v. MAURICE ROSENTHAL, Inc.

Civ. 9144.

District Court of Appeal, First District, Division 2, California.

Aug. 8, 1934.

1. Landlord and tenant ⇐108(1), 217(1)

On lessee's default in payment of rent, lessor has option of suing directly for installments of rent then due, allowing lease to continue in force, or of terminating lease in event of nonpayment after demand and notice (Code Civ. Proc. § 1161 et seq.).

2. Landlord and tenant ⇐194(1)

Where lessor gave lessee, who defaulted in payment of rent, statutory three-day notice to pay rent or quit, and lessee delivered up possession, lease was thereby terminated, and lessor could not recover rentals due subsequent to such surrender (Code Civ. Proc. § 1161 et seq.).

3. Guaranty ⇐36(8)

Where lessee, who defaulted in payment of rent, exercised option given by lessor and surrendered premises, guarantor was relieved of liability for rentals due subsequent to surrender, since lease had been terminated and obligation to pay further rents never accrued (Civ. Code, §§ 2819, 2824).

4. Guaranty ⇐100

Guarantor of lease, under provisions of bond, *held* entitled to attorney's fees expended in ascertaining liability under lease, where lessee had quit premises pursuant to notice to pay rent or quit, and in its defense of action by assignee of lessee to recover balance of collateral which lessee had delivered to guarantor.

5. Appeal and error ⇐1122(2)

In action against guarantor of lease by assignee of lessee to recover balance of collateral which had been delivered to guarantor, court could find reasonable value of attorneys' fees of guarantor, which had been denied by trial court, without remanding cause to trial court.

Appeal from Superior Court, San Francisco County; John J. Van Nostrand, Judge.

Action by the Maurice Mercantile Company against the American Employers' Insurance Company, in which the American Employers' Insurance Company filed a cross-complaint against Maurice Rosenthal, Inc. From an unsatisfactory judgment, the American Employers' Insurance Company appeals.

Modified.

Redman, Alexander & Bacon and A. B. Weiler, all of San Francisco, for appellant.

Joseph E. Bien and Werner Olds, both of San Francisco, for respondent.

SCHMIDT, Justice pro tem.

On February 7, 1927, Maurice Rosenthal, Inc. (assignor of respondent), entered into a lease of a store in Fresno for five years at a rental of $600 per month payable monthly in advance. Said lessee applied to appellant surety company to issue a $5,000 bond guaranteeing the lease, said lease requiring a surety company bond "as surety thereon in the penal sum of Five Thousand (5,000) Dollars for the faithful performance by the lessee, * * * of all the terms, conditions and covenants in this lease provided by it to be performed, observed and kept." Application to the surety was in writing, and provided among other things that the applicant would pay annually in advance the premium of $75 on the bond and would "indemnify and keep amply indemnified the corporation from and against any and all loss costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature, which the corporation shall or may, for any cause, at any time, sustain or incur or be put to, by reason or in consequence of the corporation having executed said bond." At the same time the lessee delivered $3,000 in cash collateral to appellant as part security for the $5,000 bond under a written agreement that provided that this $3,000 was given as security not only for the claims of appellant arising by reason of the execution of the $5,000 bond, but also for such that might arise under the contract between the appellant and said lessee. After receiving the $3,000, appellant executed its $5,000 bond guaranteeing the performance of the lease by

said lessee. Said lessee defaulted in the monthly rent of $600 due December 7, 1928. It had become involved in financial difficulties, and a petition of involuntary bankruptcy was filed against it on January 4, 1929. Demand was made upon respondent for the payment of this rent. It was not paid. January 7, 1929, another $600 became due and was not paid, and default was likewise made in the payment of rent due February 7, 1929. On February 27, 1929, a notice to pay rent or quit was served on the lessee; the portion thereof which is necessary to the decision herein being as follows: "You are hereby notified that you are required, within three (3) days after the service of this notice upon you, exclusive of the day of service, to pay the rent of those certain premises * * * said rent amounting to the sum of one thousand eight hundred dollars ($1,800), being the monthly instalments of rent of the said premises for the months commencing December 8, 1928, January 8, 1929, and February 8, 1929, at the rate of six hundred dollars ($600) per month. * * * If you do not pay the said rent within the said period of three (3) days hereinabove referred to, you are required, within the said period, to surrender and deliver up possession of the said premises to the undersigned, or the undersigned will institute legal proceedings against you for the recovery of the possession of the said premises, with treble rents." On receipt of this notice the lessee, Maurice Rosenthal, Inc., assignor of respondent, quit the premises within the three days. Thereafter lessor made seasonable attempts to rent the premises described in the lease, but could not do so until after October, 1929, at which time more than $5,000 in rent would have been due and unpaid under the terms of the lease. Appellant as the surety on the aforementioned $5,000 bond upon which it had received only $3,000 cash indemnity paid $5,000 to the lessor. Some months subsequent to the service of the three-day notice to quit and the quitting by respondent's assignor, the original lessee, respondent's assignor made a composition in the bankruptcy court with its creditors and was discharged by the bankruptcy court. It thereafter assigned to respondent whatever rights it had to recover from appellant the $3,000 indemnity deposited by it with appellant. Action was then commenced by respondent for the sum of $1,200 on the theory that only $1,800 rent was due when the notice to quit was given, and therefore the balance of the $3,000, namely, $1,200, should be returned. Appellant filed a cross-complaint against the lessee, the respondent's assignor, for its legal expenses claiming it had engaged counsel when respondent's assignor had defaulted and the bankruptcy petition had been filed. In addition to that legal expense, appellant claimed the legal expense of the defense of the present action. The trial court held that, when the notice to quit was given and the tenant actually quit, all liability under the lease ceased, including the liability of appellant as guarantor, except for the $1,800 due and unpaid at the time of the service of the notice to quit, and gave judgment to respondent for the $1,200 less $75 unpaid premium without deducting anything therefrom for the counsel fees claimed. The appellant appeals from that judgment, claiming that the trial court erred in both particulars.

The pertinent part of the lease on the question of remedies of the lessor reads as follows: "The party of the second part (lessee) further agrees that if the rent is not paid as hereinbefore provided, * * * then and in any of said cases, the party of the first part, (lessor) * * * lawfully may immediately or at any time thereafter and without demand or notice, enter into or upon the said premises and expel all persons therefrom and terminate this lease."

[1, 2] The first question involved is, Could the fact that the landlord gave the said three-day notice under section 1161 et seq. of the Code of Civil Procedure and the lessee delivered up possession in accordance with said notice, cancel the lease and relieve the lessee from the payment of any further rent under said lease? This question is answered in the affirmative by Costello v. Martin Brothers, 74 Cal. App. 782, 241 P. 588, the facts of which are on all fours with the case at bar. At page 786 of that opinion in 74 Cal. App., 241 P. 588, 589, it is stated: "On the defendants' default in payment of rent, at least two courses were open to plaintiff. He had the option to sue directly for the installments of rent then due, allowing the lease to continue in force, or to terminate the lease in the event of nonpayment after demand and notice. He elected to pursue the latter course, and by the foregoing notice he gave the defendants the option of paying the amount due within the time prescribed or surrendering possession. The defendants exercised the option given them by the notice by vacating the premises. Had they failed to avail themselves of either option, it is to be inferred from the contents of the notice that the plaintiff would have commenced an action of unlawful detainer against them. Had he recovered possession of the premises in such an action, he would have been entitled to judgment for rents due

up to the time of such recovery, but he would not have been entitled in that action, or in any other action, to a judgment based upon subsequent rents or rental values. It is not perceived that a different rule should apply where a lessee voluntarily surrenders possession under one of the options given him by the lessor. The notice did not of itself terminate the lease. It was in the nature of an alternative offer which became effective upon the acceptance by defendants of one of the alternatives thereof." To like effect, see Moskovitz v. LeFrancois, 121 Cal. App. 310, page 314, 8 P.(2d) 1049; Guiras v. Harry H. Culver & Co., 109 Cal. App. 743, 293 P. 705. These cases and others to like effect are distinguishable from the case of Burke v. Norton, 42 Cal. App. 705, 184 P. 45, 46, relied upon by appellant. There the lease involved provided "and, at his option, to terminate this lease; * * * that the exercise of one right or remedy by the lessors shall not impair his right to any other remedy." There was not any such provision in the lease involved in this appeal nor in the aforementioned cases other than Burke v. Norton.

[3] Appellant further contends, however, that, even though the principal (lessees herein) was discharged, the guarantor would not be relieved by reason of the provisions of section 2819 of the Civil Code which provides that a guarantor is exonerated "except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended;" and by reason of section 2824 of the Civil Code, which reads, "A guarantor, who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the guarantor, may have modified the contract or released the principal," and cites in support of his contention Ehrman v. Rosenthal, 117 Cal. 491, 49 P. 460. This was a case, however, in which the indebtedness actually existed even though there had been a composition agreement and that case holds that the guarantor was not released by the release of the principal by the composition agreement. The case at bar is one where the principal was actually released from liability for any further rents and the obligation to pay such further rents never accrued.

[4] On the issue of attorney's fees the appellant relies upon the express terms of the application for the bond wherein the principal undertook to indemnify the surety "from and against any and all loss costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature, which the corporation shall or may, for any cause, at any time, sustain or incur or be put to, by reason or in consequence of the corporation having executed said bond." The undisputed evidence shows that an attorney was frequently consulted by the surety both before and after the lessee quit the premises. We cannot say that the surety should have known that the lessee would quit the premises pursuant to the notice from the lessor or that it should have known that its legal liability to the lessor would not exceed $1,800. Under the rule of Tally v. Ganahl, 151 Cal. 418, 90 P. 1049, Cohn v. Smith, 37 Cal. App. 764, 174 P. 682, and Ætna Casualty & Surety Co. v. Exnicios, 104 Cal. App. 723, 726, 286 P. 453, the appellant is entitled to attorneys' fees in defending its liability under the lease as well as in its defense to the pending action.

[5] Under the rule of Kirk v. Culley, 202 Cal. 501, 261 P. 994, we may find the reasonable value of such attorneys' fees without remanding the cause to the trial court, and paragraph IV of the findings of fact is therefore modified to read: "That defendant is entitled to a credit of $75 as and for the premium on the bond referred to in paragraph VIII of the amended cross-complaint, that the reasonable value of the attorneys' fees incurred by defendant is $500, and that defendant is entitled to a credit of $500 as and for such attorneys' fees." It is further ordered that the judgment be modified to read: "And it is ordered and adjudged that plaintiff Maurice Mercantile Company, a corporation, do have and recover from American Employers' Insurance Company, a corporation, defendant, the sum of $625, with interest thereon from November 29, 1929, at the rate of 7 per cent. per annum, until paid, together with plaintiff's costs incurred in this action, amounting to $16.50."

As so modified, the judgment is affirmed; appellant to recover its costs on appeal.

We concur: NOURSE, P. J.; SPENCE, J.

140 Cal.App. 551

In re GOLDTHWAITE'S ESTATE.

GOLDTHWAITE v. JOHNSON et al.

Civ. 9324.

District Court of Appeal, Second District, Division 1, California.

Sept. 1, 1934.

Hearing Denied by Supreme Court Oct. 29, 1934.

Wills ⇐130

Olographic writing addressed to father, to whom son had devised his home and furniture, asking father to do him favor of giving one-half of proceeds from sale of house and furniture to another, *held* not valid as codicil to will, since it simply expressed desire that father as devisee make certain use of property devised to him.

Appeal from Superior Court, Los Angeles County; May D. Lahey, Judge.

Proceeding in the matter of the estate of Spencer Goldthwaite, deceased, by Edward S. Goldthwaite against Mary Johnson and another to contest the probate of an olographic writing as a codicil to the will of Spencer Goldthwaite, deceased. From an order admitting to probate the olographic writing as a codicil to the will, contestant appeals.

Order reversed.

Harvey M. Parker and Merriam, Rinehart & Merriam, all of Pasadena, for appellant.

G. C. O'Connell, of Los Angeles, in pro. per.

YORK, Justice.

The decedent, a resident of Los Angeles county, died on March 31, 1931, in the state of Kansas as result of an aeroplane fall. Prior to his death, to wit, on February 18, 1930, decedent had executed a duly attested will which was admitted to probate and appellant herein was appointed executor thereof. In this attested will, decedent devised to his father, the appellant, his homeplace, together with the furnishings therein. After the attested will had been duly admitted to probate, an olographic writing dated March 28, 1931, was offered for probate by Mary Johnson, now deceased, as and for a codicil to decedent's last will and testament. This olographic writing read as follows:

"March 28, 1931.

"Father—

"If anything should happen to me (die or be killed) enroute to or from California, or while there, will you do me the everlasting favor of giving one-half the proceeds from the sale of my house and furniture to Mary Johnson, 55 Pineapple St., Brooklyn, N. Y. As you know if you ever get this, the entire house and furniture is willed to you, but I love Mary very much and would like to have her have one-half

"Thanks, Father.

"Spen

"(Spencer Goldthwaite)"

"I hereby witness that the above was written by Spencer Goldthwaite on March 28, 1931, and that the above is his own signature.

"Robert T. Furman, Jr."

Appellant by written opposition and contest opposed the probate of the olographic writing set out in full above, upon the grounds that it had not been signed or executed or attested by decedent, as or for a codicil to his last will and testament, or as any will or testament, and upon the ground that the instrument was not testamentary in character.

Upon conclusion of the hearing of the contest, an order was entered in which it was decreed "that that certain writing dated the 28th day of March, 1931, and which the court finds to be wholly written, dated and signed in the handwriting of said Spencer Goldthwaite, Deceased * * * be and the same is hereby admitted to probate as a codicil to the last will and testament of said Spencer Goldthwaite, Deceased." It is from this order that appellant prosecutes this appeal. Under the heading "Statement of Questions Involved," appellant in his opening brief sets out the following:

"1. Is the olographic instrument which was admitted to probate by the trial court testamentary in character?

"2. Is an olographic instrument entitled to probate as a codicil to an attested will, if it contains nothing but words expressing a wish or desire?

"3. Where the olographic writing is addressed to decedent's father and definitely recognizes as valid the gifts made under a prior attested will, will such an olographic writing operate to cut down the gift made by the attested will, where the olographic writing contains merely expressions of wish or desire that the father apply the gifts in a particular way?"

An examination of the record discloses that decedent and proponent had planned to intermarry, but because of a serious heart ailment which had undermined the health of the proponent, they had decided against this plan, and apparently it was with this in mind that decedent wrote the letter to his father.

We think that the writing shows that it was addressed to his father, not as executor of the last will and testament of decedent, but rather to his father as a devisee under his will and that, instead of being testamentary in character, it simply expressed a desire that his father, as devisee under the will, should make certain use of the property devised to him. The writing refers to "one-half the proceeds from the sale of my house and furniture," but there is nothing either in the will or in the writing itself which orders, or even requests, a sale of the house and furniture, the will declaring: "I give, devise and bequeath * * * (a) My home and furniture at No. 1105 Glen Oaks Boulevard, Pasadena, California, to my father, Edward S. Goldthwaite." This is an unconditional and absolute devise of the homeplace to the father under the last will and testament of decedent, and the writing here involved we construe to be only an expression of a desire on the part of decedent that his father look after the proponent.

In Re Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071, it appears that in the will itself, after bequeathing all of his property to his wife, the testator incorporated the following:

"Upon the death of my wife, I desire that one-half of the property bequeathed to her shall be devised by her to my relatives." Held, that this clause had no testamentary force or effect.

Upon the authority of the cited case, the order appealed from is reversed.

We concur: CONREY, P. J.; HOUSER, J.

ISLAIS CO., Limited, v. MATHESON, City and County Treasurer.*

Civ. 9577.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1934.

1. Constitutional law ⇐143
Drains ⇐2(1)

Statute reducing penalties and interest rate on reclamation district bonds *held* not unconstitutional as impairing obligation of contract, since bondholders were not entitled to be benefited by collection of penalties which ultimately inured to benefit of landowners (Pol. Code, § 3480, as amended by St. 1927, p. 1449, § 2; St. 1933, p. 1237, § 8; Const. U. S. art. 1, § 10; Const. Cal. art. 1, § 16).

2. Taxation ⇐840

In exercise of taxing power, purpose of imposing penalty is not to enhance state, but to punish taxpayer for nonpayment, and threat of penalty is used as means of inducing taxpayers to pay promptly.

3. Taxation ⇐835

Penalty is not part of tax proper and is subject to legislative control and modification.

4. Drains ⇐18

Generally, right of bondholder extends only to amount of principal and interest and does not extend to proceeds realized from penalties.

5. Constitutional law ⇐113

Persons who contract in reference to subject concerning which Legislature has in its discretion appended some incident, such as an additional right, do so in contemplation of right to repeal that act, and constitutional prohibition against impairment of contract is aimed at different covenants between parties and not at purely statutory incident in reference to such agreement (Const. U. S. art. 1, § 10; Const. Cal. art. 1, § 16).

6. Constitutional law ⇐119

Right reserved to state to change measures must be read into every contract which is dependent upon payment of tax or assessment, since right to impose penalties or other coercive measures in order to induce prompt payment of taxes or assessments is incident of sovereignty (Const. U. S. art. 1, § 10; Const. Cal. art. 1, § 16).

7. Constitutional law ⇐117

Statute reducing penalties and interest rate on reclamation district bonds *held* not unconstitutional as impairing obligation of contract, since statute was enacted pursuant to police power, which is paramount to any contractual rights (Pol. Code, § 3480, as amended by St. 1927, p. 1449, § 2; St. 1933, p. 1237, § 8; Const. U. S. art. 1, § 10; Const. Cal. art. 1, § 16).

8. Constitutional law ⇐81

Fundamental part of "police power" is right of state in times of financial stress or grave or unusual economic conditions to protect general welfare, and such power may be exercised to protect individuals from pay-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 45 P.2d 326.

ment of excessive penalties or assessments in economic emergency.

[Ed. Note.—For other definitions of "Police Power," see Words & Phrases.]

9. Constitutional law ⇐117

Laws enacted for general public welfare are paramount to contractual rights, and interdiction of statutes impairing obligations of contracts does not prevent state from exercising such powers as are vested in it for promotion of public welfare notwithstanding contracts previously entered into between individuals may thereby be affected (Const. U. S. art. 1, § 10; Const. Cal. art. 1, § 16).

10. Constitutional law ⇐117

Parties entering into contracts may not estop Legislature from enacting laws in bona fide exercise of police power and do not, by reason of constitutional prohibition against impairment of contracts, enjoy immunity from such legislation (Const. U. S. art. 1, § 10; Const. Cal. art. 1, § 16).

11. Constitutional law ⇐70(1), 81

Legislature has wide discretion in determining what is necessary in exercise of police power, and courts will not ordinarily interfere with such discretion.

12. Constitutional law ⇐81

Individual cannot complain of reasonable legislative invasion of his usual rights for purpose of averting immediate danger which threatens welfare of community.

13. Drains ⇐2(1)

Statute reducing penalties and interest rate on reclamation district bonds on ground of emergency *held* not invalid because of failure to limit operation of statute to definite term (Pol. Code, § 3480, as amended by St. 1927, p. 1449, § 2; St. 1933, p. 1237, § 8).

14. Constitutional law ⇐247

Statute reducing penalties and interest rate on reclamation district bonds *held* not unconstitutional as denying bondholders equal protection of law (Const. U. S. Amend. 14).

15. Mandamus ⇐97

Mandamus *held* to lie to compel treasurer of reclamation district to accept in full payment of assessments, penalties, and interest in accordance with amendment which reduced penalties and interest rate as they existed at time bonds were issued, as against contention that statute reducing penalties and interest rate was unconstitutional as impairing obligation of contract (Pol. Code, § 3480, as amended by St. 1927, p. 1449, § 2; St. 1933, p. 1237, § 8; Const. U. S. art. 1, § 10; Const. Cal. art. 1, § 16).

Application for writ of mandate by the Islais Company, Limited, against Duncan Matheson, as Treasurer of the City and County of San Francisco, etc.

Peremptory writ of mandate issued.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

TYLER, Presiding Justice.

Application for writ of mandate to compel respondent to accept a certain sum of money in full payment of an assessment levied for reclamation purposes. Petitioner filed four petitions for writs against respondent, with the Supreme Court, which have been referred to this court for hearing. In addition thereto it has filed three petitions with this court. In every one of the seven petitions the points raised are substantially the same.

Petitioner is the owner of a number of tracts of land situated within the Islais Creek Reclamation District. The district caused an assessment to be levied on June 29, 1928, in the sum of $1,620,150. Thereafter the property owners of the district voted for the issuance of bonds in the amount of the assessment, which were subsequently sold. The bonds were issued and disposed of pursuant to the provisions of section 3480 of the Political Code as amended in the year 1927. In order to meet the payments for principal and interest on the bonds maturing January 1, 1934, respondent treasurer of the city and county of San Francisco, who is ex officio treasurer of the district, made a call for an installment of the assessment. By its terms the installment became payable within thirty days from October 1, 1933, and if not paid became delinquent October 31, 1933. None of the installments on the seven tracts were paid and thereafter, on December 7, 1933, they were sold by respondent to the treasurer of the city and county of San Francisco and his successors, as trustees of the district, for the amount of the call with accrued interest thereon at 7 per cent. to the date of sale, together with a penalty of 20 per cent. computed on both the amount of the call and interest to the date of sale. These sales and the totals

for which the tracts were sold were in accordance with the provisions of section 3480 of the Political Code as amended in 1927 (St. 1927, p. 1449, c. 759, § 2) in force when the bonds were issued and sold.

In 1931, section 3480 of the Political Code was amended (St. 1931, p. 754, c. 317, § 6). By the amendment it was provided that in case of called assessments becoming delinquent, the moneys owing after the delinquency should be only the amount of the installment with a penalty thereon of 10 per cent., and the interest rate was reduced from 12 to 7 per cent. The amendment also provided in express terms that it should "apply to all sales for delinquencies, and the proceedings had in connection therewith, on all assessments heretofore or hereafter to be levied." In 1933 the Legislature again amended section 3480 of the Political Code (St. 1933, p. 1211, c. 472, § 4). The amendment of 1931 with reference to the reduction of the amount of the penalty and the interest on all assessments was re-enacted or carried into the 1933 amendment, and section 8 of this amendment further provided: "This act is hereby declared to be an urgency measure within the meaning of section 1, article IV of the Constitution of the State of California, and it is deemed necessary for the immediate preservation of the public peace, health and safety that this law shall go into effect immediately."

In the various tracts involved in the several proceedings petitioner, in seeking to redeem from the delinquency of the installments, tendered to the treasurer of the district the amount of the call plus a penalty of 10 per cent. thereon, in conformity with the provisions of the amendments, and made a demand upon the treasurer to accept the sum in full payment of the amount of the delinquent taxes. The tender was refused and these proceedings followed. The petitioner in all seven of its petitions is relying upon the effectiveness of the changes made to section 3480 of the Political Code, as above referred to, to support his tender. Respondent seeks to justify his refusal of the tender upon the ground that the provisions of the amendments of 1931, and re-enacted in the amendments of 1933, to section 3480 of the Political Code, decreasing the penalty on reclamation calls, eliminating interest from the date of delinquency to the date of sale and decreasing the rate of interest required to be paid on redemption, are violative of section 10 of article 1 of the Constitution of the United States and section 16 of article 1 of the Constitution of California, forbidding the impairment of the obligation of contracts, since said amendments it is claimed materially alter the contract existing between the district and its bondholders. This argument is based upon the premise that at the time of the levy of the assessment and the issuance, sale, and delivery of the bonds, the 1927 amendment to section 3480 of the Political Code was in force. This amendment, as above stated, fixed the delinquency penalty at 20 per cent.; and the interest rate after delinquency and prior to sale, and also the interest rate on redemption, at 12 per cent. The section also provided that all moneys collected upon any assessment, including all interest and penalties, should be credited to the bond fund and used exclusively for the payment of the principal and interest of the bonds issued on the assessment. Notwithstanding the existence of these various provisions of section 3480 of the Political Code when the bonds were issued and sold, it is petitioner's claim that the provisions of the statute in reference to the imposition of penalties conferred no vested interest or contractual right, and in so far as the amendments affect the remedy formerly provided by section 3480, the reduction in the amount of the penalties was made by a law validly passed; that the imposition or collection of penalties for delinquency is not a part of the obligation between the district and the bondholders even though the penalties become part of the bond fund, and the amendments result in no impairment within the meaning of the constitutional provisions relied on. Upon this subject we are cited to a great number of authorities. There are unquestionably many decisions to the effect that a statute existing at the time of the issuance of bonds, which statute provides for the security of the bonds or the manner of enforcement thereof, are part of the contract with the bondholders, and a statute cannot be validly passed which either impairs a substantial right thereunder or materially alters the remedy for enforcing the security of the bonds. County of San Diego v. Childs, 217 Cal. 109, 17 P.(2d) 734; Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962. No such situation, however, is here presented. In the instant case the obligation to the bondholders is the payment of the amount due, the security of the assessment until payment and the right to collect payment by the sale of the land. These obligations are in no manner affected or impaired by the amendments. Nowhere is it provided that the bondholders shall share or be benefited in any manner by the collection of the penalties, nor does the fact that the penalties are to be paid into the

bond fund show a legislative intent to have the bondholders benefited thereby.

[1-9] The penalties going into the fund would ultimately inure to the benefit of the landowners, for it would lessen the amount of a call. Under these circumstances there is no impairment of the contract between the district and the bondholders. The bondholders have lost nothing, nor have any of their rights been impaired. The imposition of the original severe penalties was simply an incident of the power of sovereignty. In the exercise of the taxing power the imposition of a penalty is not for the purpose of enhancing the state, but for punishing the taxpayer for nonpayment (24 Cal. Jur. p. 257), and the threat of such penalty is used as a means of inducing property owners to promptly pay the amount due. 44 Cor. Jur. p. 816. A penalty is not part of a tax proper and is therefore subject to legislative control. What the Legislature has imposed in this connection, it may modify. Cooley on Taxation (4th Ed.) § 1821. Generally the right of a bondholder extends only to the amount of the principal and interest and does not extend to proceeds realized from penalties. It is a recognized rule that where persons contract in reference to a subject concerning which the Legislature has in its discretion appended some incident, such as an additional right, they do so in contemplation of the right to repeal that act. The section of the Constitution whereby contracts are secured against impairment is aimed at the different covenants between the parties, and not a purely statutory incident in reference to such agreement. Willcox v. Edwards, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392; Moss v. Smith, 171 Cal. 777, 155 P. 90. The right, therefore, to impose penalties or other coercive measures in order to induce prompt payment of taxes or assessments being an incident of sovereignty, the right reserved to the state to change the measures must be read into every contract which is dependent upon the payment of the tax or assessment. Citizens' Savings Bank of Owensboro v. Owensboro, 173 U. S. 636, 19 S. Ct. 530, 571, 43 L. Ed. 840. But even if we were to conclude that the provisions of section 3480 as it existed in 1927, which provided for the severe penalties above mentioned, created a remedy which became a part of the obligation of the bonds, there is another independent ground upon which the change of the penalty may be sustained. The present statute regulating penalties was enacted pursuant to the police power of this state, and therefore such enactment fixing the penalties is paramount to any contractual rights. A fundamental part of this power is the right of the state in times of financial stress or grave or unusual economic conditions to protect the general welfare. The police power which preserves such welfare may be called into being to protect individuals from the payment of excessive penalties or assessments in an economic emergency. If the bondholders had any rights in the penalties they were divested of such rights by the amendments. This question has recently received extensive consideration by the different courts. Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481; Ætna Insurance Company v. Chicago Great Western R. Co., 190 Iowa, 487, 180 N. W. 649, 16 A. L. R. 249; Des Moines Joint Stock Land Bank, etc., v. Nordholm (Iowa) 253 N. W. 701; State ex rel. Lichtscheidl v. Moeller, 189 Minn. 412, 249 N. W. 330; Klinke v. Samuels, 264 N. Y. 144, 190 N. E. 324. We do not deem a general discussion of these cases to be necessary. Suffice it to say that the gist of the opinions we have referred to is to the effect that laws enacted for the general public welfare are paramount to contractual rights, and the interdiction of statutes impairing the obligations of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the public welfare even though contracts previously entered into between individuals may thereby be affected. 12 Cor. Jur. 992.

[10-13] Parties entering into contracts may not estop the legislature from enacting laws in the bona fide exercise of the police power and do not, by reason of the contracts clause of the Constitution, enjoy any immunity from such legislation. 12 Cor. Jur. 991–992. While this power is subject to limitations in certain cases there is a wide discretion on the part of the Legislature in determining what is and what is not necessary, a discretion with which courts ordinarily will not interfere. An individual may not justly complain of a reasonable legislative invasion of his usual rights for the purpose of averting an immediate danger which threatens the welfare of the community. Unreasonable insistence of contractual rights may work serious injury to the economic welfare of all the people. The vital interests of the community under conditions as they exist at present call for legislation by which the investments of a great number of people may be conserved and ruin averted. From what we have said it follows that the Legislature in reducing the penalties did not interfere with or impair the

rights of the bondholders within the meaning of the constitutional provisions invoked, nor are the amendments objectionable, as claimed, for the reason that they do not expressly state that they are temporary in nature. The failure of the Legislature to limit their operation to a definite term does not render the laws invalid. People by Van Schaick v. Title & Mortgage Guarantee Co., 264 N. Y. 69, 190 N. E. 153. Moreover, as shown, the bondholders are not concerned with the change.

[14] A further objection is raised that the legislation involved denies the bondholders equal protection of the law (Const. U. S. Amend. 14). There is no merit in this contention. Home Building & Loan Association v. Blaisdell, supra.

[15] Petitioner is entitled to the relief sought.

Let a peremptory writ issue in accordance with the prayer of the complaint.

We concur: CASHIN, J.; KNIGHT, J.

1

ISLAIS COMPANY, Ltd. (a Corporation), Petitioner, v. Duncan MATHESON, Treasurer of City and County of San Francisco, etc., Respondent. *

Civ. 9578.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1934.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

TYLER, Presiding Justice.

Upon authority of decision in Islais Company, Ltd., a corporation, v. Duncan Matheson (Cal. App.) 35 P.(2d) 1051, this day decided, the writ of mandate prayed for in the petition is granted.

We concur: CASHIN, J.; KNIGHT, J.

*For subsequent opinion see 45 P.2d 330.

2

ISLAIS COMPANY, Ltd. (a Corporation), Petitioner, v. Duncan MATHESON, Treasurer of City and County of San Francisco, etc., Respondent. †

Civ. 9579.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1934.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ, on behalf of respondent.

TYLER, Presiding Justice.

Upon authority of decision in Islais Company, Ltd., a Corporation, v. Duncan Matheson (Cal. App.) 35 P.(2d) 1051, this day decided, the writ of mandate prayed for in the petition is granted.

We concur: CASHIN, J.; KNIGHT, J.

3

ISLAIS COMPANY, Ltd. (a Corporation), Petitioner, v. Duncan MATHESON, Treasurer of City and County of San Francisco, etc., Respondent. †

Civ. 9580.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1934.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ, on behalf of respondent.

TYLER, Presiding Justice.

Upon authority of decision in Islais Company, Ltd., a Corporation, v. Duncan Mathe-

†For subsequent opinion see 45 P.2d 332.

son (Cal. App.) 35 P.(2d) 1051, this day decided, the writ of mandate prayed for in the petition is granted.

We concur: CASHIN, J.; KNIGHT, J.

1

ISLAIS COMPANY, Ltd. (a Corporation), Petitioner, v. Duncan MATHESON, Treasurer of City and County of San Francisco, etc., Respondent.*

Civ. 9587.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1934.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

TYLER, Presiding Justice.

Upon authority of decision in Islais Company, Ltd., a Corporation, v. Duncan Matheson (Cal. App.) 35 P.(2d) 1051, this day decided, the writ of mandate prayed for in the petition is granted.

We concur: CASHIN, J.; KNIGHT, J.

2

ISLAIS COMPANY, Ltd. (a Corporation), Petitioner, v. Duncan MATHESON, Treasurer of City and County of San Francisco, etc., Respondent.†

Civ. 9588.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1934.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

TYLER, Presiding Justice.

Upon authority of decision in Islais Company, Ltd., a Corporation, v. Duncan Matheson (Cal. App.) 35 P.(2d) 1051, this day decided, the writ of mandate prayed for in the petition is granted.

We concur: CASHIN, J.; KNIGHT, J.

3

ISLAIS COMPANY, Ltd. (a Corporation), Petitioner, v. Duncan MATHESON, Treasurer of City and County of San Francisco, etc., Respondent.†

Civ. 9589.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1934.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ on behalf of respondent.

TYLER, Presiding Justice.

Upon authority of decision in Islais Company, Ltd., a Corporation, v. Duncan Matheson (Cal. App.) 35 P.(2d) 1051, this day decided, the writ of mandate prayed for in the petition is granted.

We concur: CASHIN, J.; KNIGHT, J.

*For subsequent opinion see 45 P.2d 332.

†For subsequent opinion see 45 P.2d 333.

PEOPLE v. AVENELL.

Cr. 1820.

District Court of Appeal, First District, Division 2, California.

Sept. 21, 1934.

Hearing Denied by Supreme Court Oct. 18, 1934.

1. Prostitution ⇐4

Evidence sustained conviction of pandering.

2. Criminal law ⇐1035(3), 1129(1)

Where prosecutrix in pandering prosecution testified on direct examination that accused had told her that she was to work in house of prostitution and on cross-examination prosecutrix was referred to her testimony before grand jury where she had said that she did not know character of place before she entered it, whereupon prosecutrix was asked if she had not changed her testimony because urged to do so by police officers, to which she replied in negative, trial judge's statement, "I don't know that she is changing her testimony," *held* not prejudicial where accused did not assign error and did not request instruction.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Lawrence Avenell was convicted of pandering, and he appeals.

Affirmed.

Frank Curran, of Fresno, and L. B. Fowler, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant was tried on an indictment charging the crime of pandering. The jury returned a verdict finding him guilty, and he has appealed from the judgment on the verdict and from the order denying his motion for a new trial.

[1] The principal point raised is that the evidence is insufficient. The prosecuting witness testified that the defendant sent her a letter addressed to her home in Fresno telling her that if she would come to San Francisco he could find employment for her. She arrived in San Francisco on a Sunday afternoon, was met by the defendant and one Brown, and was taken that evening to a house of prostitution where she remained until the place was raided by the police. There is some conflict in the testimony as to whether the defendant urged the prosecutrix to enter the house or merely suggested it. There is no conflict in the evidence that he procured a place for her in the house of prostitution within the meaning of the statute and that he knowingly led her to enter and to follow the trade of a prostitute.

[2] Criticism is made of a remark of the trial judge in ruling on a question tending to impeach the prosecuting witness. She had testified on direct examination that the defendant had told her that the work secured for her was in a house of prostitution. On cross-examination she was referred to her testimony before the grand jury where she had said that she did not know the character of the place before she entered it. She was then asked if she had not changed her testimony because urged to do so by various police officers. She answered, "No," and the trial judge stated: "I don't know that she is changing her testimony, counsel." The remark could well have been omitted, but the defendant did not assign error and did not request an instruction.

We find no prejudicial error in the record.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

140 Cal.App. 669

ROBINSON v. ARTHUR R. LINDBURG, Inc.

Civ. 1251.

District Court of Appeal, Fourth District, California.

Sept. 14, 1934.

Rehearing Denied Oct. 11, 1934.

Hearing Denied by Supreme Court Nov. 16, 1934.

1. Sales ⇐54

Where parties to contract for sale of half interest in business of reasonable market value of $40,000 interpreted term "reasonable market value" as synonymous with "net assets" or "net worth" during 13 months of operations thereunder, their interpretation would prevail until contrary was established.

2. Fraud ⇐59(2)

Where party, induced by fraud to enter into contract, stands on contract and seeks damages for fraud, measure of damages is difference between actual value of property received and value it would have had had fraudulent representations been true.

3. Fraud ⇐58(1)

In determining damages recoverable by party induced by fraud to enter contract for purchase of property, price paid is some evidence of value property would have had if representations had been true.

4. Judgment ⇐255

Where seller of one-half interest in business represented that such interest was worth $20,000 and buyer had paid $7,000 out of $10,000 to be paid in cash and interest was admittedly worth $15,000, judgment for buyer of $18,000 for damages resulting from fraud of seller could not be sustained.

5. Fraud ⇐59(1)

Where contract for sale of one-half interest of business provided that buyer would manage business, any loss of original investment due primarily to prevailing business conditions, or inexperience or mismanagement of buyer, could not be recovered by buyer suing seller for fraud.

6. Contracts ⇐143

All provisions of contract must be construed together.

7. Master and servant ⇐41(1)

Where contract for employment of manager at $750 per month provided that it could be terminated before 10-year period by liquidation of business to take place if value of capital decreased to certain amount, manager could not recover 10 years' salary computed at $750 per month, where liquidation was carried out in accordance with terms of contract and manager had voluntarily reduced salary to $500 a month before liquidation, and on liquidation became partner in another business at $200 per month.

8. Sales ⇐418(1)

Buyer of one-half interest in business could not recover for loss of his share of present assets of business, where, after liquidation fairly conducted in accordance with contract of sale, liabilities exceeded book value of remaining assets.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Ralph Robinson against Arthur R. Lindburg, Incorporated. Judgment for plaintiff, and defendant appeals.

Reversed.

W. H. Stammer, of Fresno, for appellant.

Theodore M. Stuart, of San Francisco, for respondent.

MARKS, Justice.

This action was instituted to recover $98,000 from the defendant. The complaint contains two causes of action: The first, for damages suffered because of the breach of a written contract; and, the second, for damages resulting from fraud and deceit in procuring plaintiff to enter into this contract. The jury returned a verdict in the sum of $18,000, and this appeal is taken from the judgment entered upon it.

The plaintiff and Arthur Lindburg were college mates, fraternity brothers, and friends of long standing. Both graduated in law from the same university, though Lindburg never engaged in its practice, engaging instead in the automobile business in San Francisco. Plaintiff practiced law in that city until April, 1930.

In 1927, Lindburg secured the agency of the Studebaker automobile for Fresno and Tulare counties. He opened a sales room and repair shop in the city of Fresno with branches in Visalia and Coalinga. For the purpose of operating the business he caused to be organized, through the plaintiff acting as his attorney, a California corporation named "Arthur R. Lindburg, Inc." All of its common stock, except qualifying shares of its directors, was owned by Lindburg. The plaintiff Lindburg, Richard K. Morey, and others became owners of its preferred stock. The plaintiff was the attorney for the corporation, and, except for a time following April 5, 1930, was its secretary and one of its directors until June 6, 1931. For the convenient handling of the business in Coalinga a separate California corporation, called "Coalinga Motors, Ltd.," was organized. The plaintiff acted as attorney in incorporating this company. This company was a subsidiary of Arthur R. Lindburg, Inc. Under order of the commissioner of corporations its issued shares of capital stock, excepting three qualifying shares of its directors, were placed in escrow with plaintiff where they have remained ever since. Up to January 1, 1930, Arthur R. Lindburg, Inc., had been a financially successful venture. It had paid dividends on its preferred and common stock and had accumulated undivided profits. The parties are in sharp disagreement on the amount of these profits.

In December, 1929, Lindburg learned of an automobile agency in St. Louis, Mo., which was for sale. He sought the advice of plaintiff, made an investigation of it and decided to purchase it, provided he could sell approx-

imately a one-half interest in the defendant corporation. He opened negotiations with Morey with the object of selling this interest to him. These negotiations progressed to a point where it seemed probable the sale would be made. With the formal consent of the directors, evidenced by a resolution passed in a directors' meeting held late in January, 1930, the minutes of which are attested by plaintiff as secretary, Lindburg withdrew $75,000 from the defendant corporation and embarked upon the St. Louis venture. This money was obtained by the defendant corporation negotiating something over $83,000 face value of automobile sales contracts to a finance company for a little more than $78,000.

Lindburg organized a Missouri corporation called "Arthur R. Lindburg, Inc.," for the purpose of conducting the business which he had purchased in St. Louis. The plaintiff again acted as attorney for Lindburg in incorporating this company.

In the negotiations for the sale of an interest in the defendant corporation to Morey, a financial statement taken from its books under date of December 31, 1929, was used as a basis of determining its net worth. It soon developed that the books of the defendant corporation did not correctly reflect its financial condition. A firm of auditors was employed and a report was made in the latter part of February, 1930, which pointed out many inaccuracies in the books, but which did not purport to be a complete audit. A copy of this report was sent to Morey and another was delivered to plaintiff who was acting for the defendant corporation and Lindburg in the transaction. It was read by plaintiff and forwarded to Lindburg in St. Louis. A contract of sale to Morey was prepared by plaintiff and sent to Morey by mail but he did not execute it. The plaintiff then conferred with Morey and learned that he would neither execute the contract nor make the purchase. The evidence is conflicting as to the reasons Morey gave plaintiff for withdrawing from the transaction. Morey acted as manager of the defendant corporation after Lindburg went to St. Louis.

Plaintiff went to St. Louis and conferred with Lindburg about the sale of an interest in the California business to Morey. Then for the first time Lindburg proposed a sale of an interest in part of the California business to plaintiff who showed interest in the transaction. The two returned to California together and Lindburg energetically pushed the negotiations for a sale to Morey which resulted in the Tulare county portion of the business being sold to him for $34,000. This was paid, $24,000 in cash, and Lindburg's note to the defendant corporation in the sum of $10,000, which was given for the preferred stock owned by Morey and transferred to Lindburg. Plaintiff attended to the legal details of the sale to Morey for the defendant corporation and Lindburg.

During this same time negotiations were being carried on between Robinson and Lindburg for the sale of a half interest in the remaining part of the business of the California corporation to Robinson. Robinson had little ready money and could not pay for a one-half interest in the net assets of the business as they then appeared to exist. Lindburg offered to "squeeze down" the value of the net worth of the corporation to the sum of $40,000 by withdrawals of capital and to sell a one-half interest in the residue for $20,000. The negotiations resulted in the execution of a contract, prepared by plaintiff, which provided for the sale of a one-half interest in the business of the California corporation to the plaintiff.

This contract, executed on April 5, 1930, forms the basis of the instant action and its terms require careful consideration. It was agreed that the assets of the corporation were "of the reasonable market value of not less than Forty Thousand and no/100 ($40,000.00) Dollars over and above said obligations and liabilities, aside from the good will thereof." The corporation agreed to sell, and plaintiff agreed to buy, "a one-half interest in its Fresno Branch automobile business and the personal property, good will and other assets therein contained"; for $20,000, $4,000 to be paid in cash on or before April 12, 1930, and $6,000 to be paid as soon as plaintiff could sell his San Francisco residence and liquidate other investments, but in any event, within one year. The remaining $10,000 was to be paid out of the profits of the business. By mutual agreement the time for making the cash payments was later extended. The contract provided: "Second party (Robinson) agrees to accept employment as Manager of the new business enterprise at a monthly remuneration of Seven Hundred Fifty and 00/100 ($750.00) Dollars, and agrees to conduct the business in the manner heretofore conducted by First Party as near as possible, and said First Party hereby consents to the employment of Second Party as Manager for the remuneration as hereinabove set forth, and agrees to offer suggestions and generally assist said Second Party in the problems to be confronted by him while carrying on his duties as such Manager." It was agreed that

the parties might organize a new corporation or use "Coalinga Motors, Ltd.," for the purpose of conducting the new business; that the books should be kept in accordance with "the Studebaker Accounting System" and that "used cars shall always be inventoried at the values fixed by what is known in the trade as the 'Blue Book.'" The defendant corporation was given "the prevailing voice" in the management of the business until Robinson's one-half interest should be paid for in full. The contract also provided that:

"This agreement shall remain in full force and effect for a period of ten years from date unless modified and changed by the mutual consent of the parties hereto. In the event the capital of the business, which is fixed at this time by First Party as being of the value of $40,000.00 should, due to mismanagement or other causes shrink in value to an amount equal to twice the value of Second Party's investment at the time (if for example Second Party's investment should amount to $10,000.00 and the value of the business should be reduced to a total of $20,000.00 from $40,000.00), then the entire business should be sold to the highest bidder or liquidated in the manner best for all parties interested, and the moneys received therefrom distributed in accordance with the financial interests of the parties to this agreement at that time.

"It is agreed by the parties to this instrument that the value of the assets as shown by the books of account of party of the First Part for the period between December 31, 1929, and April 1, 1930, cannot be definitely determined due to the fact that the said books of account have been inadequately kept; and it is further agreed that after the proper entries and adjustments have been set up on said books, taking into consideration all business operations up to and including the 31st day of March, 1930, that the value of the First Party's business shall be determined. If such value is not of the reasonable value of $40,000.00, then the price which said Second Party shall pay for his said one-half interest shall be adjusted in accordance with such value, and in the event the value of said business shall be reasonably worth more than $40,000.00, then the price which said Second Party shall pay for his said one-half interest shall be increased according to the proportion to such increased valuation. Values as in this instrument expressed shall not include good will. In the event the values do not amount to $40,000.00, First Party has the privilege of adding to said assets sufficient additional amount to make the reasonable value of the assets consisting of said business in the amount of $40,000.00."

The defendant corporation agreed to provide sufficient cash and other liquid assets with which to properly operate the business, in the form of a loan to bear interest at the rate of 8 per cent. The contract also contains the following: "The price which Second Party shall pay as in Paragraph Twelve provided for his one-half interest shall be to the amount of eighty per cent thereof only and the remaining twenty per cent of said one-half interest shall be paid for in accordance with the book values as shown on April 30, 1931."

[1] A study of the contract leaves the distinct impression that it provided that the business in which an interest was sold should have had a "reasonable market value" of not less than $40,000 exclusive of good will, and that a one-half interest in the business and its properties as they existed on April 5, 1930, was to be sold. However, a very different construction seems to have been placed upon it by the parties. "Reasonable market value," exclusive of good will, seems to have been considered by them as synonymous with "net assets" or "net worth," exclusive of good will. They also seem to have considered that the contract contemplated the sale to plaintiff of only "net assets" or those having a "net worth" of $40,000 and as having given the defendant the right to withdraw assets exceeding that amount. This theory was very apparent during the trial in the court below. The plaintiff and Lindburg were men of education and considerable experience who should have known what they intended to express in their wording of the contract. Having put their own interpretation on these provisions of this contract by their conduct during the thirteen months of operations, it must be accepted as their true intention as to the meaning of the language they used in it when it was executed. This construction must prevail until and unless future evidence shows our deductions as to their interpretations to be wrong. Skousen v. Herz, 135 Cal. App. 116, 26 P.(2d) 498.

Before the execution of the contract, but after plaintiff and Lindburg had progressed sufficiently with their negotiations so that their ultimate agreement was probable, Lindburg, with the knowledge of plaintiff, conducted a used car sale and withdrew $15,000 from the business of the California corporation. After April 5, 1930, Lindburg returned to St. Louis and plaintiff assumed the management of the new business.

The books of the defendant corporation not having been properly kept, plaintiff, after advising with Lindburg, employed C. L. Austin as bookkeeper. Austin was instructed to straighten out the records and correctly determine the assets and liabilities of the old company and those to be assigned to the new concern. No statement entirely satisfactory to both parties was ever prepared. No physical division of the assets and liabilities of the old company was ever made so that the particular property having a net worth of $40,000, over liabilities, could be definitely identified as property of the new concern and the other assets and liabilities recognized as those of the old company. In September, 1930, Austin produced a statement which purported to show assets and liabilities as of March 31, 1930. The headings on each sheet, showing assets and liabilities, are the same and give some idea of the method attempted in the segregation. They are as follows:

ARTHUR R. LINDBURG, Inc.,

Assets (Liabilities) March 31, 1930

Ledger Balance March 31, 1930	Adjustments		New Company	Old Company
	Debit	Credit		

Following these headings are columns of figures opposite most general descriptions of the items they purport to represent. It is true that a number of the items could be identified and some few were identified in the evidence. No attempt was made as to others. An illustration of the method of accounting used, which undoubtedly led to confusion, appears on the sheet setting forth the liabilities, and following the words "Notes Company Account," each company, the old and the new, is charged with $60,152.67. To complete the confusion, Robinson, as manager of the new company, took possession of all of the assets including cash on hand in the sum of $20,677.93, and proceeded to pay the liabilities as they became due. Seventy-three cars that had been sold prior to April 1, 1930, upon conditional sales contracts which had been negotiated to a finance company were repossessed and the finance company repaid. The same was true of sixty cars sold after Robinson assumed control. These repayments were made out of the general assets or incomes of both concerns. The parties treated the transactions as though the new company owned all of the assets and owed all of the liabilities, with the defendant corporation having the right to withdraw cash to reduce the net assets or net worth to the sum of $40,000.

Robinson paid $7,000, on account of the $10,000 cash payment, on the purchase price of his interest. The business was a losing venture from the time he took control so nothing was ever paid on the $10,000 to be paid out of earnings.

Lindburg returned from St. Louis in September, 1930. At that time the California concern had on hand a large stock of used cars which neither Lindburg nor Robinson desired to carry into the winter months. They decided to hold another used car sale. This produced between twelve and fifteen thousand dollars in cash. At that time Lindburg maintained that the defendant corporation was entitled to withdraw something over $18,000 from the new business to reduce the net worth of its assets as of April 5, 1930, to $40,000. He demanded payment of $15,000. Robinson objected to the withdrawal of this amount upon the ground that the money was needed in the new business. Lindburg prevailed and received a check for $15,000, payable to the defendant corporation, which was subsequently cashed. Robinson signed this check on the bank account of the new business.

Up to that time the California business had been conducted under the name of "Arthur R. Lindburg, Inc." Robinson desired that his name appear in the business and it was agreed between him and Lindburg that the name of "Coalinga Motors, Ltd.," be changed to "Robinson-Lindburg, Ltd." This was done with Robinson acting as attorney and the California business was thereafter conducted under that name. No change in the issued stock seems to have been made. It was held by the plaintiff in escrow as before. Lindburg made a personal guarantee of $10,000 to be loaned to the California business by a Fresno bank. It does not appear that any loan was made. No deposit of that amount appears in the bank statements of the California business for September, October, November, or December, 1930.

Lindburg went back to St. Louis where he remained until the last of December, 1930. He returned to Fresno about December 29th. He maintained that the Fresno business owed defendant corporation over $6,000 in order to reduce its net worth at the time of the sale to $40,000. He demanded and received a

check for the amount claimed. This was signed by Robinson, who, however, objected to the withdrawal of the money from the business and later stopped payment on it. The funds of the business were reduced and Lindburg gave another personal guaranty to the Fresno bank for a $10,000 loan which was made to Robinson-Lindburg, Ltd. He returned to St. Louis about the middle of January, 1931.

The financial affairs of the business rapidly became worse. Its sale or liquidation was seriously discussed in correspondence between Lindburg and Robinson. Lindburg desired to liquidate if a sale could not be made, because of the heavy losses the business had sustained, and Robinson wished to continue. Lindburg came to Fresno during the latter part of May, 1931, and decided that the business should be liquidated. In the minute book of Robinson-Lindburg, Ltd., the minutes of a meeting held on June 6, 1931, contains the following resolution: "That this corporation proceed to liquidate its assets and apply the same against its obligations; that Mr. Arthur R. Lindburg be given full power and authority of the company in said liquidation and to have charge thereof on behalf of this corporation, and he is hereby directed to liquidate the assets of the corporation and to apply the same against the indebtedness of this corporation. And be it further resolved that any and all banks having or to have accounts of this corporation shall be instructed to honor the signature of Arthur R. Lindburg alone against said account, and to cancel the prior authority of Ralph Robinson and C. L. Austin to draw against the said accounts or to transact business in relation thereto." Robinson denied participation in this meeting and claimed to have had no notice of it. It does not appear that it was a regular meeting of the board of directors nor is there any evidence that it was a regularly called special meeting. Robinson and Austin signed written instructions to the bank which was depository for Robinson-Lindburg, Ltd., directing it to honor company checks signed by Lindburg, and no others.

Lindburg took possession of the assets of the corporation and proceeded to sell them wherever a market could be found. The sum of $46,166.24, including an advancement of $4,928.99 by Lindburg to pay pressing claims, was realized and all or probably the greater part was applied on bills. There remained some unpaid obligations and some assets of undetermined value. The evidence as to what became of some of the assets, the value of assets remaining and the obligations unpaid is far from being either clear or satisfactory. A study of the record leaves the impression that the amount of the unpaid liabilities considerably exceeded the value of the remaining assets.

In his first cause of action plaintiff alleged eleven breaches of contract upon which he sought to predicate his right to recover damages. In an amendment to his complaint to conform to the proof, filed at the close of the evidence, plaintiff alleged that defendant "delivered to plaintiff in said business assets and property worth not to exceed $30,000.00" instead of the value of $40,000 as set forth in the contract. Plaintiff alleged his damages resulting from the breach of contract as follows: (1) The loss of the $7,000 paid by him; (2) the loss of $81,000 wages to be earned in the remaining nine years of the ten-year item of the contract; (3) the loss and destruction of his title and ownership "in the present assets of said corporation in the additional sum of $10,000.00."

The second cause of action is for damages resulting from the fraud and deceit of defendant in procuring plaintiff to execute the contract of purchase. The elements of damage are alleged in the identical form in which they are set forth in the first cause of action. The same amendment to conform to the proof was made to the second as to the first cause of action. This amendment was probably sufficient to be construed as an allegation of the actual value of the property received by the new business, one-half of which was to become the property of the plaintiff. There is no direct allegation as to the value the property would have had if the alleged fraudulent representations had been true. The price to be paid was alleged.

[2, 3] It is well settled that where a party, who is induced by fraud and deceit to enter into a contract, stands upon the contract and seeks to recover damages for the fraud, the correct measure of his damage is the difference between the actual value of the property received and the value it would have had had the fraudulent representations been true. Divani v. Donovan, 214 Cal. 447, 6 P.(2d) 247; Porter v. Hilton, 214 Cal. 705, 298 P. 501, 7 P.(2d) 301; Hunter v. McKenzie, 197 Cal. 176, 239 P. 1090; Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380. The price paid is some evidence of the value the property would have had if the representations made had been true. Divani v. Donovan, supra.

[4] We have searched the 836 pages of typewritten transcript, and the 687 pages of printed briefs, and can find no evidence, or refer-

ence to evidence, of the value the property would have had if the alleged fraudulent representations had been true, other than the statement in the contract of the purchase price to be paid. It is alleged by plaintiff that the total value of the property delivered was $30,000. This would fix the value of his half interest at $15,000. The maximum amount which the plaintiff could be called upon to pay would be $20,000, upon which he actually paid $7,000. The $20,000 was subject to a 20 per cent. reduction depending on "book values as shown on April 30, 1931." The only evidence in the record shows that the book value of the business was $14,681.92 on that date. If the $20,000 purchase price had been paid, the plaintiff's recovery for deceit must be limited to $5,000 as he admitted receiving property of the value of $15,000. The meaning of the 20 per cent. reduction clause in the contract, which was prepared by plaintiff, is most uncertain. If we assume that the 20 per cent., or $4,000, of the purchase price was to be scaled down in the proportion that the book value of the property had been reduced below $40,000, it would reduce his total payments to be made to a little less than $17,400. Had this sum been paid his damage under this cause of action could not be more than $2,400, he having admitted receiving $15,000. Plaintiff admitted that the business was a losing venture and made no profits. He could be required to pay only $10,000 in cash for the property and nothing more unless there were profits. He actually paid $7,000. He admits receiving property of the value of $15,000. In connection with the cause of action seeking damages for fraud and deceit, under no view of the case can the verdict and judgment for $18,000 damages be sustained by the pleadings and proof now in the record.

As we have seen, the allegations of damage are confined to three separate items: The loss of the $7,000 paid by plaintiff on the purchase price of the business; the loss of $81,000 as future salary to accrue during the balance of the ten-year term of the contract; the loss of $10,000, the alleged value of plaintiff's interest in the present assets of Robinson-Lindburg, Ltd. This last allegation must be construed as having the effect of alleging that the value of the total "present assets" of Robinson-Lindburg, Ltd., was $20,000 as plaintiff was to acquire only a one-half interest in them.

In approaching the question of the correctness of the judgment on the first cause of action it is apparent that the answer to one question must be determinative of this appeal, namely: Was the defendant authorized by the contract of April 5, 1930, to liquidate the business of Robinson-Lindburg, Ltd., under the evidence now in the record? There are many other questions argued in the briefs which we purposely refrain from discussing as it would be extremely difficult to do so without commenting on the weight and sufficiency of evidence that of necessity must be produced at another trial.

A paragraph of the contract which we have already quoted provides that if the capital of the business should shrink to an amount equal to twice the value of Robinson's investment, the entire business should be sold to the highest bidder or liquidated. It is clear from this language that since Robinson had $7,000 invested and if the capital had shrunk to $14,000, the contract provided for either the sale of the business as a whole or its liquidation. The only evidence which we can find in the record, or to which we have been cited in the briefs, fixes the net worth of the assets on May 31, 1931, at the sum of $12,449.99. Some effort was made to find a purchaser for the business before Lindburg proceeded to liquidate.

[5] Of course, if the losses in the business during the thirteen months in which Robinson managed it were due primarily to prevailing business conditions, or his inexperience, or mismanagement, he could not recover his original investment. A causal connection between the alleged breaches of the contract and the business losses must be proved. Proof of this causal connection is lacking in the record. At another trial it should be thoroughly developed whether or not the heavy withdrawals of cash from the business were justified under the terms of the contract. The evidence in the present record supports the conclusion that they were regularly made. However, there were many questions on this subject suggested by the evidence which remain unanswered.

[6, 7] The contention that the $81,000 future salary could be recovered as damages for breach of the contract is based on the assumption that the business was to be conducted and plaintiff was to be employed at a salary of $750 per month for the full period of ten years. The contract did provide that it should remain in full force and effect for ten years. It also contained the liquidation clause which we have already considered and quoted. That all provisions of a contract must be construed together is too elemental to need citation of authorities. Construing these two paragraphs of the contract together and paraphrasing them we have the follow-

ing: The agreement shall remain in full force and effect for a period of ten years unless modified by mutual consent and unless the business is liquidated because of the shrinkage of the value of its capital to an amount equal to twice Robinson's investment. If the contract could be construed as providing for the employment of Robinson at a fixed salary it could not be construed as an agreement to pay this salary after liquidation if the liquidation was authorized by and carried out in accordance with the terms of the contract. As we have seen, the evidence now before us supports the conclusion that the defendant corporation was authorized to liquidate the business. If the liquidation was not fairly done the amount of loss is not in evidence. In connection with the allegations of loss of future salary it should be observed that Robinson, as manager of the business, twice voluntarily reduced his salary so that he was receiving $500 a month at the time of liquidation instead of the $750 per month specified in the agreement. It should also be remembered that Robinson testified that he became a partner in another new business in Fresno on June 15, 1931; that he had a drawing account of $200 per month from this business and that it made a profit from the day it commenced operations. The amount of these profits, or the share of them to which Robinson has been entitled, does not appear from the record.

[8] The remaining element of damage claimed by Robinson was the loss of his share of the "present assets" of Robinson-Lindburg, Ltd. We might assume that the words "present assets" were intended to refer to the assets at the time of liquidation. If they refer to the time of the filing of the complaint, then they might be construed to mean that there were $20,000 assets of Robinson-Lindburg, Ltd., remaining after liquidation. Of course, Robinson would be entitled to his share of such assets if any remained. He should be entitled to insist that the liquidation be fairly and equitably conducted. The only evidence in the record is to the effect that after the liquidation the liabilities exceeded the book value of the remaining assets, which had a very questionable actual value. At another trial the question of the fairness of the liquidation and the amount of the remaining assets and liabilities, if any, should be thoroughly developed so that justice might be done between the parties.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

M. FRIEDMAN & CO., Limited, v. STERLING FURNITURE CO.

Civ. 9420.

District Court of Appeal, First District, Division 2, California.

Sept. 17, 1934.

Hearing Denied by Supreme Court Nov. 16, 1934.

1. Landlord and tenant ⇐75(1)

In absence of covenant in lease on subject of reletting, and in absence of statute, tenant had right to relet, regardless of existence of covenant against assignment.

2. Landlord and tenant ⇐194(1)

Defendant which covenanted to pay half of rental paid by plaintiff as lessee from September 1, 1929, to January 1, 1930, providing plaintiff could not relet or obtain cancellation of lease prior to September 1, 1929, was released from all obligations under covenant when plaintiff on July 11, 1929, put it out of its power to relet by surrendering premises to owner under agreement that lease should terminate February 15, 1930.

3. Pleading ⇐35

Where plaintiff pleaded covenant in hæc verba, and in same paragraph pleaded it according to its legal effect, but placed false construction on terms, construction was treated as surplusage, even though paragraph was not denied.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by M. Friedman & Co., Limited, against the Sterling Furniture Company. Judgment for plaintiff, and defendant appeals.

Reversed, with direction to enter judgment for defendant.

Pillsbury, Madison & Sutro, of San Francisco (Chas. A. Ruggles and Leland B. Groezinger, both of San Francisco, of counsel), for appellant.

Byrne, Lamson & Jordan, of San Francisco, for respondent.

STURTEVANT, Justice.

In an action brought to recover moneys alleged to be due under the terms of a written instrument, the trial court made findings in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed.

The defendant makes several points; the substance of each one being that under the facts it is not liable in any sum whatever.

That claim is based on the following story: For many years M. Friedman & Co. conducted a retail furniture business at 259–273 Post street in San Francisco. The building was leased from Hobart Estate Company. The lease was dated April 10, 1921, and provided a term of twelve years expiring April 9, 1933. It contained no limitation as to the business to be conducted by the lessee. It contained a provision limiting the right to assign without the lessor's consent, but it did not contain a provision against subletting. In the early part of 1929 M. Friedman & Co. decided to retire. After some negotiations, on April 3, 1929, it entered into a contract with the Sterling Furniture Company under the terms of which M. Friedman & Co., as the seller, agreed to sell its merchandise then on hand, and the Sterling Furniture Company agreed to buy the same, under the terms provided in a written contract executed by the parties on that date. The buyer did not buy the lease. At the time the contract of purchase was entered into, the lease had four years to run, and the rental reserved for those years was specified at $2,721.59 per month. Among other provisions contained in the contract between the seller and the buyer was the following:

"Refund of Rental. In the event that the Seller shall not succeed in re-letting or releasing the Post street premises, nor in securing the consent of the owner thereof to a cancellation and surrender of its existing lease on said premises, prior to September 1st, 1929, the Buyer further agrees to refund to the Seller one-half of the net rental paid by the Seller for said premises each month for the period commencing September 1st, 1929, and ending January 1st, 1930, not exceeding in all, however, the sum of Six Thousand ($6,000) Dollars."

Without consulting the defendant, and without first obtaining any authority from it so to do, on the 11th day of July, 1929, M. Friedman & Co. entered into a written contract with the Hobart Estate Company, under the terms of which M. Friedman & Co. surrendered to the owner the premises and every part thereof, and the owner undertook to entirely reconstruct the interior of the building for the use of "Ransohoffs," and at the same time the owner entered into a lease with "Ransohoffs" under the terms of which the new lessee would take possession January 1, 1930, and would commence paying rent on February 15, 1930. In said agreement a provision was inserted that the lease dated April 10, 1921, should terminate February 15, 1930, and that the sums accruing under the lease dated April 10, 1921, should be paid as stated in said lease down to February 15, 1930.

The plaintiff alleged, and the trial court found, that the plaintiff paid "* * * between September 1, 1929, and January 1, 1930, to Hobart Estate Company the sum of Ten thousand eight hundred eighty-six and 36/100 Dollars ($10,886.36.)." It is the theory of the plaintiff that this defendant is liable to the plaintiff for one-half of that sum.

[1, 2] In the "Refund of Rental" covenant there was the clear condition that this defendant would pay if the plaintiff did not succeed in unloading the burdens of its lease. There was the clear, implied agreement that the plaintiff would endeavor to unload. Moreover, by the express terms of the covenant, the plaintiff took from April 3, 1929, the date of the purchase, until September 1, 1929, within which to make its endeavors to unload the lease. Furthermore, at the time the contract to buy and sell was executed, both parties thereto undertook and orally agreed to make strenuous efforts to relet the Post street premises. Thereafter this defendant duly engaged the services of several realtors in that behalf. There is something in the record to the effect that Hobart Estate Company claimed the right to designate to whom and when the premises should be relet. That subject is clearly a false issue. In the lease from Hobart Estate Company to M. Friedman & Co., there was no covenant limiting the right to sublet. The covenant against assignments did not support the claim of Hobart Estate Company. Chapman v. Great Western Gypsum Co., 216 Cal. 420, 426, 14 P.(2d) 758, 85 A. L. R. 917. In the absence of a covenant on the subject of reletting, and in the absence of a statute on the subject, M. Friedman & Co. had the right to relet. 35 C. J. 975. In its complaint the plaintiff did not allege performance on its part, and there is no finding on the subject. However, the covenant on the subject "Refund of Rental," quoted above, clearly implies that M. Friedman & Co. would, in good faith, between April 3, 1929, and September 1, 1929, and during all that time—not during a part only of that time—attempt to relet the premises. There is neither proof nor finding that it did so. On the other hand, there is the undisputed fact that on July 11, 1929, it put it out of its power thereafter to relet to any one or at all. It follows that it may not base any claim on the conditional contract which it has wholly put it out of its power to perform. Carter v. Rhodes, 135 Cal. 46, 48, 66 P. 985; 18 C. J. 650.

Whether after the agreement of July 11, 1929, between the plaintiff and Hobart Estate Company was executed the plaintiff remained a lessee and moneys paid by the plaintiff were "rental," we need not discuss. But see Baranov v. Scudder, 177 Cal. 458, 460, 170 P. 1122. It is not necessary to determine whether the said instrument dated July 11, 1929, constituted a cancellation of the lease to M. Friedman & Co. nor whether the premises were on the same date relet. Nor is it necessary to determine whether said instrument purported to operate, without defendant's consent, to change a contract of indemnity. It is sufficient to hold that by its terms the plaintiff put it out of its power to perform, and therefore may not demand performance by the defendant.

[3] The plaintiff pleaded the "Refund of Rental" covenant in hæc verba. In the same paragraph it pleaded it according to its legal effect, but in doing so placed a false construction on its terms. That paragraph of the complaint was not denied. The plaintiff now claims its construction so put on the instrument must control. That is not the rule. On the contrary, the construction of the party will be treated as surplusage. Love v. Sierra Nevada Lake Water & Min. Co., 32 Cal. 639, 649, 91 Am. Dec. 602.

The judgment is reversed, and the trial court is directed to enter judgment for the defendant on the findings as they stand.

We concur: NOURSE, P. J.; SPENCE, J.

140 Cal.App. 575

RABBITT v. UNION INDEMNITY CO. et al.

Civ. 8554.

District Court of Appeal, Second District, Division 2, California.

Sept. 6, 1934.

1. Appeal and error ⇐939

Nonappearance of findings or their waiver in record does not constitute error, as there is presumption of waiver unless contrary showing is made.

2. Appeal and error ⇐539

When parties stipulate in writing all facts and cause such stipulation to be made part of record on appeal, facts so stipulated take place of findings.

3. Appeal and error ⇐539

Where record disclosed formal findings of fact were directed by court, and judgment recited findings were filed but none appeared in record on appeal, stipulation of facts would be looked to for facts of case.

4. Corporations ⇐484(2)

Where articles of incorporation expressly empowered corporation to make contract for any lawful purpose and to exercise any power for purpose of furthering its objects, which natural person was authorized to do under law in connection with implied powers conferred by law, indemnity contract binding corporation as indemnitor for surety bonds issued upon application either of corporation or of its officers signing contract individually was not ultra vires (Civil Code, § 354, subd. 9, as amended by St. 1929, p. 1270, § 24).

5. Corporations ⇐388(2)

When questioned contract of corporation is neither malum in se nor malum prohibitum, doctrine of ultra vires is limited in scope, and contract should be enforced against corporation when it has received consideration or benefit of contract.

6. Corporations ⇐484(2)

Indemnity contract executed by construction company and some of its officers individually, which bound corporation and officers signing contract as indemnitor for surety bonds issued upon application of either construction company or officers signing contract individually, and under which construction company received surety bonds necessary for its business, was valid contract of construction company.

7. Corporations ⇐388(1)

When corporation or those to whom management of its affairs have been intrusted have determined that contract is essential to transaction of affairs of corporation, corporation cannot thereafter question effect of that determination.

8. Contracts ⇐147(1)

Contract must be so interpreted as to give effect to mutual intention of parties as it existed at time of contracting, so far as same is ascertainable or lawful (Civ. Code § 1636).

9. Contracts ⇐147(2)

For purpose of ascertaining intention of parties to contract, if otherwise doubtful, language of contract governs if it is clear and explicit, and, if in writing, intention is to be ascertained from writing alone, if possible (Civ. Code, §§ 1637–1639).

10. Contracts ⇐153, 164

Several contracts relating to same matters between same parties and made parts of substantially one transaction are to be taken together, and contract must receive such interpretation as will make it lawful and capable of being carried into effect if such can be done without violating intention of parties (Civ. Code §§ 1642, 1643).

11. Contracts ⇐143

In construction of contract, court should ascertain and declare what is in terms or in substance contained in contract, but should not insert what has been omitted or omit what has been inserted.

12. Corporations ⇐484(2)

Under indemnity contract executed by construction company and some of its officers individually and providing for issuance of surety bonds on application of any of indemnitors, who agreed that any property pledged as collateral for any one bond could be reclaimed by surety as collateral on any other bond issued under contract, surety bond issued individually to officer signing contract was within scope of agreement, and surety had right to reclaim collateral advanced by construction company on bonds issued to construction company as collateral on bonds issued individually to officer.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by M. L. Rabbitt, trustee of the estate of the Citizens' Construction Company, bankrupt, against the Union Indemnity Company and the Black & White Company and others. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Elmer P. Bromley and H. E. Lindersmith, both of Los Angeles, for appellant.

Kidd, Schell & Delamer, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Appellant, plaintiff below, as trustee in bankruptcy of Citizens' Construction Company, a corporation, brought this action against respondent Union Indemnity Company and several fictitious defendants, for recovery of possession of six Improvement Act bonds of the stipulated value of $12,076.42, plus interest at 7 per cent. from date of bond, or their value in case possession could not be had. The cause was tried and submitted on written stipulations of facts by plaintiff and the defendant indemnity company, by which all the allegations of the complaint are established as true except the right of plaintiff to possession.

[1-3] Although the record discloses that formal findings of fact were directed by the court, and the judgment recites that findings were filed, none appear in the record on appeal. Under the well-settled rule in this state, the mere nonappearance of findings or a waiver thereof in the record does not constitute error, but the presumption of waiver will be indulged in unless a contrary showing is made; and, when parties stipulate in writing all the facts, and cause such stipulation to be made part of the record on appeal, the facts so recited take the place of findings. Robinson v. El Centro Grain Co., 133 Cal. App. 567, 572, 24 P.(2d) 554. Herein, therefore, we must look to the stipulations of facts for the facts of the case.

The Citizens' Construction Company on January 23, 1928, was a corporation in which M. B. Kugler, G. Roy Smith, and Frank M. Smith were the only stockholders and constituted the entire board of directors thereof, Kugler being president, G. Roy Smith vice president, and Frank M. Smith secretary. At that time the company was the owner of three contracts between itself and the board of public works of the city of Los Angeles for the improvement of certain public highways. In connection with said public improvement jobs and the financing thereof, an application was made to respondent Union Indemnity Company for certain surety bonds, one to secure payment for labor and materials in the sum of $45,500 and one for "faithful performance" in the sum of $22,750. The first above mentioned application was dated January 23, 1928, reciting therein that the name of the applicant was M. B. Kugler, and was signed by "M. B. Kugler, applicant," "Citizens Construction Co., by M. B. Kugler, pres.," and by G. Roy Smith, without further designation or description. The second application was dated the same day, and recited that applicant's name was M. B. Kugler, being signed by "M. B. Kugler, applicant," "Citizens Construction Co., by M. B. Kugler, Pres.," and by G. Roy Smith, also without further description. At the time of presenting said applications, a general indemnity agreement was executed between the Union Indemnity Company and the following signers, viz.: "M. B. Kugler", "G. Roy Smith", "Citizens Construction Co., by M. B. Kugler, Pres., by G. Roy Smith, V. Pres., by Frank M. Smith."

Pursuant to the two applications above described, respondent issued the two surety bonds therein described, and on April 2, 1928, issued on behalf of Citizens' Construction Company its bond in the sum of $69,300 in favor of Elliott-Horne Company, guaranteeing the latter company against loss in connection with the public improvement bond in event it advanced the sum of $63,000 to the construction company on said public improvement jobs. Application for this bond was signed by "Citizens Construction Co., by Frank M. Smith, Sec'y." The sum of $63,000 was thereafter advanced by Elliott-Horne Company to the construction company under a loan agreement, the latter assigning its public improvement contract in question to Elliott-Horne Company, such assignment being signed "Citizens Construction Co., By G. Roy Smith, Vice President, By Frank M. Smith, Sec. & Treasurer." This assignment contained authority to the board of public works of the city of Los Angeles to deliver to Elliott-Horne Company the Improvement Act bonds which were the proceeds of the public improvement contract above mentioned. In accordance with such authority, the bonds which are the subject of this action were delivered to Elliott-Horne Company, which company in turn delivered them to respondent Union Indemnity Company, which now holds said bonds and claims to hold them as collateral security only for certain surety bonds issued by it to G. Roy Smith, and not as security for any obligations under the labor and material or faithful performance or Elliott-Horne surety bonds, except for repayment of costs and attorney fees incurred in connection with the investigation of claims so filed with it; and as to these it is stipulated by the parties in the written stipulation of facts that, in event the court should adjudge that appellant was entitled to possession of the bonds, were it not for the said costs and attorney fees claim, the court might decree possession of said bonds less an amount to be fixed by it to compensate the indemnity company for said costs and attorney fees, amounting to the stipulated sum of $400.

Subsequent to the execution of the general indemnity bond above described and more fully stated hereinafter, respondent issued on behalf of and at the instance of G. Roy Smith, in his individual capacity and not as an officer of the Citizens Construction Company, certain surety bonds, viz.: (1) Bond for release of attachment in the sum of $648.60 in favor of one W. S. Johnson; (2) contract surety bond in the sum of $10,000, in favor of board of public works of the city of Los Angeles, to secure payment by said G. Roy Smith of material and labor claims on a public improvement job; (3) contract surety bond in the sum of $5,400, in favor of said board for faithful performance of said contract upon said job by said G. Roy Smith; (4) a finance indemnity bond in the sum of $15,926, in favor of Municipal Bond Company, securing advancement of moneys by that company to G. Roy Smith in connection with the above-mentioned improvement job. The Citizens' Construction Company was not a party in the action in which such release of attachment bond was issued, and has no interest in any of the public improvement jobs for which the above-described surety bonds were issued to G. Roy Smith.

Thereafter respondent paid to various persons sums of money aggregating $12,873.32, and incurred attorneys' fees and expenses in the sum of $1,400, by reason of the default of G. Roy Smith in connection with the above-mentioned transactions and by reason of the issuance of said surety bonds to him personally. For repayment of this sum respondent claims the right to hold the Improvement Act bonds which are the subject of this action as collateral security under the surety bonds issued to G. Roy Smith in his individual capacity, contending that under the terms of the general indemnity agreement the Citizens' Construction Company became indemnitor for any surety bonds issued by respondent to G. Roy Smith in his individual capacity, and that the collateral pledged by said company with respondent as security for surety bonds issued to it could be held as security for surety bonds issued to G. Roy Smith, as an individual indemnitor. The determination of this contention constituted the sole issue in the lower court, and it therein was decided in favor of respondent here, and on this appeal it is the only problem presented by the record and the briefs of the parties for solution. That solution must be found in an analysis and, if necessary, a construction of the general indemnity agreement and on a determination of its questioned validity.

In its essential and relevant parts applicable to the issue before us, the general indemnity agreement, signed by M. B. Kugler, G. Roy Smith and Citizens' Construction Company, provides among other things: "Whereas, the undersigned, hereinafter referred to as indemnitors, have requested and do hereby request the Union Indemnity Company * * * to execute or procure the execution of certain bonds * * * hereafter referred to as 'such bond or bonds', as have been, and such as may hereafter be, applied

for, either directly or through any agent, attorney or other representative, by the indemnitors or any one or more of them, or by any other person, firm or corporation whose name appears on any schedule or list of approved subsidiaries, signed by any of the indemnitors and attached or to be attached hereto; and the Company, upon the express condition that this instrument be executed, and in consideration thereof, has executed or procured the execution of, and may from time to time hereafter execute or procure the execution of such bond or bonds. * * * And whereas, the indemnitors have a substantial, material and beneficial interest in the obtaining of such bond or bonds. Now, therefore, in consideration of the premises and the sum of One Dollar, * * * the indemnitors, and each of them, * * * jointly, and severally, do hereby covenant and agree: 1. To pay, or cause to be paid in advance, the premium or premiums for such bond or bonds * * * in accordance with any application for such bond or bonds or of any other agreement made, or that may be made, between the applicant and the Company or the surety or sureties executing such bond or bonds. * * * 2. To indemnify the Company from and against all liability, loss, costs, damages, attorney's fees and expenses of whatever kind or nature which the Company may sustain or incur by reason or in consequence of executing any such bond or bonds as surety or co-surety * * * and which it may sustain or incur in making any investigation on account of any such bond or bonds, in defending or prosecuting any action, suit or other proceeding which may be brought in connection therewith, either against the Principal or Company or in anywise relating thereto. * * * 3. That any property of any kind which may have been or may hereafter be pledged as collateral security on any one or more of such bonds may, at the option of the Company, be reclaimed as collateral security on any or all bonds coming within the scope of this agreement, whether theretofore or thereafter executed, * * * and for the full and complete performance in all respects of the covenants of the indemnitors under this agreement. * * *"

Appellant presents two points upon which he contends that the claim of respondent to hold the Improvement Act bonds as security on the bonds executed on behalf of G. Roy Smith, individually, is not supported. The first is that such bonds were not within the scope of the general indemnity agreement, because that agreement extended only to bonds in which the Citizens' Construction Company had a substantial and beneficial interest. The second is that it was beyond the corporate authority of the officers of the Citizens' Construction Company to execute any agreement of indemnity which would bind the corporation as indemnitor for surety bonds in which it had no interest, or, as briefly denominated, a corporate act ultra vires.

Taking up the second point first, as it directly attacks the validity of the agreement itself as a corporate act of Citizens' Construction Company, we note from the record that the articles of incorporation of that company provide that the nature of the business and objects and purposes to be transacted and carried on are as follows: "1. To carry on and conduct a general engineering and constructing business, including therein * * * constructing * * * roads, highways * * * and to extend and receive any contracts or assignment of contracts therefor. * * * 2. To enter into, make, perform and carry out contracts of any kind, for any lawful purpose, without limitation as to amount, with any person, firm, association or corporation. * * * 9. The object and powers specified in these articles shall, except when otherwise herein expressed, be in nowise limited or restricted by reference to or inference from the terms of any other clause or paragraph in these articles of incorporation, but each shall be deemed to be the separate objects and powers, and said objects and powers and each of them shall be deemed to be in furtherance of and not in limitation of the general powers conferred by the general laws of the state. 10. For the purpose of attaining and furthering any of its objects to do any and all other acts and things, and to exercise any and all other powers which a copartnership or natural person could do and exercise, and which or hereafter may be authorized by law."

The indemnity agreement executed by the Citizens' Construction Company contained this provision: "And whereas, the indemnitors have a substantial, material and beneficial interest in the obtaining of such bond or bonds."

[4] Section 354, subd. 9, of the Civil Code, as it was numbered prior to 1931 (now contained in section 341, subd. 6), provides that every corporation has power "to enter into any obligations or contracts or to do any acts incidental to the transaction of its business, or conducive to the attainment of the purposes of the corporation." In Bates v. Coro-

nado Beach Co., 109 Cal. 160, 41 P. 855, 856, the Supreme Court held: "Whether a contract is 'essential' to the transaction of its ordinary affairs, or for the purposes of the corporation, is to be determined by the corporation or those to whom the management of its affairs is intrusted. If it is within the apparent scope of its organization, the fact that the contract has been entered into by it, or by its representative, is a determination on the part of the corporation that it is essential, and the corporation will not be permitted thereafter to question its effect." In Woods Lumber Co. v. Moore, 183 Cal. 497, 191 P. 905, 907, 11 A. L. R. 549, after citing the above Code provision and the case of Bates v. Coronado Beach Co., supra, the court said: "The court cannot determine that it (a contract of guaranty) is beyond the powers of the corporation, unless it clearly appears to be so as a matter of law. With respect to the means which the corporation may adopt to further its objects and promote its business its managers 'are not limited in law to the use of such means as are usual or necessary to the objects contemplated by their organization, but, where not restricted by law, may choose such means as are convenient and adapted to the end, though they be neither the usual means, nor absolutely necessary' for the purpose intended. Winterfield v. Cream City B. Co., 96 Wis. 239, 71 N. W. 101." Herein the persons signing the indemnity agreement were united in interest in furthering the business of the construction company. It was to be reasonably expected that the making of the indemnity agreement, as executed, would advance the business of the company and enable it to secure the surety bonds it required. In view of the express powers contained in its articles to make any contract with any person for any lawful purpose, and to exercise any power for the purpose of attaining and furthering its objects which a natural person was authorized to do under the law in connection with the implied powers conferred by law and above quoted, it is clear that the charge of ultra vires must fail.

[5, 6] Furthermore, the defense of ultra vires is no longer looked upon by the courts with favor, particularly when relied upon as a shield to escape liability. Where the questioned contract of a corporation is neither malum in se nor malum prohibitum, the doctrine of ultra vires is limited in scope and application, and the contract should be enforced against the corporation when it has received the consideration or the benefits thereof. Davis v. Pacific Studios Corporation, 84 Cal. App. 611, 258 P. 440; McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 P. 927. Herein it appears that, in consideration of its joint and several liability as indemnitor along with the individual indemnitors, the company received from respondent the surety bonds necessary for its business, and respondent in reliance thereon issued to G. Roy Smith the surety bonds as security for which it claims the right to hold the Improvement Act bonds. Clearly the company has received the benefits of the contract. We are of the opinion that the indemnity contract was a valid contract of the Citizens' Construction Company.

[7] Reverting to the first point presented by appellant, and viewing it in the light of the preceding discussion of the question of ultra vires, it appears that appellant is not so much seeking a construction of the terms of the indemnity agreement as he is to secure an interpretation thereof limiting the scope of the agreement so as to exclude surety bonds issued thereunder to or for the individual benefit of any signer other than Citizens' Construction Company. Appellant claims that no bond in which the company had no substantial or beneficial interest came within the scope of this agreement, and that, because it is stipulated as a fact that the company was not a party to the action in which the release of attachment bond was given, and had no interest in any of the public improvement jobs for which the other surety bonds were issued to G. Roy Smith, it therefore follows that the company had no substantial or beneficial interest in the bonds so issued. This is clearly a non sequitur. Even if the company had no material or beneficial interest in the subject-matter of the attachment suit or the public improvement jobs of G. Roy Smith, nevertheless it might reasonably have great interest in the credit of G. Roy Smith and in his securing surety bonds in prosecuting public improvement jobs; and, as hereinbefore stated, the agreement in terms declared that "the indemnitors have a substantial, material and beneficial interest in the obtaining of such bond or bonds," and the bonds therein referred to are such bonds "as have been, and such as may hereafter be, applied for * * * by the indemnitors or any one or more of them." As stated above, the Supreme Court in the case of Bates v. Coronado Beach Co., supra, held that, when the corporation has, or those to whom the management of its affairs have been intrusted have, determined that a contract is essential to the transaction of the affairs of the corporation, the latter will not thereafter be permitted to question the effect of that determination. And herein

the very persons most interested in the company business were its officers and managers, and jointly executed the indemnity agreement in question.

[8-11] There exists no uncertainty or ambiguity in the terms of this agreement which would supply a basis for the interposition by the courts by way of construction. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable or lawful (section 1636, Civ. Code); and, for the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the language of the contract governs, if it is clear and explicit; and, if in writing, the intention is to be ascertained from the writing alone, if possible (sections 1637, 1638, 1639). Several contracts relating to the same matters, between the same parties, and made parts of substantially one transaction, are to be taken together, and the contract in question must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties (sections 1642, 1643, Civ. Code); and in section 1858 of the Code of Civil Procedure it is provided that in the construction of a contract the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Herein appellant seeks to have inserted in the contract a clause of limitation of issuance of bonds so as to preclude any application for or issuance to or for the benefit of any of the indemnitors except the Citizens' Construction Company. The contract provides in clear language for application for surety bonds "by the indemnitors or any one or more of them" who "jointly and severally" covenanted and agreed to pay all premiums thereon, and to indemnify against all liability by reason of issuance of "any such bond or bonds" and who further covenanted and agreed that "any property * * * pledged as collateral security on any one or more of such bonds may, at the option of the company, be reclaimed as collateral security on any or all bonds coming within the scope of this agreement." From this language it clearly appears that any one or more of the indemnitors might apply for and receive a surety bond under the agreement, and that each indemnitor severally agreed to indemnify the company against liability or loss thereunder.

The sole question remaining, therefore, is concerning the right of the indemnity company to reclaim property pledged by one indemnitor as collateral on his bond, as collateral security on a bond issued to another indemnitor in his individual capacity. This right is in turn limited by the terms of the contract to those bonds "coming within the scope of this agreement."

[12] As stated above, the bonds issued to G. Roy Smith were clearly within the authority and covenants of the agreement, and the Citizens' Construction Company, a coindemnitor, cannot now be permitted to deny that they come within the scope of the agreement. Such bonds were issued in reliance on the express terms of the agreement wherein the Citizens' Construction Company declared that it had a substantial, material, and beneficial interest in the obtaining of bonds applied for by any indemnitor, guaranteeing against loss thereunder and covenanting that property pledged to secure its own bonds might be reclaimed as security for bonds issued to any other indemnitor. Nowhere in the agreement is any language which would warrant the interpretation that the bonds referred to therein were to be limited to the company alone. To add such provision by construction would torture the agreement into a different form, and would amount to a judicial addition thereto of that which is clearly omitted therefrom. Nor does recourse to the agreement with Elliott-Horne Company, executed some months later, furnish any basis for construction of the indemnity agreement. And the several applications for bonds by the Citizens' Construction Company were all made pursuant to the general indemnity agreement, which was the source and fount of all these bonds, and in themselves contain nothing to render uncertain or ambiguous any of the provisions of the general indemnity agreement.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

140 Cal.App. 701

FERGUSON v. DAM et al.

Civ. 9033.

District Court of Appeal, First District, Division 2, California.

Sept. 18, 1934.

Hearing Denied by Supreme Court Nov. 16, 1934.

1. Trial ⇐25(1)

In action on note, defendant was not entitled as matter of right to open and close argument under statute providing plaintiff must commence and may conclude argument unless judge, for special reasons, otherwise directed (Code Civ. Proc. § 607).

2. Trial ⇐25(2)

While trial court, in its discretion and for special reasons, might have granted defendant permission to open and close argument to jury, refusal to grant such permission *held* not abuse of discretion (Code Civ. Proc. § 607).

3. Appeal and error ⇐706(2), 933(1)

Denial of motion for new trial on ground of misconduct in argument to jury *held* without error in view of assumption that trial court, in disposition of motion, determined alleged misconduct was not prejudicial, since it could not be said conclusion of trial court was plainly wrong where no report of argument to jury was included in transcript, and affidavit in support of motion and counter-affidavit were conflicting.

4. Executors and administrators ⇐221(9)

In action by executrix on note executed by son to mother, finding of jury that mother had never agreed to cancel note in consideration of son's performance of legal services *held* justified by evidence.

5. Appeal and error ⇐1068(4)

In action by executrix on $4,000 note executed by son to mother in which son set up defense that mother had agreed to cancel note in consideration of his performance of legal services, instruction that jury should find reasonable value of legal services *held* not prejudicial where jury found against existence of any agreement for payment of legal services.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by Cora Dam Ferguson, as executrix of the will of Frances Leoni Dam, deceased, against F. H. Dam and Etta Pearl Dam, as executrix of the will of Frances Leoni Dam, deceased. From a judgment for the plaintiff, F. H. Dam appeals.

Affirmed.

Thomas C. Ryan and F. H. Dam, both of San Francisco, for appellant.

Brobeck, Phleger & Harrison and Frank S. Richards, all of San Francisco (Kenneth Ferguson, of San Francisco, of counsel), for respondent.

SPENCE, Justice.

Plaintiff brought this action seeking to recover upon a promissory note. Plaintiff had judgment upon a trial by jury and from said judgment, defendant F. H. Dam appeals.

The complaint herein contained the usual allegations found in a complaint based upon a promissory note. The amended answer of defendant F. H. Dam set forth certain denials and further set forth certain affirmative allegations relating to the defense of want of consideration. At the close of the evidence, counsel for said defendant moved the trial court for an order permitting him to open and close the argument to the jury. The motion was denied.

[1, 2] Appellant contends that he was entitled "as of right to open and close the argument" and that the trial court erred in denying his motion. In our opinion this contention is without merit. Appellant cites authorities from other jurisdictions, but cites no authority in point from any jurisdiction having statutory provisions similar to section 607 of the Code of Civil Procedure. That section provides: "When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs: * * * 4. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument." It thus appears that appellant was not entitled as of right to open and close the argument. The trial court, in its discretion and for special reasons, might have granted such permission but we find no abuse of discretion in its refusal to do so. In Potapoff v. Mattes, 130 Cal. App. 421, at page 426, 19 P.(2d) 1016, 1018, the court said: "The authorities are practically unanimous in holding that the conduct of a trial, is so largely in the discretion of the trial court that there must be made to appear an abuse of that discretion before an appellate court will interfere." See, also, Coogan Finance Corporation v. Beatcher, 120 Cal. App. 278, 7 P.(2d) 695; East Bay Municipal Utility District v. Kieffer, 99 Cal. App. 240, 278 P. 476, 279 P. 178; Watkins v. Glas, 5 Cal. App. 68, 89 P.

840; Mendocino County v. Peters, 2 Cal. App. 24, 82 P. 1122; People v. Hickman, 204 Cal. 470, 268 P. 909, 270 P. 1117.

[3] Appellant further contends that counsel for respondent was guilty of misconduct in his argument to the jury. No report of the argument to the jury is found in the transcript. Appellant presented affidavits in support of his motion for a new trial and respondent presented a counteraffidavit. These affidavits are conflicting in many particulars. The trial court denied the motion for new trial and in support of its ruling we must assume that it resolved the conflicts in favor of respondent and must further assume that it determined that any alleged misconduct was not prejudicial to the rights of appellant. In Aydlott v. Key System Transit Company, 104 Cal. App. 621, at page 629, 286 P. 456, 459, the court said: "A trial judge is in a better position than an appellate court to determine whether a verdict is probably due wholly or in part to misconduct of counsel, and its conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong. (Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538.)" After a review of the entire record in the present case, we are unable to say that the trial court was wrong in reaching its conclusion and in denying the motion for new trial.

[4, 5] Appellant further attacks several of the instructions given by the trial court. We have examined said instructions, together with all of the instructions given by the court, and find no error in any of them with the possible exception of instruction No. 27. The giving of this instruction, together with a certain ruling of the trial court on the admissibility of evidence, are both assigned as error and are said by appellant to involve the same point. In discussing this contention a brief statement of facts should be made. The promissory note set forth in the complaint was dated July 27, 1929, and was in the principal sum of $4,000. It was one of a series of notes executed by appellant to his mother for that sum over a period of years. The evidence discloses that these were all two-year notes and were dated respectively as follows: October 21, 1924; September 22, 1926; August 23, 1928; July 27, 1929. It was respondent's theory that each note was given as a renewal note in recognition of the same original obligation. Appellant alleged and testified that in October, 1926, he agreed with his mother that he would perform certain legal services for her and that she agreed to pay for such services by returning the note of September 22, 1926, and canceling said obligation. He further alleged and testified that he thereafter performed said services and that in December, 1927, his mother delivered said note to him and agreed that it was thereby canceled. Appellant admitted the execution of the subsequent notes for the same amount in 1928 and in 1929, but alleged that these notes were so executed at the request of his mother without any consideration and merely "to do something to humor and comfort said decedent, and out of love and pity for said decedent." Upon the trial evidence was offered by both sides regarding the reasonable value of the legal services to which reference has been made. Our attention has not been called to any testimony placing the value of said services at a figure in excess of $2,000.

The trial court gave instruction No. 27, as follows: "In the event that the jury should find that defendant F. H. Dam rendered legal services to Frances Leoni Dam, also known as Mrs. C. K. Dam, deceased, between October 4, 1926, and December 25, 1927, pursuant to an express agreement therefor, and that said services were not rendered gratuitously, the jury are instructed that they should determine the reasonable value of said services and that if they find that the compensation provided by said agreement is in excess of the reasonable value of said services and excessive, they should disregard said agreement and return a verdict for plaintiff for the difference between the reasonable value of said services and the amount of the note of defendant F. H. Dam, together with interest on said difference from July 27, 1929, to date, at four per cent per annum."

Assuming, without deciding, that said instruction was erroneous, it does not appear that appellant was prejudiced by the giving thereof. The jury awarded respondent the full amount of the note, thereby impliedly finding against appellant upon the issue of the existence of the alleged agreement and further impliedly finding that said services were rendered by appellant for his mother gratuitously. In other words, the jury found against the existence of any agreement, express or implied, for the payment by the mother to her son for said services. In the light of the evidence presented, we are of the opinion that the jury was justified in so finding. Newbert v. McCarthy, 190 Cal. 723, 214 P. 442; Ruble v. Richardson, 188 Cal. 150, 204 P. 572; Fuller v. Everett, 100 Cal. App. 593, 280 P. 550; Smith v. Riedele, 60 Cal. App. 551, 213 P. 281; 27 Cal. Jur. 204. Un-

der these circumstances, no prejudice resulted.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

140 Cal.App. 729

PEOPLE v. JOHNSTON et al.

Cr. 2577.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1934.

1. Constitutional law ⇐268
Criminal law ⇐636(3)

Defendant's absence from courtroom while clerk swore jurors to answer questions touching their qualifications and called names of three jurors did not vitiate proceedings, such acts being ministerial acts not affecting defendants' substantial rights (Const. U. S. Amend. 14; Const. Cal. art. 1, § 13).

Court expressly afforded defendants opportunity when personally present to have clerk repeat swearing and calling of names of jurors, but defense counsel then declared that clerk need not go back and did not repeat objection to drawing of jurors' names when defendants were in court nor direct trial judge's attention to any invasion of defendants' rights.

2. Jury ⇐150

Defense counsel's inchoate objection before defendants were brought into court to drawing of jurors' names until full panel was present or absence thereof explained *held* properly disregarded by court.

3. Kidnapping ⇐1

That defendant told assistant bank cashiers to go to bank vault, open cash drawer, and give defendant cash therein, and closed and locked vault door, leaving them inside, after taking currency from them, *held* sufficient to support conviction of kidnapping (Pen. Code, § 209, as amended by St. 1933, p. 2617).

4. Criminal law ⇐29

Fact that two assistant bank cashiers, held up, robbed, and locked in vault by two armed men, responded to same command and were simultaneously subjected to indignities they testified to, *held* not to require but one conviction for robbery and kidnapping (Pen. Code, § 209, as amended by St. 1933, p. 2617).

5. Indictment and Information ⇐191(½)

Conviction of first-degree robbery on one count of indictment *held* not to preclude conviction of kidnapping for purpose of robbery on other counts as lesser offense necessarily included within that of kidnapping (Pen. Code, § 209, as amended by St. 1933, p. 2617).

6. Criminal law ⇐884

Jury could not fix penalty for kidnapping for purpose of robbery, in absence of evidence that victims suffered bodily harm (Pen. Code, § 209, as amended by St. 1933, p. 2617).

7. Criminal law ⇐1171(2)

District attorney's remark in opening statement to jury that defendants used stolen car in perpetrating offenses charged *held* not prejudicial error, where testimony for people affirmatively established that car belonged to one defendant.

Appeal from Superior Court, City and County of Los Angeles; Walton J. Wood, Judge.

Perry William Patrick Johnston and Wesly E. Eudy were convicted of robbery in the first degree and kidnapping for the purpose of robbery, and they appeal.

Affirmed.

Orville A. Rogers, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendants were convicted of robbery in the first degree and two counts of kidnaping for the purpose of robbery, and have appealed.

[1, 2] When court convened on the day of trial certain events transpired of which appellants complain: The clerk called the roll of prospective jurors; they were sworn collectively to answer questions touching their qualifications to act as trial jurors; the court ordered: "Call 12 names, mister Clerk." Defense counsel interposed: "At this time I object to the drawing of the names until the full panel is here, or a reason assigned why the full panel is not here." The court: "Call the names, Mr. Clerk." The clerk called the names of three jurors. The court: "The defendants are in the prisoners' room, Mr. Mackay." Defendants were thereupon brought into court, and the following transpired:

"The Court: Do you want to begin all over again and call these names?

"Mr. Mackay: I think we better.

"The Court: Better what?

"Mr. Mackay: Better start over again.

"The Court: Call the names again, Mr. Clerk.

"Mr. Mackay: He don't need to go back."

Twelve jurors were called into the box and examined by court and counsel.

Appellants contend that their absence from the courtroom until called in as above indicated vitiated the entire proceedings and was in violation of article 1, § 13, Constitution of California, and of the Fourteenth Amendment of the Constitution of the United States. In the case of Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 205, 28 L. Ed. 262, cited by appellants, the court defined the requirement that a defendant "be personally present at the trial" as demanding his presence "at every stage of the trial when his substantial rights may be affected by the proceedings against him." In that case the absence of defendant while a challenge to a juror was being tried was held to be error which vitiated the verdict and judgment. Here the acts of the clerk in swearing the jurors to answer questions touching their qualifications and calling the names of three jurors were ministerial acts in no way affecting the substantial rights of defendants. The opportunity was expressly afforded them by the court, while they were personally present to have the clerk repeat these formal acts, and defense counsel then declared, "He don't need to go back." The inchoate objection which counsel started to interpose relating to the drawing of names until a full panel was present or their absence explained could not be considered as an objection for any purpose, and was properly disregarded by the court. No objection of that import was made when defendants were in court. The attention of the trial judge was not directed to any invasion of defendants' rights which counsel was thus attempting to safeguard. On appeal it is not urged that defendants had exhausted all of their peremptory challenges or that they interposed a challenge for cause to any juror thus called or selected and that such challenge had been disallowed.

[3] From the testimony it appears that about 11:30 o'clock in the morning of March 13, 1934, two armed men (appellants) appeared in a bank and held up two assistant cashiers, White and Butler. Appellant Eudy pointed a revolver at White, and appellant Johnston had a gun in his right hand and a bag in his left hand. Johnston approached White, held the bag towards him, and at his command White emptied currency from two cash drawers into it. Then Johnston told witnesses White and Butler to come with him to the vault. When the three of them reached the vault Johnston told White to open the cash drawer and give him what was in there —that he wanted the cash in the drawer— but was persuaded there was no more money there. Johnston then closed and locked the door to the vault, leaving the two witnesses inside.

Appellants contend that the evidence is not sufficient to sustain the conviction of kidnaping as charged in counts 2 and 3. Section 209 of the Penal Code (as amended by St. 1933, p. 2617) sets out in part that "every person who seizes, confines, * * * conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual * * * to commit * * * robbery * * * is guilty of a felony." Appellants' view is that since the door to the vault was an iron grill and not solid, the victims were not concealed; that the circumstances do not disclose any intent to kidnap; and that the robbery was completed before confinement commenced. It appears, however, that appellants intended to seize and carry away the victims with intent to commit a further act of robbery at the vault of the bank. The felonious nature of their acts and the obvious intent which must be gathered from the circumstances of the case fully support the conviction of the crime of kidnaping.

[4, 5] It is also suggested on behalf of appellants that there should have been but one conviction, since the two victims responded to the same command and were simultaneously subjected to the indignities testified to by them; and, further, that conviction of robbery on count 1 precluded conviction of kidnaping on counts 2 and 3 because the former was a lesser offense necessarily included within the latter. No authority supporting these suggestions is cited, and they are contrary to well-settled rules of law. People v. Bruno (Cal. App.) 35 P.(2d) 391; People v. Pickens, 61 Cal. App. 405, 214 P. 1027.

[6] It is stated that the jury erred in not fixing the penalty for counts 2 and 3 under the provisions of section 209 of the Penal Code as amended (Stats. 1933, p. 2617; Deering's Supp. 1933, p. 327). That section, however, vests in the jury the discretion of recommending the punishment only in cases

where the victim suffers bodily harm. Since there was no evidence that such bodily harm was inflicted or suffered, the punishment of appellants is fixed by the section cited as life imprisonment with possibility of parole, and the jury could not determine the matter of punishment.

[7] The remark by the district attorney in his opening statement that "they (appellants) used a stolen car," while incorrect, could not be said to have been material or prejudicial, since the people's witnesses affirmatively established that the car was not stolen but belonged to appellant Eudy.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

FERRAN v. SOUTHERN PAC. CO. et al.*

Civ. 8897.

District Court of Appeal, First District, Division 1, California.

Sept. 11, 1934.

Hearing Granted by Supreme Court Nov. 8, 1934.

1. Evidence ⇐586(3, 4)

Weight of negative testimony that signals were not given is question for jury, and such evidence is sufficient to sustain verdict, even though it conflicts with other evidence.

2. Carriers ⇐327, 333(10)

Where passenger is required to cross intervening tracks to take his train or to leave it or to change from one train to another, it is not negligence per se not to stop, look, and listen, and passenger has right to assume that company will so regulate movement of its trains as to enable him to cross in safety.

3. Carriers ⇐327, 333(10)

Railroad track upon which trains are constantly running is a warning of danger.

4. Carriers ⇐327

Passenger standing between tracks to signal his train had duty to exercise constant vigilance to discover approaching train.

5. Carriers ⇐327

Passenger struck by locomotive while standing between tracks signaling train in opposite direction *held* contributorily negligent as matter of law where signal from safe place on station platform could have been seen, and he remained between tracks for at least a minute after last look in opposite direction.

6. Negligence ⇐83

That both parties are guilty of concurrent acts of negligence does not preclude application of last clear chance rule, where defendant is able to avoid injury and negligently fails to do so.

7. Carriers ⇐347(3)

Where engineer of train striking passenger while he was between tracks signaling train in opposite direction saw passenger nearly third of mile away in time to have stopped train or slackened speed sufficiently so as to make passenger aware of peril in time to have escaped, whether engineer had clear chance to avoid injuring passenger *held* for jury.

8. Judgment ⇐199(3)

Result of judgment notwithstanding verdict is determination that there is not evidence sufficient to support verdict for plaintiff.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Phillip Ferran against the Southern Pacific Company and another. From a judgment for defendants notwithstanding a verdict in plaintiff's favor, plaintiff appeals.

Affirmed in part, reversed and remanded, with directions in part.

Daniel A. Ryan, Thomas C. Ryan, and James W. Harvey, all of San Francisco, for appellant.

Dunne, Dunne & Cook, of San Francisco, for respondents.

PER CURIAM.

An appeal by plaintiff from a judgment entered for defendants, notwithstanding a verdict in plaintiff's favor.

Plaintiff was injured while waiting to board a north-bound train at Lomita Park, a station on the railroad of the Southern Pacific Company, which company will be hereinafter referred to as the defendant. The railroad at this point consists of double tracks. Fronting the station the tracks are approximately eight feet apart. Upon the track nearest the station were operated the south-bound trains, and upon the other track the north-bound trains. Certain passenger trains made regular stops at this station; others stopped

only when flagged by passengers. The injury to plaintiff occurred on the morning of June 14, 1931. He was at that time a resident at Lomita Park, and "commuted" to and from San Francisco, where he was employed. A train bound for San Francisco and which would stop only upon signal, was due at Lomita Park station at 8:22 a. m. Plaintiff held a regular commutation ticket and was awaiting this train. The station platform was macadamized, as was the space between the tracks. According to the plaintiff, when he arrived at the station platform, he looked in both directions for approaching trains; he saw no train approaching from the north, in which direction he had a clear view for about a mile. Looking south, he saw the train he intended to board rounding a curve about half a mile away. He then walked to the macadamized space in front of the station and signaled the approaching train. He again looked to the north, and, seeing no train in that direction, remained between the tracks, facing south. While in this position he was struck by the overhang of the locomotive of a south-bound passenger train which, according to schedule, did not stop at this station. He knew that during the morning hours through trains from the north passed through the station without stopping. The north-bound train on this occasion stopped about 600 feet south of where plaintiff was struck, and the south-bound train was brought to a stop about the same distance south of the station. The engineer of the latter train died before the trial, but defendant John E. Monroe, who was the fireman, saw plaintiff standing between the tracks when about 1,700 feet away and called the engineer's attention to the fact. Monroe testified that he concluded that plaintiff's position was not necessarily dangerous, but the physical facts support a contrary conclusion. The train was traveling at the rate of 45 to 50 miles an hour, and its speed was not slackened before the collision. The evidence was conflicting as to whether the whistle sounded: the trainmen testified that this signal was given, but other witnesses heard none. The plaintiff heard the sound of a whistle immediately before he was struck, but believed that it came from the north-bound train.

[1] The weight to be given negative testimony, where it is claimed that signals were not given, is a question for the jury; and such evidence is sufficient to sustain a verdict even though it conflict with other evidence that a warning was actually given. Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709; Keena v. United Railroads, 197 Cal. 148, 239 P. 1061.

[2-5] It is the rule that, where a passenger is required to cross a railroad company's intervening tracks in order to take his train or to leave it or to change from one train to another, it is not negligence per se not to stop, look, and listen, and he has the right to assume that the company will so regulate the movement of its trains as to enable him to cross in safety. Wilkinson v. United Railroads, 195 Cal. 185, 232 P. 131. Had plaintiff been injured while crossing an intervening track in order to board the train after its arrival at the station, the above rule would of course apply; but here none of the physical conditions made it necessary for him to place himself upon or between the tracks in order to signal the train as a signal from a place of safety on the station platform could have been plainly seen by the trainmen; and it is clear beyond dispute that he placed himself in a position of danger and so remained until he was injured. He also testified that he looked to the north before crossing and after he had taken his position between the tracks, but saw no train in that direction. However, it is manifest from his testimony that he remained at that point for at least a minute after his last look to the north, and that, had he looked again within that time, the approaching south-bound train would have been plainly visible to him. A railroad track upon which trains are constantly running is itself a warning of danger (22 Cal. Jur., Railroads, § 59, p. 306); and it is plain from the facts as related by plaintiff that it was his duty to exercise constant vigilance to discover an approaching train. Here to look was to see. Similar facts have been held to constitute contributory negligence (Holmes v. South Pacific Coast Ry. Co., 97 Cal. 161, 31 P. 834), and we are satisfied that this is the only conclusion which can reasonably be drawn from plaintiff's conduct.

[6] He contends, however, that, regardless of his negligence, the engineer saw his danger, of which he was unaware, and that the failure to stop the train or to so slacken its speed as to enable him to escape, a timely warning being given, was the proximate cause of his injuries. Defendant denies that it was guilty of any negligence; but urges that, if such was the fact, both parties were guilty of concurrent acts of negligence, and that the last clear chance rule has no application.

Such was the doctrine declared in the following cases: Holmes v. South Pacific Ry.

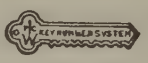
Co., supra; Everett v. Los Angeles, etc., Ry. Co., 115 Cal. 119, 43 P. 207, 46 P. 889, 34 L. R. A. 350; Green v. Los Angeles, etc., Ry. Co., 143 Cal. 31, 76 P. 719, 101 Am. St. Rep. 68; Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259; Riney v. Pacific Electric Ry. Co., 45 Cal. App. 145, 187 P. 50; Giannini v. Southern Pacific Co., 98 Cal. App. 126, 276 P. 618; Smith v. Los Angeles Ry., 105 Cal. App. 657, 288 P. 690, but the contrary was held in the recent case of Girdner v. Union Oil Co., 216 Cal. 197, 13 P.(2d) 915, 918. There the court, referring to the above decisions, said: "The element of continual negligence is present in all last-chance cases. If defendant is not able to avoid injuring plaintiff in the exercise of ordinary care, the plaintiff's original negligence continues to be the proximate cause of his own injury, which bars recovery. If, on the other hand, defendant is able to avoid injuring the negligent plaintiff, and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and is not the proximate cause thereof, and hence the applied doctrine, by its own principles, establishes the right of plaintiff to recover notwithstanding the fact that his original negligence would, by its continuing nature, bar a recovery if the doctrine were not applicable. To hold otherwise would be to dispute its existence."

[7] As stated, the engineer of the southbound train saw plaintiff in a position of danger when nearly a third of a mile away and in time to have stopped the train or slackened its speed sufficiently so that by proper signals plaintiff would have become aware of the peril in time to have escaped. Whether the engineer realized, or ought to have realized, that plaintiff was unaware of his danger, and could not be relied upon to make an effort to escape, and then had a clear chance to avoid injuring him, were, we think, properly questions for the jury. Chappel v. San Diego, etc., R. Co., 201 Cal. 560, 258 P. 73; Girdner v. Union Oil Co., supra.

[8] The rule as to a motion for judgment notwithstanding the verdict is the same as with regard to the right to grant a nonsuit; and the result is a determination that there is not evidence sufficient to support a verdict for plaintiff. Card v. Boms, 210 Cal. 200, 291 P. 190; Newson v. Hawley, 205 Cal. 188, 270 P. 364; Hunt v. United Bank, etc., Co., 210 Cal. 108, 291 P. 184. The evidence here was fairly sufficient to sustain a finding that the engineer, notwithstanding plaintiff's negligence, had the last clear chance to avoid the collision and could have done so by the exercise of ordinary care.

But as regards defendant Monroe there was no evidence that he controlled the operation of the locomotive or was in any way negligent, and the judgment in his favor must therefore be affirmed.

The judgment as to defendant Monroe is accordingly affirmed, and as to defendant Southern Pacific Company is reversed, and the cause remanded, with directions to the trial court to enter a judgment against said last-named defendant in accordance with the verdict.



140 Cal.App. 722

PEOPLE v. TORRES.

Cr. 2568.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1934.

1. Criminal law ⇐1037(1), 1171(6)

District attorney's argument *held* not prejudicial, though some of epithets and phrases used were improper, where evidence clearly established guilt of accused and there was no assignment of error at time when words were used.

2. Criminal law ⇐829(1), 1130(2)

Accused could not complain of court's refusing requested instructions, where accused did not set forth instructions in brief and did not show that court did not in given instructions correctly state law, and where jury were fully and fairly instructed on law of case.

3. Robbery ⇐26

In prosecution for rape, kidnaping, and robbery, refusing to dismiss robbery charge *held* not error under evidence showing that at time of rape prosecutrix was wearing ring which was later found in possession of accused, and that prosecutrix denied that ring was taken from her with her consent, and bruises on her finger indicated that ring was taken off violently.

Appeal from Superior Court, City and County of Los Angeles; William C. Doran, Judge.

Ramon Torres was convicted of rape, kidnaping, and robbery, and he appeals.

Affirmed.

Curtis C. Taylor and Anna Zacsek, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

Appellant Torres was convicted of rape, kidnaping, and robbery as charged in three separate counts of the information. He appeals from the judgment and from an order denying his motion for a new trial.

On the night of October 29, 1933, Mrs. Corinne Houser with her husband and her brother George were standing beside an automobile in front of the house of her brother Lawrence. The defendant Torres with two other men drove up to the curb near the place where these people were standing. After first committing assaults upon Mr. Houser and his brother-in-law George which disabled them from further resistance, appellant and his companions forced Mrs. Houser into their own automobile and drove away with her.

Having first stopped their automobile in an isolated place the other two men got out, and appellant drove on with Mrs. Houser to another isolated place where appellant committed the crime of rape upon the woman in his automobile. At the time of these transactions Mrs. Houser was wearing a ring which was afterwards found in the possession of the appellant. Although Mrs. Houser's testimony does not show that she remembers the taking of the ring, she denied that it was taken from her with her consent, and bruises on her fingers indicated that it had been violently taken off.

One cannot read the record without being thoroughly convinced that appellant is guilty of all of the crimes charged.

The grounds of appeal as stated by appellant are: That the district attorney in his address to the jury was guilty of misconduct prejudicial to appellant; that the court made remarks which were improper and prejudicial to appellant; that the court erred in refusing to give to the jury some of the instructions requested by appellant; that the court erred in one of its rulings on admission of evidence; that the court erred in refusing to grant the motion of appellant for dismissal as to the count charging robbery; that the court erred in refusing to allow the prosecutrix to respond to questions which requested her to make a physical demonstration of the manner in which she claimed to have been raped.

[1] There do not appear to have been any assignments of error directed to the alleged misconduct of the district attorney or of the trial court. While some of the epithets and phrases used by the district attorney in his address to the jury were improper and are subject to criticism, we are of the opinion that when read in connection with the entire address, and particularly in the absence of any assignment of error at the time when the words were used, they do not constitute a sufficient cause for reversal of the judgment in this case where the evidence so clearly establishes the guilt of appellant that at all events he should have been convicted.

[2, 3] Appellant claims that the court erred in refusing some of his requested instructions. None of these instructions are set forth in the brief, nor is any attempt made by appellant to show that the court did not in the instructions which it gave to the jury correctly state the law upon the questions involved in the subject covered by the requested instructions. From the additional information derived from the record and brought to our attention by the attorney-general, we are satisfied that the jury was fully and fairly instructed upon the law of the case. The court did not err in refusing to grant appellant's motion for dismissal of the count charging robbery. There was evidence sufficient to justify conviction of the offense. People v. Clayton, 89 Cal. App. 405, 264 P. 1105. We are satisfied that there is no good reason for reversing either the judgment or the order denying motion for a new trial.

The judgment is affirmed and the order is affirmed.

We concur: HOUSER, J.; YORK, J.

140 Cal.App. 587

WITHEY v. HAMMOND LUMBER CO. et al.

Civ. 8723.

District Court of Appeal, Second District, Division 2, California.

Sept. 11, 1934.

1. Automobiles ⇐193(8)

Truck owner *held* responsible, under rule of respondeat superior, for acts of negligence of driver committed while acting within scope of his duties as owner's employee.

2. Automobiles ⇐245(6, 72)

Where lumber company's truck was standing across sidewalk in front of building under construction and pedestrian, after passing around rear of truck, was caught and injured when truck suddenly started, questions of driver's negligence and pedestrian's contributory negligence *held* for jury under evidence.

3. Automobiles ⇐245(26)

In action by pedestrian injured when lumber company's truck, standing across sidewalk in front of building under construction suddenly started, denial of nonsuit motion of general contractor *held* error, there being no evidence that general contractor had right to control movements of truck or violated any duty toward pedestrian; nor was there sufficient evidence introduced thereafter to render the error nonprejudicial.

4. Municipal corporations ⇐705(12)

General contractor owed to pedestrian, using fenced-in sidewalk in front of premises of building under construction, duty of so conducting operations as not to cause injury, but such duty did not extend to acts or operations of others over whom contractor had no control.

5. Automobiles ⇐197(1)

Where lumber company's truck standing across sidewalk in front of building under construction suddenly started, duty of warning to pedestrians rested solely on driver and not on general building contractor.

6. Trial ⇐419

Refusal of nonsuit is not reversible error if it appears from all the evidence in record, including defendant's evidence, that case for plaintiff was made out.

7. Appeal and error ⇐1001(1)

Sufficiency of evidence to establish given fact is primarily for trial court and jury, and, if there is substantial evidence to support conclusion reached, it is not open to review on appeal.

8. Negligence ⇐136(8)

Ordinarily, question of contributory negligence is for jury, and it becomes question of law for court only where facts are undisputed and reasonable minds can draw but one conclusion therefrom.

9. Automobiles ⇐160(6)

Where pedestrian was injured when lumber company's truck, standing across sidewalk in front of building under construction, suddenly started into street, statute requiring driver of vehicle on "public highway," before starting, to see first that such movement can be made in safety *held* inapplicable, since private driveway was not "public highway" within statute (St. 1923, p. 519, § 21; St. 1925, p. 413, § 130, subd. (a).

[Ed. Note.—For other definitions of "Highway," see Words & Phrases.]

10. Automobiles ⇐246(4)
Trial ⇐219, 296(3)

Where pedestrian was injured when lumber company's truck, standing across sidewalk in front of building under construction, suddenly started, instruction that defendants responsible for movement of truck were negligent if, when starting such truck, they did not first see that truck could be started with safety *held* faulty in not defining "safety" or informing jury that only ordinary care was required, but any error therein was cured by other instructions (Civ. Code, § 1714).

In other instructions court correctly defined negligence and charged defendants were under duty to use ordinary care in operation of truck, and further that if driver, prior to setting truck in motion, looked to rear and then saw no one in position from which injury would result by reason of movement of truck, and if general contractor required flagmen to keep pedestrians clear of truck and one of flagmen signaled driver to drive truck off the sidewalk, and if, under such circumstances, driver acted as reasonably prudent man would have done, driver was not negligent.

11. Trial ⇐295(1)

All instructions must be read together.

12. Automobiles ⇐246(38)
Trial ⇐228(3)

Where pedestrian was injured when truck, standing across sidewalk, suddenly started, instruction that if pedestrian, after proceeding around truck with ordinary care, was in danger because of crowd and defendants observed or "could" have observed that plaintiff was in peril by use of reasonable precaution or diligence, it was defendants'

duty so to operate truck as not to injure pedestrian *held* not erroneous under last clear chance doctrine, nor as using word "could" instead of "should."

13. Automobiles ⇐246(4)

Where pedestrian was injured when truck, standing across sidewalk, suddenly started, instruction that if defendants observed that people were crowding about truck and that truck could not in safety be started, or by exercise of ordinary care could have observed that truck could not be moved in safety, it was defendants' duty not to move or start truck *held* not erroneous as requiring more than ordinary care.

14. Automobiles ⇐160(6)

In action by pedestrian injured when truck, standing across sidewalk, suddenly started, that others were assisting or attempting to assist driver in safe movement of truck would not relieve him of his primary and continuing duty to exercise care and prudence in its operation so as not to injure others.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by C. W. Withey against the Hammond Lumber Company, J. W. MacDonald, and C. W. Driver, individually and doing business under the firm name and style of MacDonald & Driver, and John Doe, the latter appearing and answering as L. J. McCormick. Judgment for plaintiff, and defendants appeal.

Reversed and remanded with directions as to defendants MacDonald & Driver, and affirmed as to the other defendants.

Jennings & Belcher, of Los Angeles, for appellants Hammond Lumber Co. and L. J. McCormick.

Syril S. Tipton and Elmer E. Sawyer, both of Los Angeles, for appellants J. W. MacDonald and C. W. Driver.

W. W. Wallace, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

This action was brought by plaintiff against Hammond Lumber Company, a corporation, J. W. MacDonald, and C. W. Driver, individually and doing business under the firm name of MacDonald & Driver, and John Doe. The latter appeared and answered in the person of L. J. McCormick, an employee of Hammond Lumber Company. The complaint in its essentials alleged that, while plaintiff was walking on a sidewalk, the defendants negligently drove and operated a large lumber truck in and upon the sidewalk, striking plaintiff, and causing the injuries complained of and for which damages are sought. In addition to the general allegation of negligence as to all defendants, it is alleged that defendants gave no notice or warning to plaintiff, or other pedestrians using the sidewalk, that the truck would be moved. Defendants Hammond Lumber Company and L. J. McCormick answered separately, each denying the allegations of negligence and pleading contributory negligence. Defendants MacDonald & Driver answered jointly, likewise putting in issue the charge of negligence on their part and pleading contributory negligence. At the trial, the same counsel appeared for Hammond Lumber Company and McCormick, and MacDonald & Driver were jointly represented by other counsel. A trial was had before a jury and a verdict against all defendants above named was returned for the sum of $15,000, on which judgment was entered. Separate motions for new trial were made by the lumber company and McCormick together, and by MacDonald & Driver, which were denied. Separate appeals from the judgment were thereupon taken by the two groups of defendants, and the record presented consists of a transcript on appeal containing the judgment roll, notices of appeal, and a single bill of exceptions, which appellants and respondent stipulate may be used by each appellant on the separate appeals.

The epitomized essential facts which are disclosed by the record are as follows: On October 30, 1930, a building was in course of construction on the west side of Broadway between Sixth and Seventh streets, in the city of Los Angeles. Appellants MacDonald & Driver were the general contractors constructing such building. A wall or partition had been erected across the front of the premises on the west part of the sidewalk, with a large door or gate about midway thereof, to permit the entrance to the premises by persons and vehicles. In connection with such wall the outer part of the sidewalk was fenced off, with an overhead canopy or ceiling and with barriers on the street side along the curb, leaving an opening opposite the gate making a passageway or tunnel about four feet wide through and on which pedestrians passed back and forth along that side of Broadway. A short time before 10:25 o'clock a. m. of that day respondent passed along this

passageway going south, made purchases in a nearby store, and, at the time mentioned, returned going north through the passageway along with other pedestrians. As he approached the part opposite the gate, he saw a large empty lumber truck of appellant Hammond Lumber Company standing across the walk, its front end in the street and its dual rear wheels approximately in the center of the sidewalk; the body, which extended some six feet to the rear of the rear axle, projecting about two feet beyond the gate and into the premises. He looked into the cab of the truck and saw no driver in it. He then proceeded to the rear of the south side thereof, around its rear, and then turned along the north side of the truck, coming back on the walk when he met other pedestrians who were approaching the truck to pass it. Respondent stopped at a point on the north side of the vehicle, with his right foot on a line in front of the rear wheel and his back or side slightly in advance of an iron roller on the truck, which projected from the frame about three inches beyond the outer line of the rear wheels. While in this position, the truck started forward, the rear wheel ran upon respondent's right foot, the iron roller struck his back or side, and he fell, suffering an injured foot and a fracture of his right upper leg bone.

Appellant McCormick, an employee of the lumber company, had delivered a load of lumber on this truck a short time before the accident in question, by backing his truck through the gate and dumping the lumber within the premises. He had then driven the empty vehicle through the opened gate to the point where respondent saw it standing, brought it to a stop, applied the brakes, and, leaving the engine running, climbed down from the cab on its left or north side to gather up ropes trailing behind, with which the load had previously been secured. He passed around the front end of the truck and, having gathered and placed the ropes on the truck on the south side thereof, returned around the front of the machine, climbed into the cab on its north side, and prepared to start forward. He first looked back to the rear on the left or north side, and saw people standing on each side of the truck but saw no one near it at that time. He then heard a man in the street, with a whistle, who said, "Are you all ready?" to which McCormick said, "Yes," whereupon the former blew his whistle and stopped traffic on Broadway, allowing McCormick to go forward. On hearing an outcry he stopped his truck after going only six or eight feet, and observed respondent on the walk near the gutter, injured.

In addition to these undisputed facts the following testimony was given:

Called by plaintiff under section 2055, Code of Civil Procedure, McCormick said: "The man that swung a flag was for MacDonald and Driver; he asked me if I was all ready and I said 'yes', and he blew his whistle and stopped traffic and I started." He also testified: "This man who told me to come ahead was the flagman they had there. * * * There were quite a few automobiles and streetcars on the street at that time, and I was watching those at the time I started, but there was nothing to concentrate my attention out in the street at the time I released my clutch. * * * There was a car coming there, but he had stopped them; the flagman had stopped them. * * * I had delivered lumber at this place several times before and this man that told me to come ahead in the street had been there before and had given me instructions of that kind before. * * * When I got out to roll up the rope I didn't see Mr. Withey, the plaintiff in this action. I looked back just a second or so before I started the truck and there were people on each side of the sidewalk that I saw."

Mrs. Addie Lee testified that she was on the sidewalk going south and was standing by the railing on the north side of the truck when she first saw respondent standing in front of her, to her right; that she had to pause because the truck was in the way and was trying to get through, and people were in the way; that "there were no guards there on the pedestrian walk nor was there any noise or warning given of this truck moving." She also testified: "When I first saw Mr. Withey he was not close to the body of the truck; the body extended. * * * The first thing I saw of Mr. Withey was when he was almost directly in front of me and on the same side of the truck that I was on."

Miss Joyce Lee testified she was standing beside Mrs. Addie Lee, her mother, and saw Mr. Whithey there just in front of them, facing north, and that then the truck started. "There didn't seem to be any warning given; it happened so sudden I didn't notice anyone there by the truck who made any statements that the truck was going to move or anything of that sort. I didn't hear anyone state that the truck was going to be moved."

Miss Vida Perrin testified that she followed behind respondent around the rear of the truck and to the sidewalk on the north side.

"There was such a crowd there, he went to go through some women—and he couldn't get through, and I heard someone call from the street. * * * 'All right, man,' and with that the truck started forward and it struck Mr. Withey in the back. * * * When I got up to the truck there were not gates there—absolutely nothing—nor warning—nothing. There were no flags—no men with flags to warn us, or who did warn us. * * * There was no warning whatever. * * * Before any movement of the truck was made at all, I did hear a man from aways down the street yell, 'All right Mac,' but I did not see him; I couldn't see him, but I heard that. Right instantly he said that, the truck shot forward." The witness further testified: "As I came up to the truck and looked over it, I saw several women standing in there, facing toward us. * * * It was full of people then; just simply full of people. * * * He [Mr. Withey] was facing kind of through these people that were crowded in there. * * * Many trying to get through, crowded up. * * * Just prior to the time Mr. Withey was struck he put his hands up to go through the people, like that (indicating). That is the position he was in. To get through these people that were standing, there was such a crowd, and just as he was in that position, just like this, this truck came forward, and one of the rollers struck him there and twisted him right around this way. * * * I did step back out of the way. I was sideways to the truck. I could see the truck was going to hit him; I could see him; he had his back to it. * * * He just got there and was aiming to move to go through. You could not move; you could not step, because there were too many people there. He was there a second, trying to get through those people, when this thing went forward. He wasn't walking, like the crowd was there (indicating); he faced the crowd; that is why he could not get through."

Respondent testified that when he came up to the truck he glanced at it and saw it was empty: "Noticed there was no driver on the seat, so I just went to go with the crowd around the rear end of the truck. * * * I was next to the truck; people were going south on the west side, of course, and as a came around the other side, I came over to go through on the right hand side, of course. That is, on the north side, because the crowd was so thick coming this way—coming south—that I couldn't get through. So I hesitated there for, I don't know how long, a second or two perhaps, and the next thing I knew I was caught. * * * As I hesitated there momentarily before proceeding northward there were as many people standing in the pedestrian way as could get in; they were standing and they were going back and forth. I heard no warning, absolutely none. before that truck started. I did not know the truck was going to move." On cross-examination he testified: "I had previously been in the lumber business and as I came up there I recognized that as being the usual lumber truck * * * and saw that it had no lumber on it and assumed, of course, that the truck had discharged its load of lumber in the building and was headed out into the street. * * * At that time I could see right over the top of the truck without any difficulty. * * * I did see a lot of people coming down this covered-over passageway coming towards the truck and towards me. * * * I walked around the rear of the truck. I was right next to the truck as I made this trip around it. * * * Then I hesitated there a little bit, I presume a second or two or three, expecting to go on north as soon as I could get through. * * * I do not recall that anyone came in contact with me at this time at all. I didn't remain in any position any time; I was on the move, and I perhaps hesitated there a few seconds. At the time I was in that position I didn't stop to think about that I was in front of the wheels of that truck; there was no driver on the truck. No thought as to the position of the wheels of the truck was on my mind at the time, so far as I recall. * * * But I assumed that they were protecting pedestrians there. I relied upon them to handle the truck in such shape as to protect the pedestrians. I intended to look out for myself; I went along in the pedestrian place provided, attending to my business, just like the rest of the people. * * * It was when I encountered the truck that I arrived at the conclusion that there was no driver there. I don't think I ever looked again at the truck seat to see whether the driver was there or not. I may have looked, I may not; I could not say; I don't know. I assumed that the driver was on the seat when the truck started up; I didn't know it. I didn't see anyone with a flag out in the street there, nor did I hear that man say to the truck driver, 'Are you all ready?' I did not hear a man out there in the street blow a whistle."

The foregoing comprises the substance of all the evidence offered by plaintiff when he rested his case, and it has been so stated at length because of its vital importance in con-

sidering the subsequent rulings of the court on motions for nonsuit made by each group of appealing defendants.

Upon resting his case by plaintiff, defendants Hammond Lumber Company and McCormick moved the court for a nonsuit on the grounds that the evidence showed as a matter of law that plaintiff was guilty of contributory negligence, and that the evidence showed no negligence on the part of the lumber company and McCormick; also that the evidence was insufficient on the question of negligence of such defendants to permit the case to go to the jury. Defendants MacDonald & Driver made a motion for nonsuit on the same grounds as above stated and the additional ground that there was no showing of any duty owing to plaintiff on the part of those defendants. Both motions were denied, and the orders denying them are assigned as errors of law on this appeal.

[1, 2] The motion for nonsuit of defendants Hammond Lumber Company and McCormick was properly denied. Under the rule of respondeat superior the company was responsible for acts of negligence of its employee, McCormick, committed while acting within the scope of his duties as such employee; and the evidence clearly presented a case of at least prima facie negligence on the part of McCormick, the driver who was in control of and operating the truck at the time of the accident, which would be sufficient to support a finding of negligence in the absence of explanation showing that his operation of the machine and the ensuing injury was not due to his neglect or want of care. From the evidence relating to respondent's acts and conduct and knowledge just before and at the time of the accident, it cannot be said that, as a matter of law, he was guilty of negligence which proximately contributed to the happening of the accident. Those facts, as revealed by the evidence, peculiarly presented a case wherein the jury should determine whether as a matter of fact the respondent was negligent as pleaded.

[3, 4] The motion of defendants MacDonald & Driver for nonsuit should have been granted. At the close of respondent's case there was not even a scintilla of evidence that these appellants had any right to control the movements of the truck, nor that they or any of their agents or employees exercised or attempted to exercise any control at the time of the accident over its movements. Aside from the fact of presence of the truck on the premises under the control of these appellants as constructing contractors, and the signaling of the man in the street, no relationship at all was shown to exist between the owner and operator of the vehicle, on the one hand, and the contractors on the other, except that by inference it might be that of buyer and seller of the lumber delivered from the truck. Assuming that the man in the street was an employee of such appellants, there still appears a total lack of attempt on his part to direct or control the movements of the truck. His inquiry, "Are you ready," or his statement, "All right Mac," simply carries the implication that he was endeavoring to ascertain if the driver of the truck was ready to proceed into the street so that he in turn could stop traffic to permit such movement. This act still left McCormick, the driver, in exclusive control of the movements of the truck, and by no reasoning or inference could the act of the man in the street be considered as an exercise of control over the truck by his employers, MacDonald & Driver.

Nor was there any evidence upon which could be predicated any duty on the part of the above-named appellants toward respondent which was not discharged or not brought into question here at all. To a pedestrian using the fenced-in sidewalk in front of the premises on which appellants were constructing a building, the latter owed the duty of so conducting the operations of construction as not to cause injury. This duty, however, did not extend to and include the acts or operations of others over whom they had no control but who were, in the nature of things, independent actors. In Thompson on Negligence, § 3, it is stated: "An essential ingredient in any conception of negligence is that it involves the violation of a legal duty, which one person owes another,—the duty to take care, for the safety of the person or property of the other; and the converse proposition is that, when there is no legal duty to exercise care, there can be no actionable negligence." This rule does not include care for the safety of persons against negligent acts of others over whom no control or right to control exists. It does not require, in a situation such as is herein presented, that the building contractor shall provide personal guardianship to each pedestrian passing along a public walk in front of the premises.

[5] It is alleged in the complaint herein that "defendants gave no notice or warning of any kind or character to plaintiff or other pedestrians who were then and there using said sidewalk, that said truck would be moved."

As viewed under the actual proofs herein, this allegation is in nowise connected up with any duty of the last-named appellants; but respondent nevertheless claims that these appellants were under duty to warn pedestrians of the intended movement of trucks entering and leaving their premises. There is no basis in fact or in law for such claim. That the evidence introduced by respondent shows that no warning was given to him by any one of the movement of the truck does not demonstrate that these appellants were derelict in any duty to him. The duty of warning those near or approaching the truck of its intended movement rested solely in appellant McCormick, as operator and in exclusive control thereof. Under the facts alleged in the complaint and established by respondent's case, there appears no duty on the part of these appellants owing to respondent in respect to the movement of the truck, and therefore no duty to warn him of its movements. Hence there was no question of fact in respect to negligence on the part of these appellants to be submitted to the jury. In 2 Cooley on Torts (3d Ed.), page 1410, quoted with approval by the Supreme Court in Johnstone v. Panama Pacific, etc., Co., 187 Cal. 323, 202 P. 34, 35, it is said: "1. The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed. * * * 2. The duty being pointed out, the failure to observe it is to be shown; in other words, the existence of negligence." Herein, respondent entirely failed to show the existence of any duty to him on the part of these appellants in respect to either control or warning of movements of the Hammond Lumber Company truck; hence there could be no failure to observe duty in that respect and consequently no negligence on the part of these appellants.

[6] Whether the error in denying the motion for nonsuit made by appellants MacDonald & Driver is to be held as reversible error herein depends on whether those appellants afterwards introduced evidence supplying the defects of respondent's proofs, thus rendering any error in denying the motion harmless, in accordance with the well-established rule in this state. 9 Cal. Jur. 564. For if it appears from all the evidence in the record that a case for plaintiff was made out, then the action of the court in refusing the nonsuit is not reversible error. Russell v. Pacific Can Company, 116 Cal. 527, 48 P. 616; Carter v. Canty, 181 Cal. 749, 186 P. 346. After the order denying the motion was made, appellant McCormick was called "on behalf of defendants" and examined by his counsel and cross-examined by respondent's counsel. Then three other witnesses were called "on behalf of defendants" and examined first by counsel for MacDonald & Driver. Inasmuch as appellants Hammond Lumber Company and McCormick have assigned insufficiency of the evidence to support the verdict and judgment herein, both that question and the one above stated in respect to the nonsuit order may be determined by a summarized statement of defendants' evidence.

In addition to testimony which he gave when examined by plaintiff under section 2055, Code of Civil Procedure, appellant McCormick, called on behalf of defendants, testified: "They had a man out in the street to flag the traffic. We always stopped the truck in front of the building and this flagman would go out and flag the traffic so that we could bring the truck in. They have a man on each side to hold back the traffic until I could drive in. I mean there was a man on each side of the entrance to the driveway and sidewalk where the pedestrians walked on the sidewalk; there was one man on each side. These men were there that day when I took the load in, but I did not know who they were; I never did know. All jobs have them. * * * There was a third man in the street. These men did take up their positions that day at the time I proceeded to back my truck into the building. * * * When I drove my truck forward there was a flagman on each side. There was one standing with his arms across the sidewalk on each side of the truck. * * * These two flagmen were in position while I was doing that [rolling up the ropes], and then I got back in the cab. * * * I looked back and there was nobody around the truck at all, everything clear; so the man out in the street —there was a flagman out in the street with a whistle; so the man out in the street says, 'Are you all ready?' I says, 'Yes,' so he says, 'All right,' and blew his whistle and stopped the traffic and I started out. * * * At the time I looked back—before I moved the truck —the two flagmen were there on either side of the truck." On cross-examination he testified: "I saw these flagmen there; I think they were two Mexicans; I am not sure. One of these Mexicans is in the courtroom. He was there with a flag at that time; I am positive of that. He was on the south side but I couldn't swear he had a flag.

* * * I looked out of the side first, and then this man out in the street said, 'All ready,' and I saw everything was clear so I went right ahead at that time. I was not looking backward when I released the clutch so the truck could move forward. * * * When I looked out of my cab on the left side I did not say anything to the flagman that was there on the sidewalk. * * * As to how close he was to the truck * * * he was about 9 or 10 inches. * * * I did not see anyone there. * * * Not in between the flagman and the truck. * * * From the time I looked back until I started the truck was about a second; perhaps a second or two seconds; long enough for the man out in the street to stop the traffic. * * * When I looked back this man around in front says, 'Are you all ready?' and I said 'yes,' and he blew his whistle and stopped the traffic and I started up; so I never looked back again."

The witness Robert Washington, called on behalf of defendants, testified that on the day in question he was working on this construction job; that he flagged traffic to permit the truck to back in with its load, after which he delivered his flag to the foreman. He did not see the accident.

The witness H. B. Nyce, called on behalf of defendants, testified that he was foreman for a subcontractor on the job in question; that while awaiting a truck he expected he saw the lumber truck back in, unload, and pull out; that when it pulled out he stood outside the door on the walk with his arms out, his back to the truck, alongside a flagman on the north side of the truck; that there was a flagman on the south side; and that the two flagmen had red flags.

The witness Vermudez, also called by defendants, testified that he saw the truck when it went away; that he was called to clear the unloaded lumber and take it over to the carpenter; that he was holding the people back on the south side so they could not pass behind the truck; that he stopped about four or five people that were trying to pass; that he did not have a flag; no one told him to go there; that there was no flagman then on the south side; that "about four people passed; two of them passed and three remained; this gentleman, who was the one that was hurt, and two ladies that did not pass; * * * I saw Mr. Withey at the time he passed around the rear of the truck; that was when I went ahead to stop the people, because he was going ahead of two ladies. * * * There was one person stopping people at the other door, that is on the north side. * * * I did see Mr. Withey when he made a movement to pass but the truck caught him. * * * He was trying to go to the side, and at the time he went this way to move his body to the left, the roller of the truck caught him. * * * Then he fell on about half of the sidewalk, and the wheel passed over his leg."

The foregoing comprises the substance of all the testimony on behalf of defendants on the subject in question. In rebuttal plaintiff called a witness, Lowrey, who testified he was timekeeper for appellants MacDonald & Driver on this job; that he saw the truck moved out but did not see the accident; that he was there right after the accident; that at the time there were no flags or sticks with red cloth tacked to them; that after the accident he purchased red cloth and cut it in strips for flags; that Vermudez was a laborer on the job, not a flagman; that he, Lowrey, was standing inside the gate with his back to the truck, and did not see Nyce or Mr. Withey at the time the latter was struck.

Miss Joyce Lee, being recalled in rebuttal, testified that she did not observe any one spread his arms across the pedestrian way immediately before the accident.

It is clear from the foregoing statement of the evidence introduced by them that appellants MacDonald & Driver have not waived any benefit of error in the ruling on their motion for nonsuit by reason of supplying defect in proofs of respondent in respect to the duty of those appellants to respondent in connection with any control or warning of movements or operation of the truck; hence the denial of their motion must be deemed prejudicial and constitutes reversible error. The evidence relating to the conduct and acts of Vermudez and Nyce does not furnish a basis for liability of these appellants. Vermudez, a laborer, while distributing lumber in the course of his duty, voluntarily attempted to prevent pedestrians from entering the premises and going around the rear of the truck. Nyce, who was not a servant or agent of these appellants, likewise attempted to hold the crowd of pedestrians back so that the truck could be free to move, the witness stating that he was expecting a truck of his own to enter with materials. The most reasonable conclusion to be drawn from this evidence relating to flagmen is that appellants at times sought by the use of flagmen to protect and expedite their operations from

the onrush of pedestrians, rather than to offer or furnish protection to the pedestrians. Such evidence does not support the claim that these appellants had, or attempted to exercise, the right to control the movement of the truck in question, or that they were charged with the duty of protecting pedestrians on the sidewalk from the dangers inherent in the moving of trucks into and out of the premises. On the comprehensive statement of the facts so revealed it likewise follows as a matter of law that the verdict and judgment against these appellants is lacking in evidentiary support, and the judgment against them must therefore be reversed.

This disposition of the appeal of MacDonald & Driver renders it unnecessary to review the numerous errors assigned by them in relation to the admission of evidence, giving and refusing of instructions and amount of damages, excepting only as the same are duplicated in the other appeal and must be reviewed and determined in considering the appeal of Hammond Lumber Company and McCormick, to which we now address ourselves.

[7] The first point raised by the last-named appellants in their brief charges insufficiency of the evidence to establish negligence on their part. We have stated the testimony of witnesses at length to show that the question of whether or not there was negligence on the part of the driver of the truck was essentially one for the determination of the jury. Upon that evidence the jury made its implied finding of negligence. We cannot say that finding is not supported. The sufficiency of evidence to establish a given fact is primarily a question for the trial court and jury; and if there is substantial evidence to support the conclusion reached it is not open to review on appeal. "The rule is well settled that, when a verdict is attacked for insufficiency of the evidence, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury." Comstock v. Morse, 107 Cal. App. 71, 290 P. 108, 109. The evidence herein shows substantial support for the finding of negligence.

[8] The second contention raised by these appellants is that the evidence shows that respondent was guilty of contributory negligence as a matter of law. Again we refer to the rather lengthy statement of evidence given above, to demonstrate that the question of whether or not there was contributory negligence on the part of respondent was essentially a question for the jury to determine. In Cummins v. Yellow & Checker Cab Co., 127 Cal. App. 170, 15 P.(2d) 536, 538, appears a correct statement of the rule applicable herein, in the following language: "Ordinarily, of course, the question of whether a plaintiff was guilty of contributory negligence is a question for the jury. It is a question of law for the court only where the facts are undisputed, and only then where on those facts reasonable minds can draw but one conclusion." We cannot hold as a matter of law that the evidence herein establishes contributory negligence on the part of respondent. Such evidence reveals a peculiar and somewhat unusual case of conduct of the parties under the circumstances related, which required determination of the question of contributory negligence as one of fact, not of law, because reasonable minds might draw different conclusions from the facts or might view the facts in quite different light. The jury's implied finding on the plea of contributory negligence cannot, therefore, be disturbed.

[9-11] Appellants Hammond Lumber Company and McCormick next challenge an instruction of the court, given at the request of respondent, as follows: "The driver of any vehicle upon a public highway, before starting such vehicle, shall first see that such movement can be made in safety, and if it cannot be made in safety, shall wait until it can be made in safety. If you find from the evidence in this case that the defendants, or any of them, in starting such truck upon the public highway, towit, Broadway Street, Los Angeles, California, did not first see that said truck could be started with safety, then the defendants or such of them as were responsible for the movement of the truck were guilty of negligence." They contend that this instruction by its terms imposed an absolute duty on appellants and ignored the rule that it was only ordinary care that was required of the driver in starting the truck. It appears patent that the first sentence in the above instruction is verbatim with the language of the first clause in section 130, subd. (a), of the California Vehicle Act (St. 1923, p. 558, as amended by St. 1925, p. 413), and appellants complain because only a portion of the section was quoted in the instruction and without proper construction by the court, so that the jury would understand that only ordinary care was required of the driver and that he was not bound to see that such movement could be made with absolute safety. In addition, they contend that the section is not applicable to the facts herein.

Under the definition of "public highway" in the California Vehicle Act (section 21 [St. 1923, p. 519]), the sidewalk in question and driveway across it into the premises where the building was being constructed were not public highways. Therefore no statutory duty was imposed on the driver of the truck in question, in relation to respondent, by the terms of section 130 of the act. But the instruction in question does not mention that section, nor does it contain any statement that a violation of the duty to "first see that such movement can be made in safety" would constitute negligence per se or as a matter of law. After reciting the rule as to starting, the court instructed that "if you find from the evidence in this case that the defendants or any of them in starting the truck upon a public highway, towit, Broadway Street, Los Angeles, California, did not first see that said truck could be started with safety, then the defendants or such of them as were responsible for the movement of the truck were guilty of negligence." Considering the whole instruction together, it correctly states, in an abstract form, the duty of the driver of a vehicle, either on a public highway or a private driveway, to other persons under the general rule requiring every person to so conduct himself and so to use his property that injury will not result to others—sic utere tuo ut alienum non laedas—thus rendering him liable for his wrongful acts whether willfully or carelessly done. This rule and maxim are embraced and defined in section 1714 of our Civil Code, which provides: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person." The instruction complained of did not define "safety," nor did it inform the jury that only ordinary care was to be exercised by the driver in seeing if the starting could be made in safety, assuming that both he and others using the passageway exercised ordinary care. Inouye v. Gilboy Co., 115 Cal. App. 25, 300 P. 835; Ruperto v. Thomas, 113 Cal. App. 523, 298 P. 851. In this respect, and standing by itself, the instruction is faulty; but considering it along with other instructions given it does not appear that the jury was misled or likely to be misled to appellants' prejudice. In its other instructions the court correctly defined negligence, and charged the jury that defendants were under duty to use ordinary care in the operation of the truck, and further gave an instruction at the request of defendants as follows: "If you find from the evidence that the defendant McCormick, prior to setting his truck in motion, looked to the rear and then saw no one in a position from which an injury would result by reason of the movement of the truck; and if you further find that the general contractors on the building then under construction furnished a flagman or flagmen to keep pedestrians clear of the truck while same was departing from the building under construction and control traffic in the street; and if you further find that one of these flagmen signaled the defendant McCormick to drive his truck off the sidewalk; and if you further find that in view of these circumstances, if you find them to exist, and such other circumstances as you may find surrounded the happening of the accident, that the defendant McCormick acted as any other reasonably prudent man would have done under the same or similar circumstances, then I instruct you that the defendant McCormick was not guilty of negligence, and, regardless of all other considerations in the case, your verdict must be in favor of the defendants McCormick and Hammond Lumber Company." Any omission of explanation or interpretation of the general language of the former instruction complained of was fully supplied by this instruction, and the literal statement of the rule in the former is sufficiently interpreted and explained by the latter. All the instructions, read together, as the well-known rule requires, show the law to be fairly and clearly stated in respect to the driver's duty, and hence any error in the instruction complained of is cured. Crooks v. White, 107 Cal. App. 304, 290 P. 497.

[12] Appellants next assign the giving of the following instruction as error: "If you find from the evidence in this case that plaintiff, by using ordinary care in proceeding in a northerly direction on the sidewalk on the west side of Broadway, and proceeding around the said truck standing on the sidewalk, and after passing the rear of said truck found himself in a place of danger by reason of the crowds of people then attempting to proceed southerly on said sidewalk, and defendants, in operating said truck, observed or could have observed that plaintiff was in a condition of peril, by the use of reasonable precaution or diligence, then it was the duty of defendants to so operate and drive said truck in such a manner as not to injure the plaintiff." It is contended that this instruction involves the attempted statement of the doctrine of imminent peril, or last

clear chance, without including a qualification that such position of peril was not occasioned by the negligence of the person claiming the benefit of such situation. With this view of the instruction we cannot agree. The doctrine of imminent peril, or last clear chance, is not reflected therein. It simply states that if plaintiff found himself in a place of danger by reason of the crowds of people then attempting to proceed southerly on the sidewalk, and if defendants, in operating the truck, "observed or could have observed that plaintiff was in a condition of peril by the use of reasonable precaution or diligence, then it was the duty of defendants to so operate the truck in such manner as not to injure the plaintiff." This is a fair statement of the duty of appellants arising on discovering the dangerous position of respondent, and of their duty to use ordinary care not to injure other persons. Appellants complain of the use of the word "could," asserting that the word "should" was the proper term. By using the word "could" the court confined the duty of appellants to the exercise of ordinary care in watching out for others who might be affected by a movement of the truck; whereas by the use of the word "should" the court would be imposing constructive knowledge upon the driver of that which he should have acquired by exercise of watchful care.

[13] The giving of the following instruction is also assigned as error: "If you find from the evidence that the defendants observed that people were crowding about said truck and that said truck could not in safety be started, or if the defendants could have observed, by the exercise of ordinary care, that said truck could not be moved in safety because people were crowding about the same, then it was the duty of the defendants not to move or start said truck." What has been said in respect to the previous instructions discussed applies to this instruction. It comprises a literal statement of appellants' legal duty to others on putting a truck into motion, and, when read in connection with other instructions, imposes the exercise or use of only ordinary care.

[14] We have examined the assignments of error predicated on rulings on admission and rejection of evidence, being exceptions numbered 2, 9, and 11. In exception No. 2 the question clearly called for a conclusion on a hypothetical premise. Furthermore, the ruling was harmless, because the jurors, in their own common knowledge, could find the answer sought by appellants. There was no error here. There was likewise no error in the ruling in exception No. 9. Presence of flagmen on the sidewalk when the truck backed in could not be relevant or material to the question of the driver's use of care when later driving the truck out. Exception No. 11 embraces the same proposition, and there was no error in the ruling. There was evidence before the jury that at times flagmen were stationed on the walk while trucks were going in or out of the premises, but such fact would not affect the driver's duty to exercise ordinary care in moving his truck. The fact that others were assisting or attempting to assist the driver in the safe movement of his machine would not relieve him of his primary and continuing duty to exercise care and prudence in its operation, so as not to injure others.

The judgment as against appellants J. W MacDonald and C. W. Driver is reversed and as to them the cause is remanded with directions to enter judgment in their favor. The judgment against appellants Hammond Lumber Company and L. J. McCormick is affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

36

36

CALIFORNIA REPORTER

IN VOLUME

36 PACIFIC REPORTER

SECOND SERIES

2 Cal.App.2d 370

PEOPLE v. STEELE.

Cr. 301.

District Court of Appeal, Fourth District, California.

Nov. 21, 1934.

Hearing Denied by Supreme Court Dec. 20, 1934.

1. Licenses ⇐18½

Contract for lease of personal property to mine gold with right to operate it on land owned by lessor who retained some control over place of operations and was to receive large share of net proceeds as part of rental *held* not "security" within Corporate Securities Act, for sale of which lessor must have obtained permit (St. 1929, p. 1251, § 2 (7).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

2. Licenses ⇐18½

"Security," within Corporate Securities Act requiring permit for sale thereof, may contemplate that profit will accrue from money invested, but expectation of such result cannot, of itself, determine that instrument is a security, and, generally, term has no proper application to enterprise which is to be conducted by investor (St. 1929, p. 1251, § 2 (7).

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

R. W. Steele was convicted for violating the Corporate Securities Act, and he appeals.

Reversed.

Hearing denied by Supreme Court; WASTE, C. J. and SHENK, J. dissenting.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

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Reversed.

Hearing denied by Supreme Court; WASTE, C. J. and SHENK, J. dissenting.

Robert H. Patton, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant was charged with grand theft and with a violation of the Corporate Securities Act, in that on or about July 15, 1933, he "did feloniously sell an instrument in writing evidencing an interest in a profit-sharing enterprise constituting a security under subdivision 7, § 2, of the Corporate Securities Act of the State of California (St. 1919, p. 231, § 2, subd. 7, as amended by St. 1929, p. 1251) without the said defendant or anyone having applied for or obtained, from the Corporation Commissioner of the State of California, authority or permit so to do." On the first trial he was acquitted on the charge of grand theft, and the jury disagreed on the other charge. A second trial on the charge of violating the Corporate Securities Act resulted in a conviction, and this appeal is from the judgment which followed.

It appears that the appellant was the owner or holder of certain placer mining claims located in Inyo county, and also the owner of certain mining equipment. From some time in April, 1933, until July 15, 1933, the complaining witness, Simon Z. Dunn, was associated with the appellant in attempting to work these mining claims under some contractual relationship which is not here material. On the last-named date, these parties entered into a written agreement which is referred to in the information and which constitutes the purported security upon which this charge against the appellant is based. It is conceded that the appellant received from Dunn the sum of $250 at the time this agreement was executed, and also that he had not obtained from the corporation commissioner any permit which in any way related to this transaction.

[1] The determining question here is whether the written instrument in question constitutes a security within the meaning of the Corporate Securities Act. The agreement reads as follows:

"Contract and Agreement for Lease of Personal Property.

"This Agreement by and between R. W. Steele, Lessor, Party of the First Part and the undersigned Simon Z. Dunn, Party of the Second Part, Witnesseth:

"That, whereas, the first party is the owner and/or holder of the right to possession of and in certain placer mining claims and locations situate in and near that territory in Inyo County, California, known as Mazourka Canyon and its tributaries and is the owner and/or lessee of certain placer gold mining equipment, and

"Whereas, the second party is desirous of conducting gold mining operations as an independent contractor upon the property and claims now in possession of the first party and elects to make use of and rent for the purposes of such operation the equipment now in the possession of the first party:

"It is therefore agreed the first party does hereby let and lease to the second party the use of placer equipment as hereinabove described subject to the conditions hereinafter set forth for a period of two years from the date hereof, the same to be used by the second party at the places and in the manner hereinafter set forth and not otherwise; the party of the second part may at his option renew this contract for two (2) years upon payment of one 00/100 Dollar ($1.00) to the party of the first part;

"1. In consideration of said use of equipment for said period, the second party agrees to pay as rent therefor the sum of $250.00 payable in advance concurrently with the execution hereof, and in addition thereto, agrees to pay to the lessor 96¼ per cent of the net proceeds of the mining operations that shall be conducted by the second party in accordance herewith continuously throughout the life of this lease; said net proceeds shall be calculated after the deduction from the gross proceeds of the operation of such equipment as shall be furnished to and used by the second party hereunder after the deduction by the first party of the following costs and expenses.

"(a) The sum of One 00/100 Dollar ($1.00) per day per machine for water to be furnished by first party.

"(b) Net cash cost of mining and delivering gravel to machines.

"(c) Actual cost of board furnished to second party.

"(d) Net cost of gasoline, oil and repairs to machines.

"2. In addition to the furnishing of the above mentioned equipment, the first party further agrees,

"(a) To locate and maintain said equipment in such location as to enable the second party to operate the same in gold bearing gravel throughout the life of this lease ex-

cept for such intervals as may be required for the removal of the same from zone to zone or as may be necessitated by unavoidable break-downs, floods, inclement weather, acts of God, or of the sovereign authority of the United States, or orders of court not occasioned by the first party.

"(b) The first party shall furnish a technical director who shall supervise and direct the mining operations of the second party and the second party expressly agrees that the said technical director shall have absolute discretion as to the times, places and manner in which the operations and work of the second party shall be conducted, said discretion shall be exercised with the view of obtaining the maximum return for the use of said equipment to both parties hereto.

"(c) The technical director shall allocate the equipment leased by the second party in the most favorable location available at the reasonable discretion of the technical director and priority in point of time of execution of the lease shall determine the relative rights of the second party and other lessees.

"3. The second party hereby expressly agrees that the first party shall have the right to let the use of the equipment hereby leased to second party to any other person or persons not exceeding twenty (20) in number including second party provided the use by such other persons shall be made subject to the direction of the technical director who shall act in the interest of all parties concerning such use and the second party agrees to cooperate with such other persons and with the technical director so as to obtain the maximum use and profit of said equipment, and if at any time the second party shall fail or refuse to so cooperate, the first party shall have the right and option to declare this lease terminated upon the payment to the second party the unearned portion of said rental, pro-rated according to the unexpired period of this lease. This is binding unto my heirs and assignees. R. W. Steele.

"R. W. Steele,
"Party of the First Part
"Simon Z. Dunn,
"Party of the Second Part.

"Dated this 15th day of July, 1933."

The respondent contends that this instrument is an "investment contract" within the meaning of that term as included in the definition of a security set forth in subdivision 7 of the act in question, and, in support thereof, relies upon People v. White, 124 Cal. App. 548, 12 P.(2d) 1078, and People v. Claggett, 130 Cal. App. 141, 19 P.(2d) 805. The instrument involved in the first of these cases was plainly an investment contract, but it differs so completely from the contract before us that the holding to that effect is of no value here. In the second case referred to, the written instrument provided that the investor, in return for his investment, was to receive a certain share or interest in the net proceeds from certain mining operations and should later receive a designated share of the capital stock of a corporation which was to be formed. In the case now before us, the agreement contemplates no return on the money invested, other than the right to use certain property, and any anticipated profits could come only through the proceeds of operations to be conducted by the appellant himself.

[2] While a "security," within the meaning of this act, may contemplate that a profit will accrue from the money invested, the expectation of such a result cannot, of itself, determine that an instrument is a "security." A person buying or leasing land or other property may expect to derive a profit from the money invested, but neither such a transaction nor the instrument by which it is evidenced may be designated as a security in the sense here intended. Generally speaking, at least, the term has no proper application to an enterprise which is to be conducted by the investor himself.

Under the contract now before us, the complaining witness could not expect any return from his money on account of anything done by others nor because of his investment alone. His profit must accrue, if at all, from operations conducted by himself, and his return necessarily depended upon the success or failure of his own operations in attempting to mine gold at a profit.

The respondent argues that, while this instrument is a lease in form, it has the effect of permitting the lessee to share in the profits of a mining enterprise to be conducted by the lessor. We cannot so read the agreement. It is a lease of personal property with the right to operate the same on land owned or controlled by the lessor, and any possible profit could come only from the efforts of the lessee in the operations to be conducted by him. And we think the situation is neither affected by the fact that the appellant retained some control over the place where the operations were to be conducted nor by the fact that he was to receive, as part of the rental, a large share of the net proceeds.

Although the agreement here in question is obviously subject to criticism in many respects, we think it is not a "security" within the meaning of the Corporate Securities Act. While it must be conceded that this transaction was not without its earmarks of fraud, and even though it be assumed that another crime was in fact committed, we are of the opinion that the evidence will not sustain a conviction on the particular charge with which we are here concerned.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.2d 502

QUIGLEY v. NASH.

Sac. 4781.

Supreme Court of California.

Sept. 26, 1934.

1. Executors and administrators ⇐261

Widow who paid freight bills on merchandise ordered by and shipped to deceased, installment due on deceased's conditional purchase of automobile, and nominal sums in conduct of deceased's business *held* entitled to preferred claim against estate, since expenditures were necessary to preservation of estate's property.

2. Executors and administrators ⇐195, 275

Where widow procured transfer to her personal account of deceased's bank balance of $718.99, upon promise to pay out of insurance money, payable to her personally, deceased's notes amounting to $1,507.03, held by bank, and subsequently did so, amount of bank balance so transferred should not be set off by administrator against amount due widow as family allowance, nor against another preferred claim held by widow, but should be deducted from widow's general claim based on payment of the two notes amounting to $1,507.03 (Code Civ. Proc. § 1454).

3. Executors and administrators ⇐275

Where widow had transferred to her personal account bank balance of $129.19 standing to account of deceased and widow, without survivorship, only upon promise, subsequently kept, to pay out of her personal funds note of deceased and widow amounting to $150 held by bank, administrator *held* not entitled to set off against another claim of widow, who made no claim for difference between bank balance and amount of note, amount of bank balance (Code Civ. Proc. § 1454).

4. Appeal and error ⇐1152

Supreme Court may modify judgment to conform with trial court's findings without remanding the cause for a new trial.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Bank.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Ethel H. Quigley against Earl L. Nash, administrator of the estate of Paul A. Quigley, deceased who filed a counterclaim. From an adverse judgment, plaintiff appeals.

Modified and affirmed.

J. E. Pardee, of Susanville, for appellant.

R. M. Hardy, of Susanville, for respondent.

CURTIS, Justice.

Action to recover on two claims presented against the estate of Paul A. Quigley, deceased. The plaintiff is the surviving wife of said deceased. Deceased, during his lifetime and at the time of his death, was engaged in the lumber and supply business in Susanville, Lassen county, in this state. His death occurred on May 31, 1930. The plaintiff on June 3d following took charge of said business, and on June 7th applied for letters of administration of his estate. On June 10th deceased's place of business was destroyed by fire. There was no insurance carried on said business, and in consequence of this loss the estate of decedent was rendered insolvent. On June 13th plaintiff waived her right to administer upon said estate in favor of Earl L. Nash, who was thereafter appointed and qualified as administrator of said estate. Between the date when the plaintiff took charge of the business of her deceased husband and the destruction of his business by fire, plaintiff received the sum of $6,683.42, being proceeds of an insurance policy on the life of her husband which was her individual property. From this and other sources, she proceeded to pay certain obligations of her deceased husband, his funeral expenses, and certain expenses incurred in connection with the business left by said deceased. The money thus paid out by her is the subject-matter of the two claims involved in this action. The administrator failed to act upon either of said claims, that is, he refused to allow or reject either of said claims, and the plaintiff, after the lapse of ten days from the presentation of said claims to said administrator, instituted this action to recover the amounts claimed to be due as set forth in said claims.

The two claims will be referred to as claim A and claim B. Claim A was for money paid by the plaintiff to the Bank of Lassen County on two promissory notes, one for $1,150 principal and $4.85 interest, and the other for $350 principal and $2.18 interest, totaling in all the sum of $1,507.03. Claim B was presented as a preferred claim against said estate, and was for money paid by plaintiff on account of various items which will be further explained. In his answer the defendant admitted all the material allegations of plaintiff's first cause of action, which cause of action was based on claim A. As to the second cause of action, based upon claim B, the defendant denied each and every allegation thereof. As a further answer to said complaint, defendant set up a counterclaim against plaintiff's demands consisting of two items, one for $718.99 and the other for $129.19, and prayed for judgment that plaintiff take nothing by her said action and that defendant recover the amount of his counterclaim. Upon the issues thus made, the cause proceeded to trial and resulted in the trial court directing a judgment in favor of the plaintiff allowing claim A in full as a general claim against said estate; allowing three items in claim B amounting to $157.46 as a preferred claim, and the balance thereof as a general claim against said estate less the amount of $16.50, which item was abandoned by plaintiff at the trial. The amount allowed as a general claim was $174.42, and consisted of five items in claim B. Upon defendant's counterclaim, the court gave judgment in favor of defendant in the sum of $848.18, being the sum total of the two amounts of $718.99 and $129.19, claimed by defendant in his counterclaim. The court further directed that from this amount of $848.18 there be deducted the sum of $757.46, leaving the sum of $90.72, against which sum there should be further offset plaintiff's costs incurred at said trial, and any dividends paid plaintiff on her general claim against said estate. The item of $757.46 requires some explanation. According to the finding, the probate court had made an order directing the payment to plaintiff of a family allowance from the estate of her deceased husband—$50 per month for one year, or a total of $600. The item of $757.46 is made up of this item of $600 family allowance and the said sum of $157.46, being that part of claim B which the court directed should be allowed as a preferred claim against said estate. From this order the plaintiff has appealed on the judgment roll. While no bill of exception or reporter's transcript has been prepared by means of which the evidence is brought before us, the findings are quite full and contain much evidentiary matter as well as the necessary probative facts of the case.

[1] No question is made as to the propriety of the court's order in allowing claim A as a general claim against said estate. We will

therefore pass to claim B and particularly to those items which the court refused to allow as a preferred claim but directed their payment along with the claims of other general creditors of said estate. By holding that these items should be paid as general debts against said estate, the trial court determined that plaintiff acted properly and legally in making payment of the several amounts represented by these items. The only question to determine is whether these claims constituted a general or a preferred claim against said estate. The first of these items consisted of four freight bills on merchandise ordered by, and shipped to, deceased prior to his death. The railroad company after the death of the deceased held the same, and had a lien thereon for the freight charges. In order to obtain possession of this merchandise and to stop demurrage charges, the plaintiff paid said charges and had the merchandise delivered to deceased's place of business. In doing so, plaintiff further paid out the sum of $8.50 for unloading a part of said merchandise, which amount was also included as one of the items in claim B which the trial court refused to approve as a preferred claim against said estate. Another item in claim B which the court rejected as a preferred claim and allowed as a general claim against said estate was an installment payment upon a conditional contract of purchase of a Ford automobile, which automobile was afterwards sold to the plaintiff, and the estate received the full benefit of said installment payment made by plaintiff. There were also two items insignificant in amount, to which the court refused to give a preference over the general claims against said estate. They were incurred in the conduct of the business of the decedent after his death. The findings are very full regarding all these disputed items. They clearly show that all of these items cover expenditures which were necessary for the preservation of the property of said estate. Had they been made by an administrator regularly appointed to settle the estate, they would, undoubtedly, have been proper charges of administration to be paid in course of administration, without the necessity of any formal claim being presented for their allowance or payment, and before the payment of any general or preferred claim. In our opinion, all of these items amounting to $174.42 should be allowed as preferred charges against said estate. The total of these items and the items in claim B amounting to $157.46 which the court allowed as preferred charges, amounting in all to $331.88, should have been allowed and approved as preferred charges against said estate, being the total amount of claim B, less the item of $16.50, which the plaintiff abandoned at the trial of said action.

[2] We now come to the items of set-off allowed by the court against plaintiff's family allowance and her preferred claim. The first of these items concerns the sum of $718.99 which deceased had on deposit with the Bank of Lassen County at the time of his death. This sum was withdrawn by plaintiff on June 6th under an affidavit presented to the bank in accordance with section 1454 of the Code of Civil Procedure then in force. However, at the time plaintiff presented said affidavit to the bank and asked for the payment of said sum of $718.99 to her, the bank officials, as they had a legal right to do, refused to pay to her any part of said sum unless the plaintiff paid to the bank the amount due on the two promissory notes, held by the bank against decedent, and which form the basis of claim A hereinbefore referred to. Upon the plaintiff's promise to pay said two notes personally out of her insurance money, the bank permitted her to transfer said sum of $718.99 to her individual account. Plaintiff received her insurance money three days thereafter, and on the same day paid to the bank the full amount of principal and interest of said two notes, and also a third note for $150, which we will later again refer to. The bank had a perfect legal right to credit on said notes the amount of said deposit of $718.99, but only waived its right temporarily upon condition that the plaintiff would pay the full amount of said notes upon receiving her insurance money. The receipt by plaintiff of said sum of $718.99 from the bank and her payment of the note three days later under a promise so to do can be regarded as but one transaction, the net result of which was that plaintiff in reality only paid to the bank the difference between the amount due on said two notes and said sum of $718.99, or the sum of $788.04. This amount of $718.99, therefore, should not be allowed as a set-off against the amount due plaintiff on her family allowance or against her preferred claim against said estate. In fairness to the estate, however, we think it should be deducted from the amount of $1,507.03, the amount of the principal and interest due on said two notes at the time of their payment by plaintiff. This would leave the sum of $788.04 as the amount for which claim A should be allowed.

[3] The situation regarding the item of $129.19 rests upon a somewhat different state of facts. At the time of his death, in addition to his individual account, the deceased with

his wife maintained a joint account (without the right of survivorship) in said bank in the name of himself and wife and against which both of them drew checks. A short time prior to his death, the deceased and his wife borrowed from the bank on their joint note the sum of $150 and deposited the same in this joint account. As we have seen, there was in this account to their credit, at the date of decedent's death, the sum of $129.19. At the time plaintiff had said sum of $718.99 transferred to her individual account, she asked the bank to make the same disposition of this sum of $129.19. The bank, upon the express promise of plaintiff to pay said note for $150, changed this joint account of deceased and his wife by erasing the deceased's name therefrom and thereby transforming it into the individual account of plaintiff, and three days afterwards, when plaintiff received her insurance money, she paid said $150 note held by the bank. As a result of this transaction, the plaintiff paid to the bank something like $20 over and above the amount of said deposit of $129.19. In these circumstances, it is clear that defendant is not entitled to any set-off whatever arising out of the application of this $129.19 on said $150 note. On the other hand, plaintiff would have been entitled to recover from the estate the amount paid by her in payment of said $150 note in excess of said sum of $129.19, had she included said excess in any claim filed by her against said estate. As she failed to make claim for this amount, she is not entitled to recover the same. The defendant, however, is not entitled to recover or claim as a set-off said sum of $129.19, or any part thereof.

It follows from these conclusions that plaintiff is entitled to judgment against defendant in the sum of $788.04, which is the sum of $1,507.03, being the amount of the principal and interest on the two promissory notes set out in claim A, less the sum of $718.99, and that said amount be paid as a general claim against said estate in due course of administration. Plaintiff is further entitled to judgment against defendant in the sum of $331.88 upon said claim B, and that said amount be paid as a preferred claim against said estate in due course of administration and before any of the general claims against said estate is paid. It is not necessary to make any order regarding the sum of $600, due plaintiff as a family allowance. The court has already made an order for her allowance in this amount which is unaffected by the judgment to which she is entitled in this action.

[4] We see no reason for prolonging this litigation by reversing the judgment and remanding the case to the trial court for further proceedings. Under the power now given this court, we may modify the judgment to conform to the findings, and, as modified, the judgment may be affirmed. To do so may also require a modification of the conclusions of law. It is therefore ordered that, in place of the conclusions of law made by the trial court, the following are substituted as conclusions of law in said action: "That plaintiff is entitled to recover the sum of $788.04 upon said Claim A, as a general claim against said estate, payable in the due course of administration. That plaintiff is entitled to receive the sum of $331.88 upon said Claim B, as a preferred claim against said estate to be paid in due course of administration, together with costs." It is further ordered that the judgment of the trial court be modified by striking out all that part of said judgment following the words, "It is hereby ordered, adjudged and decreed as follows," and by inserting in lieu thereof the following: "That plaintiff have and recover from the defendant Earl L. Nash, administrator of the estate of Paul A. Quigley, deceased, the sum of $788.04, and that the same be paid as a general claim against said estate in due course of administration. Furthermore, that plaintiff have and recover against said defendant the sum of $331.88, and that the same be paid as a preferred claim against said estate and before any of the claims of general creditors are paid, in due course of administration, and that plaintiff have and recover her costs, amounting to the sum of $15.25."

As so modified, the judgment is affirmed, the appellant to recover her costs on appeal.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

1 Cal.2d 510

PEOPLE v. SISSON.

Cr. 3743.

Supreme Court of California.

Sept. 28, 1934.

1. Criminal law ⇐438

In murder prosecution, photographs of partially nude body of deceased woman *held* competent to show position and condition of the body.

2. Homicide ⇐338(2)

Where photographs of partially nude body of deceased woman were competent in murder prosecution, but unnecessary, their introduction *held* not prejudicial, in view of conclusive proof of defendant's guilt.

In Bank.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Eulogio B. Sisson, also known as Pete Y. Sison, was convicted of murder in the first degree, and he appeals.

Affirmed.

J. E. Ebert and J. R. Lazarus, both of Marysville, for appellant.

Erling S. Norby, Dist. Atty., and W. C. Rucker, Deputy Dist. Atty., both of Marysville, and U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

LANGDON, Justice.

The defendant in this case was charged with murder. He pleaded not guilty, and not guilty by reason of insanity. The jury brought in a verdict of guilty of murder in the first degree, without recommendation, and, in the trial on the second plea, found him sane at the time of the offense. Judgment of death was thereafter rendered, and a motion for new trial was denied. This appeal followed.

The guilt of the defendant is conclusively established. On the morning of November 7, 1933, he walked into the police station in Marysville, Cal., and told the officer on duty that he had "killed a man." The officer went with him to a rooming house where defendant pointed out the mutilated body of a woman. It appeared that she was a prostitute, that defendant had stayed with her the previous night, and had stabbed her to death. Defendant on the stand testified that he had given her a great deal of money and that she had promised to marry him. This was, it appears, the cause of a quarrel.

[1, 2] The appeal raises but one point, that the introduction of photographs of the partially nude body of the deceased was prejudicial error. The photographs were competent to show the position and condition of the body, and, although obscene and inflammatory matter should, in general, be kept from the jury, they were admissible in this case for the reason we have mentioned. It is true that the introduction of this evidence was unnecessary, and the practice of bringing such things to the attention of the jury, in cases where no useful purpose is served thereby has been heretofore disapproved by this court. See People v. Burkhart, 211 Cal. 726, 297 P. 11. However, in the instant case the proof of guilt is conclusive, and the sufficiency of the evidence is not questioned.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

1 Cal.2d 495

BUSING v. PIERSON et al. *

L. A. 14507.

Supreme Court of California.

Sept. 24, 1934.

Rehearing Denied Oct. 22, 1934.

1. Appeal and error ⇐1097(1)

Judgment on former appeal precluded consideration on second appeal of contentions formerly determined adversely to appellant.

2. Mortgages ⇐578

In mortgage foreclosure, original defendant could not complain of bringing in by supplement to complaint of additional parties defendant who did not appeal from judgment.

3. Mortgages ⇐580

In mortgage foreclosure, costs of suit *held* properly adjudged against purchaser of mortgaged premises, who did not agree to pay mortgage debt, in event proceeds of sale should be insufficient to discharge mortgage debt and costs of suit.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*See, also, 4 P.(2d) 932.

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. Frederickson, Judge.

Action by H. B. Busing, administrator of the estate of Louie S. Dexter, deceased, substituted plaintiff, against George N. Pierson and others. From a judgment for plaintiff the defendant Catherine A. McKenna appeals. On respondent's motion to dismiss appeal or to affirm the judgment.

Motion granted and judgment affirmed.

J. Irving McKenna and McKenna & McKenna, all of Los Angeles, for appellant.

Winslow P. Hyatt, of Los Angeles, for defendants C. Chapman Lantz and T. Allen Box, Jr., as executor, etc.

Edwin J. Miller and Miller & Casady, all of Los Angeles, for respondent.

WASTE, Chief Justice.

Respondent moves to dismiss the appeal herein or to affirm the judgment appealed from, urging that nothing of merit has been advanced in support of a reversal.

[1] The action was brought for the purpose of foreclosing two mortgages given to secure an indebtedness of $1,600, evidenced by two promissory notes, each in the sum of $800. The property mortgaged consists of several parcels of real property. When recorded, the mortgages became first liens on the property. Plaintiff is the assignee of the notes and mortgages. The defendant, by mesne conveyances, became the owner of the mortgaged property. In due time plaintiff commenced this foreclosure action which, after trial, terminated in defendant's favor principally upon the theory that the action was barred. This court reversed the judgment. Dexter v. Pierson, 214 Cal. 247, 4 P.(2d) 932. Upon the second trial judgment went for the plaintiff, whereupon the defendant McKenna prosecuted the present appeal. She urges fifteen grounds in support of a reversal. Comparison of these contentions with those urged by appellant in her brief upon the prior appeal in an effort to sustain a judgment favorable to her and to demonstrate the impropriety of a judgment for plaintiff, indicates that all but two of the points now raised were there advanced and, by reason of the reversal, necessarily determined to be without merit. The prior decision is now the law of the case as regards the several contentions urged on the former appeal and repeated herein.

[2] Appellant advances but two other points worthy of consideration. Each is devoid of merit. The first has to do with the propriety of the trial court's action in permitting plaintiff to file a supplement to the complaint in order to bring in certain other parties defendant whose claim of interest in the mortgaged premises came to light at the conclusion of the trial and before the signing and filing of the findings and judgment. These parties were thereafter found to have no interest in either the notes and mortgages or the mortgaged property. Judgment went against said new defendants and they have not appealed. Appellant is not in a position to complain. Her rights were in no way affected or prejudiced by the amendment.

[3] Equally untenable is appellant's claim that the court below was without jurisdiction to enter a personal judgment against her inasmuch as she had not assumed or agreed to pay the mortgages. The judgment does not purport to hold appellant personally liable for any portion of the mortgage debt. It merely decrees a sale of the properties to satisfy the mortgage liens and provides that in the event the proceeds from such sale are insufficient to also discharge the *costs of suit* the appellant shall pay such costs. There is, of course, no impropriety in holding the losing party answerable for the costs of suit.

In conclusion, we do not find that the court below abused its discretion in denying appellant's motion for a new trial.

The motion is granted, and the judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; SPENCE, Justice pro tem.

1 Cal.2d 493

BUSING v. PIERSON et al.*

L. A. 14766.

Supreme Court of California.

Sept. 24, 1934.

Appeal and error ⇐800

Where transcript had been on file for nearly a month when motion to dismiss appeal for failure to file transcript within time required by law came on to be heard, determination of the appeal had not been retarded, and affidavits were filed explaining delay, motion to dismiss appeal was denied.

In Bank.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by H. B. Busing, administrator of the estate of Louie S. Dexter, deceased, substituted plaintiff, against George M. Pierson and others. From an order denying motion to retax costs, the defendant Catherine A. McKenna appeals. On respondent's motion to dismiss appeal.

Motion denied, and time for filing of briefs fixed.

McKenna & McKenna and Catherine A. McKenna, all of Los Angeles, for appellant.

Edwin J. Miller, of Los Angeles, for respondent.

PER CURIAM.

Respondent moves to dismiss an appeal from an order denying motion to retax costs on the ground that the transcript was not filed within the time required by law. When the motion to dismiss came on for hearing, the transcript had been filed and appellant, by way of affidavit, averred that her delay in completing and filing the transcript was due principally to an attempt to consummate a settlement of the cause and thus obviate the necessity of preparing and filing the documents essential to the appeal. A counter affidavit filed by respondent denies material portions of appellant's showing. In a supplemental affidavit appellant avers that the certificate of the clerk attached to the copy of the notice of motion served on her had to do with an appeal prosecuted by other parties to the litigation. In view of these matters appellant requests that she be relieved of her default and given reasonable time within which to file her opening brief.

When the motion came on to be heard the transcript had been on file for approximately one month. The delay in its filing has not retarded the determination of the appeal. On the showing made we are, therefore, inclined to relieve appellant of her default. Whenever possible we favor the disposition of a cause on its merits.

The motion to dismiss is denied, and appellant is given twenty days within which to file her opening brief, respondent is given twenty days within which to reply thereto, and, if desired, appellant is given ten days within which to file her closing brief.

PEOPLE v. MAKOVSKY. †

Cr. 1798.

District Court of Appeal, First District, Division 1, California.

July 27, 1934.

Rehearing Denied Aug. 11, 1934.

Hearing Granted by Supreme Court Aug. 23, 1934.

1. Weapons ⇐17(1)

Information charging violation of statute prohibiting sale of billies and stating type of instrument unlawfully sold in language sufficient to enable person of common understanding to know what was intended was sufficient, though not charging sale of instrument "commonly known" as billy (St. 1923, p. 696, § 1, as amended by St. 1925, p. 542, § 1; Pen. Code, §§ 950, 951).

2. Criminal law ⇐37

Decoys may be used to entrap criminals and present opportunity to one intending to commit crime, but not to ensnare innocent persons into committing crimes.

3. Criminal law ⇐569

Evidence, in trial for unlawfully selling billies, that man acting under police department's instructions went to defendant's place of business, asked for dozen blackjacks, and later received three billies, procured by defendant from wholesale house, *held* to establish entrapment requiring reversal of conviction (St. 1923, p. 696, § 1, as amended by St. 1925, p. 542, § 1).

KNIGHT, J., dissenting.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

† For subsequent opinion see 44 P.2d 536.

Louis Makovsky was convicted of unlawfully selling billies, and he appeals.

Reversed.

Rehearing denied; KNIGHT, J., dissenting.

George Gelder, of Oakland (Myron Harris, of Oakland, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Appellant was charged in an information containing two counts, one of which alleged the unlawful selling of blackjacks and the other the unlawful selling of billies, both contrary to the statute. Stats. of 1923, pp. 695, 696, § 1, amended May 22, 1925, Stats. of 1925, p. 542, § 1. Count 1 was dismissed. Defendant was found guilty upon the second count. This is an appeal from the judgment and from an order denying a motion for a new trial. Two main grounds are urged for a reversal of the judgment and order.

Appellant first complains that there was no evidence to show the instruments sold were billies. There is no merit in this contention. The instruments were produced at the trial and there is ample evidence in the record to show that they were commonly known as billies. Moreover, there is, according to the testimony, little if any difference between a billy and a blackjack, and the possession of either instrument is denounced by the statute.

[1] Appellant next complains that the count upon which he was convicted does not state facts sufficient to charge a public offense, in that it did not charge the sale of an instrument "commonly known" as a billy. The information charged the violation of a particular statute which was referred to, and it also stated the type of instrument which was unlawfully sold. The language employed was sufficient to enable a person of common understanding to know what was intended. Pen. Code, § 950. The information was therefore sufficient within the provisions of section 951 of the Penal Code.

[2, 3] And, finally, appellant claims the evidence establishes that a trap was deliberately set by police officers who caused his arrest and conviction. Upon this subject it appeared in evidence that in September, 1933, a man named Forts was working in the police department in the city of Oakland. He was not a regular officer but was paid so much for each case in which he procured arrests for offenses. In the present case he received the sum of $7.50 for his services. On the day in question Forts, acting under instructions from the department, went to the defendant's place of business and told defendant that he was working on a certain boat; that a friend of his had informed him he could procure blackjacks from defendant. Forts stated he wanted a dozen. Defendant informed Forts that he did not have such instruments, but that he would try to procure them for him. Forts then left defendant's store and later returned and received from defendant three billies which defendant had in the meantime procured from a wholesale house. Forts paid defendant $1.50 apiece for the articles, and later turned them over to police officer Pardee of the police department under whose direction he was acting. Forts was told by the officer to return to defendant's store with the billies purchased, and obtain more of them. While Forts and defendant were discussing the matter, Pardee entered the store and arrested defendant. It is appellant's contention that these facts present a clear case of entrapment. In support of this contention it is argued that there is no evidence in the record to show appellant had ever before been arrested or under suspicion of having committed this character of offense or of any other offense at any time, or that he was in the habit of selling the instruments in question or had them in his possession for sale; that the crime did not originate in the mind of appellant but rather in the minds of the officers who used persuasion and deceitful representations to induce and lure appellant into the commission of a criminal act.

It is unquestionably true that decoys may not be used to ensnare the innocent and law-abiding into the commission of crime when the criminal design originates not with the accused but is conceived in the minds of officers, and the accused is by persuasion, deceitful representation or inducement lured into the commission of a criminal act. When an officer induces a person to commit a crime, which he would not have committed without such inducement, the law will not punish the person so lured into the crime. People v. Malone, 117 Cal. App. 629, 4 P.(2d) 287. Under such circumstances the government is estopped by sound public policy from prosecuting therefor. The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite and create crime for the sole purpose of prosecuting and punishing it. While decoys may be used to entrap criminals and to present opportunity to one intending to commit a crime, they are not

permitted to ensnare the innocent into the commission of a crime when the criminal design originates not with the accused but is conceived in the minds of the officers, and the accused is by persuasion or inducement lured into a criminal act. Newman v. United States (C. C. A.) 299 F. 128; People v. Malone, supra. We are of the opinion that the facts of this case bring it squarely within this rule.

We are cited by respondent to cases involving entrapment in the sale of narcotics and intoxicating liquor, where it was held that the defense of entrapment did not preclude a conviction. In the cases cited, the officers suspected the defendants of being engaged in the business of selling narcotics and liquor and they were induced by the officers to make a sale. There is no objection to such acts as they merely give the supposed offender an opportunity to sell, and there is no unlawful entrapment. Here, however, as above stated, the scheme originated in the minds of the officers, and appellant so far as the record shows was not engaged in selling the instruments involved, nor was he ever suspected of doing so. The officers deliberately planned a scheme to cause or influence appellant to commit a crime so they might arrest and punish him. Under such circumstances the law will not authorize a conviction.

The order and judgment are reversed.

I concur: CASHIN, J.

KNIGHT, Justice (dissenting).

I dissent for the reason that in my judgment the reversal is based, first, on law not applicable to this class of a case; and, secondly, on the assumption of certain essential facts as to the existence of which there is at best a conflict of evidence.

It is doubtless true that where an accused is charged with having committed a crime such as burglary, robbery, theft, or the like, the design to commit which, so the accused claims, originated with the officers of the law and was not conceived in his mind, but that as a result of persuasion or inducement he entered into the enterprise and committed the crime, the doctrine of illegal entrapment is available to him as a defense; and if he is convicted and there is no conflict in the evidence on that issue, he is entitled to a reversal of the judgment, because as said in In re Moore, 70 Cal. App. 483, 233 P. 805, it would be violative of sound public policy and repugnant to good morals to uphold the conviction of a person who, being entirely innocent of any intention to commit a crime, was inveigled into its commission by an officer of the law or by a private detective hired for that purpose. A fair example of a case belonging to the class above mentioned (but which nevertheless was affirmed because of a conflict in the evidence) is People v. Malone, 117 Cal. App. 629, 4 P.(2d) 287, the only California case cited in the majority opinion. The persons there accused testified that a police investigator, whose true identity was not known to them at the time, inveigled them into committing a burglary, the design to commit which originated with the officer and not with them, and that the investigator facilitated in its commission by lending them a truck with which to carry out his plans. But as stated there was a conflict of evidence on that issue and the conviction was affirmed.

Here we are dealing with a case of another class, which under the authorities should be governed by a different rule. See 7 Cal. Jur. 884. It is a case wherein the accused is charged with having illegally possessed and sold certain articles, the possession and sale of which was forbidden by law. And with respect to such cases it has been held in this state for years, by an unbroken line of decisions, that even though the officers of the law originate the plan to bring about the sale and facilitate its consummation by furnishing the money with which the purchase is made, the doctrine of illegal entrapment is not available as a ground for reversal; that a reversal is warranted only when the evidence establishes also, and without conflict, elements of persuasion, inducement or allurement outside the ordinary transaction of purchase and sale between a willing purchaser and a willing vendor. In re Moore, supra; People v. Ramirez, 95 Cal. App. 140, 272 P. 608; People v. Heusers, 58 Cal. App. 103, 207 P. 908; People v. Barkdoll, 36 Cal. App. 25, 171 P. 440; People v. Tomasovich, 56 Cal. App. 520, 206 P. 119; People v. Rodriguez, 61 Cal. App. 69, 214 P. 452; People v. Caiazza, 61 Cal. App. 505, 215 P. 80; People v. Rucker, 121 Cal. App. 361, 8 P.(2d) 938.

In the present case it appears from the evidence that for more than ten years appellant had been engaged in the operation of a business in Oakland dealing in part in the sale of dangerous and deadly weapons, the possession and sale of which was regulated and governed by a state law enacted in the year 1923 (Stats. 1923, p. 695); and admittedly the police department of that city, in pursuance of its law enforcement duty, planned to ascertain whether appellant and others were violating said law, and if they were, to secure the nec-

essary evidence against them so they might be prosecuted therefor; furthermore, that for obvious reasons it employed a person to assist in carrying out such plan who would not be suspected of being a member of said department, and that the police furnished him with the money with which to make the necessary purchases. But the record contains no testimony showing, as charged in the majority opinion, that the officers or their agent persuaded, induced, or lured appellant into making said sale, or that he was innocent of any intention of committing a crime in so doing. On the contrary, there is evidence affirmatively showing that he was at all times ready, able, and in fact eager to make the sale; that not only did he willingly and actively participate in the transaction, but that he well knew from the beginning, as stated by him at the time, that if he participated in the sale of the deadly weapons Forts was seeking to purchase he would be committing a criminal offense, and that he was willing, nevertheless, to take the chance of arrest. In this regard it appears from the testimony given by Forts that when he entered appellant's store and informed appellant that he had been sent there by a friend who had told him he would be able to buy some such weapons there, appellant replied, "You know, young man, it is against the law, but I will take a chance so long as your friend sent you up here." Appellant then asked Forts how many he wanted and Forts replied "about a dozen." Appellant stated that "at that time" he did not have that many, but requested Forts to come back later, about noon; and before Forts left appellant asked for a deposit, which, however, was not put up. When Forts returned at noon appellant took a bundle from his showcase, unwrapped it and displayed the three weapons in question, stating that he was able to obtain only three, but that if Forts would come back the next day he would have the others. Forts paid for the weapons, following which appellant tried to interest him in the purchase of some pistols; but no sale thereof was made. Continuing, the evidence shows that after Forts left the store, taking the weapons with him, he met Officer Pardee, under whose direction he was operating; and pursuant to Pardee's instructions Forts immediately returned to the store and began arguing with appellant about the type of weapons he had sold him. While the discussion was going on Pardee and Officer McMorrow entered the store, and appellant immediately dropped the bundle and covered up the weapons. Advancing toward the two men Officer Pardee said, "What is going on here?" and appellant replied: "There is nothing going on here." Pardee then said: "You covered something with paper on top of the shelf there. What is it?" And appellant replied: "Nothing." Whereupon Pardee reached over, took the bundle, and exposing the weapons said: "I see now the reason you covered it." Pardee then asked appellant if he did not know it was against the law to sell such weapons to a citizen, and appellant replied: "Yes, it is against the law, but I took a chance, just the same." Pardee's testimony as to what occurred after he entered the store is substantially the same as the above except that he stated appellant first admitted knowing it was in violation of law to sell said weapons, and later claimed he had a legal right so to do. Moreover, appellant as a witness in his own behalf made no claim that he was lured or persuaded into the act of selling. He took the position at the trial as on this appeal that he had a lawful right to sell the type of weapon he delivered to Forts; and at the trial he produced a number of witnesses to support such position. It is true, Forts told him he was connected with the shipping industry; and appellant may have believed it; but this circumstance is of little consequence in view of appellant's claim that he had the legal right to sell said weapons to anybody. Even assuming, however, that it might be reasonably inferred from any part of appellant's testimony that the transaction involving the sale of the weapons extended beyond an ordinary sale and tended to prove elements of persuasion and enticement, such testimony could do no more than raise a conflict on the issue of illegal entrapment, which was submitted to the jury as a question of fact under court instructions, the correctness of which appellant expressly concedes; and evidently the members of the jury, as sole judges of the credibility of the witnesses, rejected appellant's story and accepted as true the testimony given by the officers. If follows, therefore, that in any event the conclusion reached by the jury on this issue should be taken as controlling on appeal.

When the facts of this case are compared with those involved in the Moore, Ramirez, Rucker, and Heusers Cases, it becomes apparent that the plan here followed by the police in seeking to enforce the terms of this important statute was no different from the one receiving the sanction and approval of the reviewing courts in those cases; nor any different from the one that has been followed for years in this state by local

governmental law enforcement agencies. Moreover, such comparison makes it clear that the case of illegal entrapment, which appellant has sought to establish on this appeal, is no stronger than those attempted to be made out in the cases above cited, and it is far weaker than the one relied on in the Moore Case; and in all of those cases the convictions were sustained.

Finally it may be observed that inasmuch as the question of illegal entrapment is one of fact to be submitted to the jury, it is seldom indeed that a judgment of conviction in a case of this kind has been reversed in this state on that ground; and no such reversal has been cited by appellant on this appeal.

For the reasons stated it is my conclusion that a reversal of the judgment of conviction on the ground of illegal entrapment is not justified.

140 Cal.App. 689

BROWNE et al. v. FERNANDEZ et al.

Civ. 9287.

District Court of Appeal, First District, Division 2, California.

Sept. 17, 1934.

Hearing Denied by Supreme Court Nov. 16, 1934.

1. Automobiles ⇐238(7)

In action by occupant against owner of automobile for injuries sustained in accident, allegation that owner, knowing that danger to occupant was to be apprehended by not stopping, willfully failed to stop at stop sign and drove automobile into arterial street at excessive rate of speed *held* to state cause of action against owner of automobile under guest statute (St. 1931, p. 1693, § 141¾).

2. Automobiles ⇐181(1)

Failure to perform a statutory duty is not "willful misconduct" within automobile guest statute, but there must be actual knowledge, or that which in law is esteemed to be equivalent of actual knowledge, of peril to be apprehended from failure to act, coupled with conscious failure to act to end of averting injury (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

3. Automobiles ⇐245(14, 61)

In automobile collision case, whether defendant automobilist was negligent and whether such negligence contributed to accident which resulted in plaintiff's injuries was not question of law for court but was question of fact for jury under proper instructions.

4. Automobiles ⇐245(61)

In automobile collision case in which evidence showed that defendant automobilist was guilty of negligence, it was for jury to determine whether that negligence in any degree proximately contributed to injuries received by plaintiff.

5. Appeal and error ⇐1068(1)

Where defendant set up contributory negligence and evidence did not show contributory negligence, that instructions were given on defense of contributory negligence *held* not reversible error where there was nothing in record to indicate verdict was based on that issue and where it could be assumed that jury based verdict on finding defendant was not negligent.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Velma C. Browne and another against Manuel Fernandez and Herbert Mabie. From the judgment, the plaintiffs and Herbert Mabie appeal. Affirmed.

Hearing denied by Supreme Court; PRESTON, LANGDON and THOMPSON, JJ., dissenting.

Dunn, White & Aiken and Hamilton Wright, all of Oakland, for appellant Herbert Mabie.

Louis Oneal and Maurice J. Rankin, both of San Jose, for appellants-respondents Browne.

Frank V. Campbell and L. H. Schellbach, both of San Jose, for respondent Manuel Fernandez.

STURTEVANT, Justice.

In the complaint filed in the lower court and as amended by interlineation, the plaintiffs, who are husband and wife, charge that on October 29, 1932, plaintiff Velma C. Browne was riding in the automobile of Herbert Mabie as his guest. The said automobile was then being driven and operated by defendant Mabie on Lafayette street in the city of Santa Clara, county of Santa Clara, at or near the place where said Lafayette street intersects and runs into Clay street, also known as the San Francisco Highway. Continuing they alleged:

"III. That on said October 29th, 1932, and while plaintiff, Velma C. Browne, was riding in the automobile of said Herbert Mabie, as

above alleged, said defendant, Herbert Mabie, drove and operated said automobile in which said plaintiff was riding in such manner as to be guilty of wilful misconduct, and plaintiff alleges the following in that respect; that said Clay street, which is part of the San Francisco Highway, as above alleged, is a boulevard or arterial street, and was on said October 29, 1932, designated as such boulevard, and on said Lafayette street, immediately south of where same intersects with said Clay street an arterial or boulevard stop sign was erected and maintained by law, and said sign was in such a position as to be apparent to all persons entering said Clay street from said Lafayette street, and said defendant, Herbert Mabie, when he approached said Clay street observed said stop and knew that it was his duty to stop before attempting to enter upon said Clay street and knew that said Clay street was an arterial or boulevard street and knew that danger and peril to plaintiff was to be apprehended by not stopping, notwithstanding which said Herbert Mabie carelessly and negligently and wilfully and with the intention to violate the law requiring him to stop before entering said arterial street failed to bring his said automobile to a stop before attempting to enter said arterial street and drove same at an excessive rate of speed into said arterial street without stopping or pausing at said arterial stop sign.

"IIIa. That while plaintiff, Velma C. Browne, was riding in said automobile of Herbert Mabie, as above alleged, and while said automobile was being driven by said Herbert Mabie from said Lafayette street and into said Clay street, as above alleged, defendant Manuel Fernandez carelessly and negligently drove, operated and propelled an automobile in his possession on said Clay street, at or near where same is intersected by said Lafayette street and at the point thereon where said plaintiff, Velma C. Browne, was being driven, as aforesaid, and that said carelessness and negligence of said defendant, Manuel Fernandez, combined and in conjunction with said wilful misconduct of said Herbert Mabie caused the said automobiles driven by said Manuel Fernandez and Herbert Mabie respectively to come into violent collision."

Defendant Mabie filed his general demurrer to the complaint and, after the complaint was amended by interlineation, filed a general demurrer to the amended complaint, which demurrer the trial court overruled. In due time answers were filed in behalf of the defendant Fernandez and defendant Mabie and trial was had before a jury, which returned a verdict in favor of plaintiffs Browne and against defendant Mabie in the sum of $3,000, and found a verdict in favor of the defendant Fernandez.

Plaintiffs Browne appealed from the judgment on the verdict in favor of defendant Fernandez and the defendant Mabie appealed from the judgment upon the verdict rendered in favor of plaintiffs and against Mabie.

[1, 2] Defendant Mabie contends that the complaint, as amended by interlineation, does not state a cause of action and that therefore the court should have sustained the general demurrer thereto. The attack is against the allegations contained in the complaint as hereinbefore set forth. It is argued that the facts alleged, namely, failure to stop and speeding up across the highway, do not constitute, under the law, willful misconduct so as to entitle plaintiff Velma Browne, a guest rider, to recover damages; and that the allegation (which was the matter added by interlineation) "and knew that danger and peril to plaintiff was to be apprehended by not stopping," does not in any way add to the facts.

Since the enactment of the passenger guest rule, as now contained in section 141¾, California Vehicle Act (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), there have been several well-considered cases interpreting what is meant by willful misconduct. In Howard v. Howard, 132 Cal. App. 124, at page 128, 22 P.(2d) 279, 281, it is stated: "It seems to us that the intent of the Legislature, as expressed in these enactments, requires that willful misconduct be interpreted as something quite different from negligence, even gross negligence, and that it involves distinct positive elements rather than the merely negative elements of negligence or carelessness." After defining gross negligence as set forth in Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327, and what is meant by willful misconduct as set forth in Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, the opinion continues: " 'The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute "willful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury.'

"While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence, and that this misconduct must be willful. While the word 'willful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result." To the same effect see Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520; Turner v. Standard Oil, 134 Cal. App. 622, 25 P. (2d) 988. Not expressing our approval of the pleading as a model, we are unable to say that it wholly fails to state a cause of action against the defendant Mabie.

All the other questions discussed by defendant Mabie involve the same point as raised upon the demurrer to the complaint.

[3, 4] An entirely different question is presented on the appeal of the plaintiffs against the defendant Fernandez. On this phase of the case plaintiffs contend that the verdict in favor of defendant Fernandez is contrary to the evidence in view of the fact that the evidence overwhelmingly preponderated in plaintiffs' favor that defendant Fernandez was guilty of negligence and that such negligence contributed to the accident which resulted in the injuries to plaintiff. That is not a question of law for the court to determine but was a question of fact for the jury under proper instructions. Assuming that the evidence showed the defendant Fernandez guilty of negligence and that the jury so believed, nevertheless it was for the jury to determine whether that negligence in any degree proximately contributed to the injuries received by the plaintiff Browne.

[5] The plaintiffs complain that the court improperly instructed the jury. That complaint is without merit. Seldom has a record come before us which shows so much care on the part of the trial judge. The instructions were given in the morning so the jury had the entire day to deliberate on its verdict. After examining and approving them, the trial judge gave every requested instruction and gave a few additional ones of its own motion. They cover seventy folios of typewritten manuscript. One was: "I instruct you that in applying these instructions to the evidence they are to be taken as a whole." We have read all of them and find no prejudicial error in any one. It is claimed that there was no evidence of contributory negligence and therefore no instruction on that subject should have been given. Under the facts contained in the record, we think it may not be said that there was no evidence on the subject of contributory negligence. Bauer v. Tougaw, 128 Wash. 654, 224 P. 20, 21. But all of that evidence was to the effect that the plaintiffs were not guilty of contributory negligence. In his answer defendant Fernandez set forth, in effect, three defenses: (1) That the accident was caused by the negligence of the defendant Mabie; (2) that the defendant Fernandez was not negligent; and (3) that the plaintiffs were guilty of contributory negligence. Later he requested and the trial court gave instructions on the subject of contributory negligence. But there is nothing in the record that tends to show that such verdict was based on the issue of contributory negligence. The defendant Fernandez gave testimony to the effect that he committed no act of negligence, and, if the jury believed it, the jury was well within its rights in returning a verdict in his favor. Nothing to the contrary appearing, it can therefore be assumed that the jury found that Fernandez was not negligent and that on that finding it based its verdict. Under such circumstances the judgment may not be reversed because instructions were given on the defense of contributory negligence. Brandes v. Rucker-Fuller Desk Co., 102 Cal. App. 228, 282 P. 1009; 24 Cal. Jur. 832, 833.

It is claimed some instructions omitted certain words. All of the instructions could not be embodied in one sentence. All read as a

whole correctly stated the several rules which they were intended to cover.

The judgment appealed from is affirmed.

I concur: NOURSE, P. J.

SPENCE, Justice.

I concur in the judgment, but it must be conceded that this is one of the difficult, border-line cases arising under our amended guest law which limits recovery to cases of willful misconduct and intoxication. California Vehicle Act, § 141¾ (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580), as amended by St. 1931, c. 812, p. 1693. The meaning of the term "willful misconduct," as employed in said section, has been frequently discussed in the recent decisions. Meek v. Fowler (Cal. App.) 35 P.(2d) 410; Horning v. Gerlach (Cal. App.) 34 P.(2d) 504; Manica v. Smith (Cal. App.) 33 P.(2d) 418; Gibson v. Easley (Cal. App.) 32 P.(2d) 983; Norton v. Puter (Cal. App.) 32 P.(2d) 172; Olson v. Gay (Cal. App.) 27 P.(2d) 922; Forsman v. Colton, 136 Cal. App. 97, 28 P.(2d) 429; Turner v. Standard Oil Co., 134 Cal. App. 622, 25 P.(2d) 988; Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520; Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279. It appears, however, that the language in said decisions is not entirely harmonious.

Two main problems were presented to the courts under said section. The first was to arrive at a satisfactory definition of the term "willful misconduct" as used therein. The second was to apply such definition to the facts and to determine whether the evidence was sufficient to sustain a finding of willful misconduct as opposed to mere negligence or even gross negligence. Neither problem was free from difficulty.

In my opinion the most satisfactory definition of the term "willful misconduct" is to be found in Turner v. Standard Oil Co., 134 Cal. App. 622, 25 P.(2d) 988. It is there said at page 626 of 134 Cal. App., 25 P.(2d) 988, 990: "'Willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." Substantially similar definitions are to be found in the other decisions mentioned, but slight variations in phraseology have led to some confusion. If such confusion continues to exist, it will no doubt result in the nullification of the legislative attempt to confine recovery to cases of willful misconduct and to deny recovery in cases involving negligence or gross negligence.

It has been frequently said that willful misconduct is something different from and greater than either negligence or gross negligence and the opinions in the above-mentioned cases discuss the relationship between negligence and willful misconduct. Broadly speaking, it may be entirely correct to say that all willful misconduct falls within the definition of negligence, for the doing of an act which constitutes willful misconduct is likewise the doing of an act which a man of ordinary prudence would not do under the circumstances. It does not follow, however, that all negligence constitutes willful misconduct. It is not an essential element of negligence that there be any intent to do the act or make the omission. It is sufficient if the act be done either intentionally or thoughtlessly. Neither is it essential that the act be done or the omission be made with knowledge that injury will be the probable result thereof. On the other hand, both the element of intent and the element of knowledge of the probability of resulting injury as set forth in the foregoing definition must be present in order to constitute willful misconduct. In my opinion the definition of willful misconduct as found in Turner v. Standard Oil Co., supra, and above set forth, is as clear, concise, and accurate as it is possible to make it. In the light of the legislative history, said definition seems to carry out the purpose which the Legislature had in mind. I believe that said definition should be accepted and should, without confusing amplification, be strictly adhered to in order that the law on this subject may be treated as definitely settled.

In order to test the sufficiency of the evidence in any given case involving a charge of willful misconduct, it must be borne in mind that it is seldom possible to obtain direct evidence of the necessary intent and knowledge except through the testimony of the defendant himself. If the facts warrant it, however, such intent and knowledge may be inferred from the surrounding circumstances. Olson v. Gay, supra; Walker v. Bacon, supra; Norton v. Puter, supra. It is impossible to lay down any general rules in this regard, but each case must stand upon its own facts. In certain aggravated cases, the necessary intent and knowledge may be readily inferred from the surrounding circumstances while in others the question of the sufficiency of the evidence to support such inference presents a

more serious problem. It may be noted that such intent and knowledge may not be inferred from the facts in every case showing an act or omission constituting negligence for, if this were true, any set of facts sufficient to sustain a finding of negligence would likewise be sufficient to sustain a finding of willful misconduct.

Coming to a consideration of the present case, appellant Mabie's attack is based upon the alleged insufficiency of the complaint and the alleged insufficiency of the evidence. Said appellant does not challenge the instructions defining willful misconduct, as the only instructions given on this subject were those proposed by said appellant and all of his proposed instructions were given by the court. It is therefore unnecessary to discuss said instructions, but it may be stated that while said instructions defining willful misconduct were not confined to the definition above set forth, they were substantially correct.

Disregarding conflicts, there was evidence in this case to show that despite the admonition of his guests, appellant Mabie disregarded the stop sign, proceeded into the intersection at a speed of approximately 25 miles per hour, and then speeded up his car in an effort to beat the two on-coming cars which were traveling along the highway. Conceding the case to be a close one, I believe that the jury could properly infer from the evidence presented that there was the requisite intent and that there was the requisite knowledge of probability of injury to his guests to constitute willful misconduct. It therefore follows that there is no merit in appellant's contention concerning the insufficiency of the evidence.

The complaint herein is not to be commended, but it should be stated that it was drawn and thereafter approved by the trial court as amended before the opinions had been handed down in the recent cases defining willful misconduct. An obvious attempt was made in said complaint to plead willful misconduct and appellant Mabie was not misled. If it be assumed for the purpose of argument that it was insufficient in its allegations of willful misconduct, nevertheless a reversal should not be ordered under the circumstances as the evidence was sufficient to show willful misconduct and the jury impliedly found under proper instructions that said appellant was chargeable therewith. Constitution, art. 6, § 4½; Baker v. Miller, 190 Cal. 263, 212 P. 11; Bonney v. Petty, 125 Cal. App. 527, 13 P.(2d) 969; Nichols v. Smith (Cal. App.) 28 P.(2d) 693.

1 Cal.App.2d 120

MORRIS v. PURITY SAUSAGE CO. et al.

Civ. 8910.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1934.

1. New trial ⇐140(1)

Where affidavit in support of new trial motion was filed more than ten days after statutory period for filing affidavits and no extension was granted, consideration of affidavit by trial court would be improper (Code Civ. Proc. § 659a).

2. Appeal and error ⇐933(5)

On appellant's motion to rectify suggested diminution of record so as to include therein affidavit allegedly considered in support of new trial motion, appellate court could not presume that trial court considered the affidavit where consideration thereof would have been improper because affidavit was filed too late (Code Civ. Proc. § 659a).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding by Matilda Morris against the Purity Sausage Company, Conrad Annasohn, and another, individually and as copartners, etc., and others. From the judgment, plaintiff appeals. On plaintiff's motion for an order to rectify the diminution of the record suggested by plaintiff.

Motion denied.

Ingemar E. Hoberg and Donald C. Young, both of San Francisco, for appellant.

Cooley, Crowley & Supple, of San Francisco, for respondents.

PER CURIAM.

Appellant by motion sought an order for the diminution of the record on appeal so as to include therein a certain affidavit alleged to have been considered in support of appellant's motion for a new trial.

[1, 2] It appears without dispute that the affidavit in question was served and filed more than ten days after the time permitted by section 659a of the Code of Civil Procedure for the filing of affidavits on motions for a new trial, and, so far as shown, no extension of time was granted. Under such circumstances, consideration of the affidavit by the trial court would have been improper (Crofford v. Crofford, 29 Cal. App. 662, 157 P. 560; Terry v. Lesem, 89 Cal. App. 682, 265 P. 523),

and we cannot presume that such was the case (2 Cal. Jur. Appeal and Error, § 499, p. 852).

The motion is denied.

140 Cal.App. 651

COLONIAL MUT. COMPENSATION INS. CO., Limited, v. MITCHELL, Ins. Com'r.

Civ. 9869.

District Court of Appeal, Second District, Division 2, California.

Sept. 14, 1934.

1. Insurance ⇐8

State insurance commissioner could not demand, as condition of allowance of permit to begin business to compensation insurance carrier, deposit of cash and securities equal to reserves for outstanding losses provided in lieu of bond to secure payment of claims, minimum of $100,000 required in case of bond, in view of commissioner's long-continued interpretation that only $25,000 in cash or securities was required where no bond was filed (St. 1917, pp. 292, 295, §§ 1, 11).

2. Statutes ⇐219

Administrative officials' long-continued interpretation of law providing for deposit of cash and securities by compensation insurance carrier in lieu of bond as not requiring minimum of $100,000 as in case of bond, with no ill results and no exception thereto by legislature, is strong factor tending to uphold such prior interpretation in event of ambiguity (St. 1917, pp. 292, 295, §§ 1, 11).

Petition for a writ of mandate by the Colonial Mutual Compensation Insurance Company, Limited, against E. Forrest Mitchell, State Insurance Commissioner. On demurrer to the petition.

Peremptory writ issued.

Walter L. Bowers and W. Wallace Trau, both of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for respondent.

STEPHENS, Presiding Justice.

Petitioner duly organized under the Workmen's Compensation Insurance Act as a limited mutual company. It applied to the respondent for a certificate of authority tendering for approval securities and cash in an amount of $25,000. May 22, 1934, respondent submitted the application to the Attorney General and thereafter the last-named official advised the Insurance Commissioner that a company commencing business must deposit a minimum of cash or securities in the amount of $100,000. Whereupon respondent refused petitioner the certificate of authority upon the sole ground that, as directed by the Attorney General, he would require $100,000 in cash, or securities; it being conceded that otherwise the certificate should issue and that the value of the securities offered amounted to $25,000. A demurrer to the petition was interposed.

It appears that since 1917 the Insurance Commissioner, acting upon advice of the Attorney General, has continuously permitted companies to commence the business sought to be done by petitioner upon deposit of $25,000; that when petitioner made its application there were eleven workmen's compensation insurance carriers operating in this state, each one of which began with a deposit of $25,000, which amount remains unchanged as to seven, and as to none has the amount been raised to more than $33,000; that in issuing permits upon this basis the Insurance Commissioner has at all times acted upon the advice of the Attorney General as to the sufficiency of these initial deposits. The law has not undergone any change in the sections of the act here in question within the period since 1917.

The issue here presented requires that we construe sections 1 and 11 of the Compensation Insurance Act enacted in 1917.

The title of the act and section 1 read as follows:

"An act to provide for the protection of beneficiaries of workmen's compensation insurance policies against the default or insolvency of insurance carriers issuing such policies by requiring such carriers to provide security for the payment of such compensation." (Approved May 9, 1917; St. 1917, p. 292.)

"Section 1. Every insurance carrier, except the state compensation insurance fund, transacting the business of workmen's compensation insurance in this state, shall on the first day of October, A. D. 1917, file in the office of the insurance commissioner of this state a bond in favor of said insurance commissioner as trustee for the beneficiaries of awards of compensation rendered by the industrial accident commission, executed by said carrier and some surety company or companies approved

by said insurance commissioner and authorized to transact the business of suretyship in this state. Said bond shall be in an amount not less than the reserve for outstanding losses of said insurance carrier on compensation insurance in this state on December 31, A. D. 1916, calculated as prescribed by the laws of this state, nor for more than double the amount of said reserve, but in no case for less than the sum of one hundred thousand dollars."

Section 11 provides: "Any compensation insurance carrier may, in lieu of said bond and subject to the same conditions, deposit with the state treasurer, through the insurance commissioner, from time to time as may be demanded by said commissioner, cash or approved interest-bearing securities readily convertible into cash, equal to the reserves for outstanding losses required by section six hundred two (a) of the Political Code at the time of said deposit, on the compensation business of said carrier in the State of California, calculated as hereinbefore provided, as security for the payment of its obligations on said business done in this state, and said deposit shall not be withdrawn except upon the written order of the insurance commissioner in payment of compensation claims, but shall be forthwith payable by the state treasurer to the insurance commissioner upon such order; provided, that any such deposit, or any remainder thereof, may be repaid to such carrier upon satisfactory showing to the insurance commissioner that every liability to pay compensation shall have been reinsured with a solvent carrier or fully paid and discharged. Said deposit shall be used only for the payment of compensation claims so long as there shall remain unpaid any such claim or any part thereof."

[1] It appears that the correct construction of these sections is as the Attorney General has heretofore construed it and as the Insurance Commissioner has applied it, requiring and holding that a carrier before being allowed a permit to begin business may furnish a bond in the sum of $100,000 as provided in section 1, or may deposit cash or securities as allowed by section 11, in which event $25,000 in such cash or securities has been held sufficient at the outset to insure payment of its obligations on business to be done immediately in this state and to qualify under the requirement that such deposit shall "equal the reserves for outstanding losses required by section six hundred and two (a) of the Political Code."

Respondent now for the first time, under the legal advice of the attorney general, has concluded that the enactment requires that if the applicant for a permit elects to deposit cash or securities under section 11 instead of furnishing the bond provided by section 1, he must produce and deposit $100,000 worth of cash or securities.

We are convinced that the past ruling and not the present holding of the Attorney General is the correct one. It would require a strained construction to reach a different conclusion. When section 11 provides, "any compensation insurance carrier may, in lieu of said bond and subject to the same conditions, deposit * * * cash or * * * securities readily convertible into cash," it cannot be doubted that it was the legislative intent that such deposit in cash or securities should take the place of the bond mentioned in section 1 for all purposes. The object of both is clearly to provide "for the payment of its obligations on said business done in this state"; the basis for calculation in making such provision apparently is "the reserve for outstanding losses of said insurance carrier." Where a bond is furnished under section 1, it is considered proper to require that it should be at least in the amount of such reserves, but no more than double such amount. But where cash or securities readily convertible into cash is deposited pursuant to section 11, it is only required that the deposit be "equal to the reserves for outstanding losses," etc. Such difference between the amount of a bond and a cash deposit is customary and the reasons justifying it too obvious to require statement here.

Section 11 makes no mention of any specific sums to be deposited except as above quoted. If it had intended that the cash deposit be $100,000 regardless of the amount of reserves, doubtless it would have so stated in apt language. That such omission was intentional seems clear. There could be no logical reason for such a deposit. The experience of the commissioner's supervision of carriers demonstrates this. Although having full authority to require an increase of the amount of the deposit if necessary to carry out the expressed purpose of the act, it appears that no substantial increase above the $25,000 initially made has been so required of the eleven carriers at present operating in this state. Respondent concedes that under his construction of these sections, after the first year of a carrier's doing business, the amount of his deposit might be reduced to perhaps $25,000. This being

so, why it would be desirable to compel $100,000 to be placed on deposit in the beginning is not apparent nor suggested by respondent. The court is not justified in reading a provision into the law which is not found in its language, and for which no logical reason exists. But respondent leans for support on the words "and subject to the same conditions," in section 11, where it is provided that cash or securities may be deposited in lieu of the bond. There is nothing in this language indicating what the amount of the deposit shall be. The conditions mentioned undoubtedly consist of those provisions for use of the bond for the purposes for which it was intended, namely, for the protection of beneficiaries under the workmen's compensation insurance policies, and the ultimate and timely payment to such beneficiaries of the awards made such beneficiaries by the industrial accident commission. The deposit merely takes the place of the bond. For example, if a judgment were entered under section 1, it would include all legal costs, including reasonable attorney's fees, which would be collectible from the carrier or from the surety on the bond; so it would, only more simply and directly from the deposit of cash or securities. No doubt also the deposit would, after 30 days lapse from date of the carrier becoming insolvent or having a receiver appointed for it, become available at once for the payment of awards as provided in section 1, in like instances as to liability on the bond. These and similar provisions are the "conditions" intended in section 11, to which we have adverted.

The intent towards elasticity of the act in allowing reduction of the deposit so long as payment of "compensation claims" is secured is emphasized by the provision of section 11, "provided, that any such deposit, or any remainder thereof, may be repaid to such carrier upon satisfactory showing to the insurance commissioner that every liability to pay compensation shall have been reinsured with a solvent carrier or fully paid and discharged." This and the history of the administration of the law admittedly true as alleged in the petition is wholly inconsistent with the unsupported claim by respondent that any other interpretation of section 11 than one requiring the deposit of $100,000 in securities would render fruitless the efforts of the legislature to protect the wage-earners.

The Insurance Commissioner is rightly and effectually given plenary power to protect the payment of awards for compensation to the wage-earner throughout the act, and in particular by the provision of section 11 that the deposit in lieu of the bond may "from time to time as may be demanded by said commissioner" be made. Beyond what the legislature has here enacted, all that is necessary to complete the protection of the wage-earner is that degree of vigilance by the Insurance Commissioner which the law may properly expect of every public officer. He may at any time, within the exercise of his own reasonable discretion, require such additional deposit as will fully protect the wage-earner and insure the payment of awards to him made under other provisions of the Workmen's Compensation Act.

[2] If any ambiguity existed here, the long-continued interpretation of the law by the officials called upon to administer it, with no ill results and no exception to such interpretation by the legislature, would be a strong factor tending to uphold such prior interpretation. Godward v. Board of Trustees, 94 Cal. App. 160, 270 P. 725; Comstock v. Davis, 44 Cal. App. 275, 186 P. 380; Riley v. Thompson, 193 Cal. 773, 227 P. 772; Mayes v. Paul Jones & Co. (C. C. A.) 270 F. 121.

Let the peremptory writ issue as prayed.

I concur: DESMOND, J.

1 Cal.App.2d 142

FLAGG v. SLOANE et al.

Civ. 1058.

District Court of Appeal, Fourth District, California.

Sept. 27, 1934.

1. Appeal and error ⇐907(3)

Appellate court must presume on appeal taken on judgment roll alone that fact findings are supported by evidence.

2. Corporations ⇐243(2)

Persons to whom one in whose name corporation stock was issued agreed to assign part of it, but never did because prohibited by corporation commissioners' permit, *held* not liable for purchase price of stock.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by George L. Flagg, trustee of the estate of the California Land Buyers' Syndicate, a corporation, bankrupt, against Harrison G. Sloane, O. E. Darnall, and Ed Fletcher, Jr. Judgment for defendants, and plaintiff appeals.

Affirmed as to defendants Darnall and Fletcher.

See, also, 135 Cal. App. 334, 26 P.(2d) 874.

Ed. P. Sample and William H. Wylie, both of San Diego, for appellant.

Hamilton, Lindley & Higgins and Harrison G. Sloane, all of San Diego, for respondents.

MARKS, Justice.

This is an action to recover $120,000 unpaid purchase price of 5,000 shares of the capital stock of the California Land Buyers Syndicate, a bankrupt corporation. The action involves 5,000 shares of stock of the par value of $25 each; $5,000 was paid to the corporation by R. L. Stewart and the stock issued. It was not delivered, but was placed in escrow in accordance with the permit of the commissioner of corporations.

[1] This appeal is taken on the judgment roll alone. We must therefore presume that the findings of fact are all supported by the evidence.

[2] The findings of fact show that all of the stock here in question was issued in the name of R. L. Stewart and was never sold, assigned, or transferred by him; that it could not have been, as no permit therefor was ever issued; that neither Darnall nor Fletcher ever appeared on the books of the corporation as the owners of this stock.

The only possible interest of Darnall or Fletcher in any of this stock was through what was called a "participation agreement," whereby Stewart agreed to assign certain of the stock to them at some time in the future. This was never done, or attempted, as the permit issued by the commissioner of corporations prohibited Stewart from giving any other person any interest in any of the stock.

This case came before this court on the motion of the defendant Sloane to dismiss the appeal or affirm the judgment as to him. Flagg v. Sloane, 135 Cal. App. 334, 26 P.(2d) 874. The motion was granted and the judgment affirmed as to him. The opinion in that case disposes of all the pertinent questions presented here.

The appeal is without merit, and the judgment is affirmed as to O. E. Darnall and Ed Fletcher, Jr., the two remaining respondents.

We concur: BARNARD, P. J.; JENNINGS, J.

140 Cal.App. 662

LINDLEY et al. v. SALE et al.

Civ. 5090.

District Court of Appeal, Third District, California.

Sept. 14, 1934.

Rehearing Denied Oct. 13, 1934.

Hearing Denied by Supreme Court Nov. 16, 1934.

1. Landlord and tenant ⇐148(1), 208(1)

Assignment of lease with consent of lessor does not relieve lessee of express covenant to pay rent or taxes, in absence of express release by lessor, but lessor may hold lessee responsible as surety for payment of obligations by assignee.

2. Landlord and tenant ⇐208(1)

Under lease releasing lessees from obligation to pay rent, taxes, and assessments on assignment if lessees were not in default, lessees were not in default of payment of rent when no installment of rent was unpaid or due at time of assignment.

3. Landlord and tenant ⇐76(1)

Under lease releasing lessees from obligation to pay rent, taxes and assessments on assignment if lessees were not in default, lessees were not in default for failure to pay taxes or assessments, which, at time of assignment, were not enforceable by law (St. 1911, p. 1192, as amended).

4. Landlord and tenant ⇐149

In absence of covenant on part of lessee to pay taxes or assessments at specified time, there is no legal obligation to pay them until last day upon which law requires them to be paid so as to save interest, penalties, or personal liability of lessor.

5. Landlord and tenant ⇐148(1)

Where lease providing for payment of taxes and assessments by lessees did not require payment of taxes or assessments at any specified time, it would be assumed that parties intended that taxes and assessments should be paid when law required those acts to be performed, so that lessees were not in "default," which is failure to perform duty or obligation required by law or by contract, so long as law authorized payment of taxes

and assessments without imposition of additional penalties, interest, or delinquency.

[Ed. Note.—For other definitions of "Default," see Words & Phrases.]

6. Landlord and tenant ⇐76(1)

Under lease providing lessees could assign lease provided they were not in default in payment of taxes, rent, or assessments, lease could be assigned when all payments of rents, taxes, and assessments, which could then be legally enforced, had first been paid by lessees.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Florence Haynes Lindley, individually, and Florence Lindley and James L. McLachlan, as trustees under the last will and testament of Walter Lindley, deceased, against L. D. Sale and Edward T. Off. From the judgment, the defendants appeal.

Reversed, with directions.

Lloyd W. Moultrie, of Los Angeles, for appellants.

J. Wiseman Macdonald, of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered against the assignors of a lease for installments of rent, taxes, and assessments due under the terms of a 99-year lease. The sole question to be determined is whether the lessees were in default for failure to pay taxes and street assessments which were levied but not delinquent at the time of the assignment.

The plaintiffs own certain lots in Los Angeles. November 19, 1921, these lots were leased to the defendants for the term of 99 years for the aggregate rental of $891,000 payable in monthly installments of $750 on the first day of each month beginning with January 1, 1922, together with all taxes and assessments levied against the property. March 27, 1931, the lease was assigned to Robert P. Biggs, who is not a party to this suit. The assignment was recorded December 31, 1931. All installments of rent which were due had been paid prior to the assignment. Two installments of rent which accrued in May and June subsequent to the assignment were not paid. At the time of the assignment the second installment of taxes for that year, amounting to $2,666.15, and certain street assessments were unpaid but not delinquent. The street assessments which accrued prior to the assignment were secured by bonds and authorized to be paid in installments pursuant to the provisions of the Public Improvement Act of 1911, St. 1911, p. 1192, as amended. The lease provided for the assignment and the release of defendants from the obligations thereof provided they were not in default of payments at the time of the assignment and on condition that the assignees expressly accept and assume in writing the terms and obligations of the lease. The lease contains the following provisions:

"The lessees, in consideration of the leasing of the premises as aforesaid, hereby covenant and agree to and with the said lessors to pay rent, and do hereby bind themselves, their heirs and assigns, well and truly to pay rent, for said demised premises, in the full sum of eight hundred ninety one thousand ($891,000.00) dollars, being at the monthly rate of seven hundred and fifty ($750.00) dollars for each and every month of and during the term of this lease. * * *

"As a further consideration for the leasing and demising as aforesaid the said lessees further covenant, promise and agree to bear, pay, and discharge, in addition to said reserved rent, all rates, taxes, charges for revenue and otherwise, assessments and levies, general and special, ordinary and extra ordinary of every name, nature and kind whatsoever, * * * which may be taxed, charged, assessed, levied or imposed upon said premises, or upon any or all buildings and improvements thereon, during the term hereby granted. * * *

"It is further covenanted and agreed between the parties that the lessees shall have the right at any time to assign this lease, provided that they are not in default hereunder, and further provided that such assignment shall be in writing and duly recorded, and that the assignee of said lessees shall expressly accept and assume, in said written assignment, all the terms, conditions, and covenants in this lease contained to be kept and performed by said lessees, and shall expressly agree to comply with and be bound by them. * * * And in the event of such assignment said lessees so assigning shall thereby be thenceforth released and discharged from further liability under this lease, or under any of the agreements or covenants herein contained."

Suit was commenced June 2, 1931, by the owners of the property against the lessees,

for two monthly installments of rent which accrued after the lease was executed, and for the second installment of taxes and street assessments then payable but not delinquent, on the theory that the failure to first pay the taxes and assessments which constituted liens against the property placed the lessees in default and rendered them personally liable for all such payments under the terms of the lease. The cause was tried by the court sitting without a jury. The court adopted findings to the effect that the lessees were in default under the terms of the lease at the time of the assignment thereof, and thereupon rendered judgment against them for the sum of $4,908.47 and costs of suit. From this judgment the defendants have appealed.

[1] The assignment of a lease with the consent of the lessor does not relieve the lessee of his express covenant to pay rent or taxes, in the absence of an express release of his obligations by the lessor. It has been said the effect of such an assignment is to make the lessee a surety for the payment of the obligations by the assignee. The lessor may still hold the lessee responsible. Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann. Cas. 1916E, 830; Strei v. Brooks, 95 Cal. App. 589, 273 P. 145; Winter v. Knapp, 90 Cal. App. 75, 265 P. 527; 36 C. J. 371, § 1227; 16 R. C. L. 846, § 346; 1 Tiffany on Landlord and Tenant, 962, § 157 A-2. But in the present case the lease specifically releases the lessees from their obligation to pay rent and taxes in the event of an assignment thereof provided they were "not in default" at the time of the assignment. The lease provides in that regard: "In the event of such assignment said lessees so assigning shall thereby be thenceforth released and discharged from further liability under this lease, or under any of the agreements or covenants herein contained."

[2, 3] We are of the opinion the lessees were not in default of payments of rent, taxes, or assessments on March 27, 1931, when they assigned the lease to Robert P. Biggs, as they were authorized to do by the express terms thereof. No installment of rent was then unpaid or due. The second installment of taxes did not become delinquent for some time thereafter. The payment of the street assessments had been extended pursuant to the provisions of the Public Improvement Act of 1911 and were not then due. Neither the second installment of taxes nor the street improvement assessments were then enforceable by law. The law fixing the time within which the taxes and assessments may be paid became a part of the contract of lease. It may not be said the lessees were in default for failure to pay taxes or assessments until they were required by law or the express terms of their contract to pay the same. It is said in 1 Tiffany on Landlord and Tenant, p. 855, § 143: "The obligation of the lessee under his covenant is to pay the tax in time to avoid a sale of the lessor's property for nonpayment, or the enforcement of personal liability for the tax against the lessor, and before any penalty or interest becomes due by reason of delay in payment."

[4] In the absence of a covenant on the part of a lessee to pay taxes or assessments at a specified time, there is no legal obligation to pay them until the last day upon which the law requires them to be paid so as to save interest, penalties, or personal liability of the lessor. Trask v. Graham, 47 Minn. 571, 50 N. W. 917, 918; Minneapolis, St. Paul & S. S. M. Ry. Co. v. Linnell, 155 Minn. 103, 192 N. W. 365; Haynes v. Wisner, 129 Wash. 92, 224 P. 592; Willett v. Kesselring, 78 Okl. 199, 189 P. 752. In the Trask Case, supra, which was a suit between a lessee of property and his assignee thereof, for installments of rent and taxes paid under the terms of the lease, it was held there was no default for failure to pay taxes before they became delinquent. The court says in that regard: "The covenant to pay was general, and would be satisfied if paid within the year and so as to save the lessor harmless. The lessees would not be in default, at least till the taxes became delinquent, which would not be till June 1st. There had been no breach of the covenant to pay the taxes, and the assignee took the leasehold estate cum onere as to them also. The plaintiff, as assignee, was liable directly to the lessor upon the covenant to pay the taxes. There had been no previous breach of the covenant, and the plaintiff, as assignee, took the place of the lessee in respect to liability upon covenants not yet matured. * * * Granting, then, that the lien of the taxes attached to the land January 1st, the obligations to pay them under the lease had not yet matured, and there is no covenant against encumbrances or liens on the land."

In the Willett Case, supra, which was an action for unlawful detainer based upon an alleged breach of covenant for the nonpayment of "all taxes and assessments that shall be levied upon said premises during the term," it was held the default did not occur until the payment of taxes became delinquent. In that case the taxes had been levied and

became a lien on the property, but they were not delinquent at the time the suit was commenced. The court said in that regard: "It was that interim of time between the date taxes were due and the time penalty for failure to pay attached that this suit was commenced. The agreement fixed no exact date or time upon which the taxes were to be paid. In the absence of an agreement fixing the time for an act to be done the law presumes that the act will be done in a reasonable time. * * * Until penalty attached, Kesselring could not be prejudiced by failure to pay the taxes; but after default is made in the payment of same, and penalty attaches thereto, he may be prejudiced thereby. We believe, and so find, that the trial court committed error in holding that as a matter of law that it was the duty of Mrs. Willett to pay the taxes when the same became due."

In the Minneapolis, St. Paul Railway Case, supra, the court quoted approvingly from Wills v. Summers, 45 Minn. 90, 47 N. W. 463, as follows: "It was held, under the terms of a lease reading substantially as the one herein as to the payment of taxes: 'That the covenant to pay the taxes would be satisfied by the payment thereof at any time before they became delinquent.'"

The same principle was announced in the case of Ricou v. Hart, 47 La. Ann. 1370, 17 So. 878.

[5] The term "default" is defined as the failure to perform a duty or an obligation required by law or by contract. The contract in this case did not require the payment of taxes or assessments at any specified time. We must then assume the parties to the lease intended to provide they should be paid when the law required that act to be performed. The lessees, therefore, were not in default so long as the law authorized the payment of taxes and assessments without the imposition of additional burdens of penalties, interest, or delinquency.

[6] We are satisfied the term "default" as it is used in the lease which is involved in this case means that the lessees were authorized to assign that instrument upon the written acceptance of the terms and obligations thereof by the assignee when all payments of rent, taxes, and assessments which could then be legally enforced had first been paid by the lessees. The assignee did accept in writing the terms and obligations of the lease, and is liable to the owners for the payment of the same. It may not be assumed the assignee is irresponsible. If he is, it was the misfortune of the lessors that they failed to provide against such a contingency. The irresponsibility of the assignee was not an issue in this case. Fraud in the making of the assignment was neither charged nor proved.

The judgment is reversed, and the court is directed to render judgment for the defendants.

We concur: PULLEN, P. J.; PLUMMER, J.

1 Cal.App.2d 64

NORTH v. EVANS.

Civ. 1098.

District Court of Appeal, Fourth District, California.

Sept. 24, 1934.

Hearing Denied by Supreme Court Nov. 22, 1934.

1. Appeal and error ⇐907(3)

Where appeal was taken on judgment roll alone, court assumed all findings of fact were supported by sufficient material and competent evidence.

2. Judgment ⇐844

Where debt was assignable, assignment of judgment assigned debt upon which it was based.

3. Execution ⇐53

Where debtor had assigned notes many months prior to levy of execution, creditor acquired no interest in notes or debts through sale.

4. Execution ⇐55

Where creditor had issued execution and had secured court order directing county clerk to recognize levy of execution upon notes in clerk's possession, sheriff's legal possession ended, if notes were not subject to execution except on court order, when creditor thereafter directed sheriff to withdraw levy, and sale of notes made thereafter under execution was invalid.

5. Bills and notes ⇐534

Where plaintiff's attorney was in fact real party in interest in action on notes, plaintiff was not entitled to judgment allowing attorney's fees.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by C. C. North against Lillian E. Evans. Judgment for plaintiff, and defendant appeals.

Modified and, as modified, affirmed.

See, also (Cal. App.) 28 P.(2d) 938.

Frank J. Macomber, of San Diego, for appellant.

S. G. North, of San Diego, for respondent.

MARKS, Justice.

On December 13, 1927, Lillian E. Evans gave E. D. Wilkinson her promissory note for $700, due 180 days after date. On March 28, 1928, she gave him a second note for $787.50, due on or before September 1st of the same year. Prior to October 3, 1930, Wilkinson assigned both notes to C. C. North for collection. On that date Mrs. North instituted this action against Mrs. Evans to collect the principal sums, interest, and attorney's fees with S. G. North appearing as her attorney. Mrs. Evans filed her answer, and on December 24, 1930, the trial court gave judgment against her on the pleadings. On December 31, 1930, E. D. Wilkinson assigned all his right, title, and interest in this judgment to S. G. North for and in consideration of the sum of $100, and on January 5, 1931, C. C. North assigned all of her right, title, and interest in the judgment to S. G. North in consideration of the sum of $5. Notices of these assignments were served upon Lillian E. Evans and her attorneys on January 5, 1931. This judgment was reversed by this court on October 2, 1931. North v. Evans, 117 Cal. App. 317, 3 P.(2d) 609. On December 3, 1931, the county clerk of San Diego county entered judgment in favor of Lillian E. Evans and against C. C. North in the sum of $92, costs of appeal.

The San Diego Trust & Savings Bank secured a judgment against E. D. Wilkinson and his wife in the sum of $568.03, which was assigned to J. K. Wilson. On October 7, 1932, an execution was issued on this judgment and placed in the hands of the sheriff of San Diego county with instructions to levy upon all of the right, title, and interest of E. D. Wilkinson in and to the promissory notes upon which this action is brought, by serving a writ of garnishment upon the county clerk of San Diego county who had possession of the notes which were attached as exhibits to a deposition of E. D. Wilkinson taken by the plaintiff in the instant case, and filed in the office of the county clerk. The clerk made a return on the garnishment stating that he had the notes in his possession but did not deliver them to the sheriff. No garnishment was served on the maker of the notes.

On October 8, 1932, Lillian E. Evans had an execution issued on the $92 judgment for costs entered in this case against C. C. North, and on the same day obtained an order of the superior court of San Diego county "directing the said clerk to recognize the levy of said execution by the sheriff of the County of San Diego, State of California, on the notes sued on herein as the property of C. C. North." The sheriff served the writ on the county clerk and obtained possession of the notes. On October 13, 1932, Mrs. Evans directed the sheriff to withdraw the levy of the execution. On October 19, 1932, the sheriff of San Diego county sold all of the right, title, and interest in the notes for $350 to J. K. Wilson under the execution issued in the case of the San Diego Trust & Savings Bank against Wilkinson and wife. The notes were delivered to Wilson.

On October 20, 1932, Lillian E. Evans directed the sheriff to levy a garnishment on the notes in the possession of J. K. Wilson under the execution issued on the judgment for $92 costs in the instant case and to sell the interest of C. C. North in the notes. Prior to the sale S. G. North filed a third party claim in which he claimed to be the legal and equitable owner of the notes and a person not named in the findings before us (a line evidently is omitted in the printed copy) filed another third party claim to a 60 per cent. interest in the notes. On October 21, 1932, the interest of C. C. North in the notes was sold by the sheriff to Lillian E. Evans for $50, and the notes delivered to her attorney. No execution was ever levied upon, or sale had, of the interest of S. G. North or C. H. Lytle in the notes.

Mrs. Evans filed supplemental answers setting up the judgment for $92 costs and the proceedings had in connection with the execution sales which we have outlined. The case proceeded to trial with S. G. North acting as attorney for C. C. North, who continued as the plaintiff, and on May 8, 1933, the trial court rendered judgment in favor of the plaintiff in the sum of $1,487.50 principal, $543.86 accrued interest, and $201.55 attorney's fees.

[1] This appeal is from that judgment. It being taken on the judgment roll alone, we must assume that all of the findings of fact, from which we have gleaned those set forth, are supported by sufficient material and competent evidence.

[2] The first question presented to us is the effect of the assignment of the judgment of December 24, 1930, by E. D. Wilkinson and

C. C. North to S. G. North; that judgment having been reversed on appeal.

The only California case directly bearing upon this question is the old case of Brown v. Scott, 25 Cal. 189, where it was held that an assignment of a judgment effected an assignment of the debt for which it was obtained, even though the judgment itself was void as being beyond the jurisdiction of the court to render.

The case of Rufe v. Commercial Bank of Lynchburg, Va. (C. C. A.) 99 F. 650, 654, is factually similar to the instant case. There a judgment was recovered and an assignment made of it. It was later set aside and another judgment entered for the plaintiff. The Circuit Court of Appeals was of the opinion that one person cannot hold the judgment and another the debt as "they are inseparable."

These cases furnish us with authority for reaching the conclusion that in the instant case the debt being assignable, the assignment of the judgment assigned the debt upon which it was based. We express no opinion on the effect of the assignment of a judgment recovered upon a cause of action which is not assignable under the laws of this state.

[3] Defendant urges that neither the plaintiff nor S. G. North are the owners of the judgment or the debts on which it was obtained for the reason that title was passed to J. K. Wilson by the sheriff's execution sale on October 19, 1932, under the judgment obtained by the San Diego Trust & Savings Bank against E. D. Wilkinson. There is no merit in this contention. The trial court found that many months prior to the execution sale, Wilkinson had assigned the notes in issue here to C. C. North for collection and that for a valuable consideration both Wilkinson and C. C. North had assigned the judgment obtained on the notes to S. G. North. All interest of Wilkinson in the notes passed out of him long before the levy of the execution and he had no interest in them at the time of the levy and sale. Curtin v. Kowalsky, 145 Cal. 431, 78 P. 962. It follows that Wilson acquired no interest in the notes or the debts through the sheriff's sale.

[4] In considering the effect of the execution sale of the notes to defendant under the execution on the $92, judgment for costs in the instant case, we must bear in mind the following facts: That the notes were in the possession of the county clerk of San Diego county; that garnishment was made upon him by the sheriff on October 8, 1932, by virtue of an execution issued on the judgment in the case of San Diego Trust & Savings Bank v. Wilkinson; that the notes were not delivered to the sheriff as they were regarded as being in custodia legis; that on the next day defendant had issued an execution in the instant case and secured the order of a judge of the superior court directing the clerk to recognize the levy of the execution from which we have quoted; that a second levy was made by the sheriff and the notes delivered to him by the clerk under the execution issued on the judgment for costs; that on October 13, 1932, defendant directed the sheriff to withdraw her levy on the notes; that on the 19th day of October, 1932, the sheriff sold the notes to J. K. Wilson under the execution in the San Diego Trust & Savings Bank case and delivered them to Wilson, the purchaser; that on the next day the sheriff levied on the notes in the possession of Wilson under the execution issued on the judgment for costs, and on November 21, 1932, sold and delivered them to Lillian E. Evans at the execution sale on her judgment.

It is the theory of defendant that since the notes were in the custody of the law when in the possession of the county clerk they were not subject to the levy of the first execution. 13 Cal. Jur. 5; 15 Cal. Jur. 1011; 23 C. J. 357. She also assumed the position that while the first garnishment had no force or effect because the sheriff could not take possession of the notes to sell them, the second garnishment on her execution was effective because of the ex parte order of the superior court. Assuming these positions to be correct, the sheriff had no right to retain possession of the notes after defendant ordered him to release the levy under her execution. If such levy was the only legal authority for the possession of the notes by the sheriff, his right of legal possession ended with the release of that levy. He should have then returned the notes to the possession of the clerk. As he did not do so, he must be regarded as holding them for the clerk, who was legally entitled to their custody. It follows, from the premises that defendant has given us, that the possession by the clerk was the possession of the law and that the subsequent execution sales were of no effect. Defendant can protect herself in so far as her judgment for costs is concerned when the judgment in this case becomes final.

[5] Plaintiff does not attempt to support that portion of the judgment which allowed

her attorney's fees, as her attorney was in fact the real party in interest in this action.

The judgment is modified by striking therefrom the $201.55 allowed as attorney's fees, and as so modified is affirmed. Each party will pay his own costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.App.2d 756

S. G. NORTH and C. H. Lytle, Plaintiffs and Respondents, v. SAN DIEGO TRUST AND SAVINGS BANK (a Corporation), Defendant, and J. K. Wilson and Lillian E. Evans, Defendants and Appellants.

Civ. 1125.

District Court of Appeal, Fourth District, California.

Sept. 24, 1934.

Hearing Denied by Supreme Court Nov. 22, 1934.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

J. K. Wilson, in pro. per., and Frank J. Macomber, of San Diego, for appellants.

S. G. North, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment quieting title to respondents' interests in two promissory notes which form the basis of the action in the case of C. C. North v. Lillian E. Evans (Cal. App.) 36 P.(2d) 133, the opinion in which is this day filed.

The pertinent facts, except the assignment of an interest in the note to C. H. Lytle, all appear in the opinion in the case of North v. Evans. That opinion disposes of all of the questions presented in the instant case and renders the questions here involved moot. For the reasons there given the judgment here appealed from is affirmed. The parties will pay their own costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.App.2d 18

CHARDON v. ALAMEDA PARK CO.

Civ. No. 8743.

District Court of Appeal, First District, Division 1, California.

Sept. 22, 1934.

1. Theaters and shows ⇐6

Patron of amusement device assumes any risk naturally and obviously arising from proper use and operation of device if it is properly designed, constructed, and maintained.

2. Theaters and shows ⇐6

Proprietor of public place of amusement is required to exercise precaution, skill, and care commensurate with circumstances to maintain place and every contrivance used in its operation in reasonably safe condition for use intended, and, for any injury proximately caused by failure to perform such legal duty, he is liable in damages to injured party.

3. Theaters and shows ⇐6

Proprietor of public place of amusement, although he is not insurer of safety of patron nor liable if contributory negligence is shown, is required to see that devices are properly constructed, maintained, and managed by competent agents.

4. Theaters and shows ⇐6

Proprietor of public place of amusement is liable for injuries to patrons resulting from defective condition of devices, although he was ignorant of defect.

5. Theaters and shows ⇐6

Questions of negligence of proprietor of public place of amusement and of contributory negligence of patron are for jury.

6. Theaters and shows ⇐6

In action against amusement park for injuries sustained in sliding down chute, whether patron's injuries were proximately caused by failure to exercise reasonable care in keeping ground beneath slide in safe condition or were contributed to by patron's negligence *held* for jury.

7. Theaters and shows ⇐6

In action against amusement park for injuries sustained in sliding down chute, evidence that landing place at bottom of chute was not maintained in safe condition and that sand at bottom was scattered and had not been replenished, so that, when patron descended, he landed on hard ground and fractured spine, supported verdict for patron.

8. Theaters and shows ⇐6

In action against amusement park for injuries sustained by adult patron in sliding down chute, patron was not contributorily

negligent in failing to examine condition of ground at bottom of chute before descending, because he had right to assume due care had been exercised in matter of inspection and proper precautions had been taken for safety of patrons.

9. Theaters and shows ⇐6

In action against amusement park for injuries sustained by adult patron in sliding down chute, patron's denial that he had observed condition of ground at bottom of chute, although he had been sitting near chute, supported finding that patron was not contributorily negligent.

10. Theaters and shows ⇐6

In action against amusement park for injuries sustained by adult patron in sliding down chute, use of slide was not restricted to children, where there were no signs displayed so restricting use, and chute was located in connection with other adult amusement devices, as regards contributory negligence of patron.

11. Theaters and shows ⇐6

In action against amusement park for injuries sustained in sliding down chute, refusal of instruction that patron was required to inspect slide before using it *held* proper.

12. Theaters and shows ⇐6

In action against amusement park for injuries sustained in sliding down chute, instruction that patron had right to assume that those in charge of device had exercised due care in inspecting device and taken necessary precautions to see that device was safe for patrons *held* proper.

13. Theaters and shows ⇐6

In action against amusement park for injuries sustained in sliding down chute, instruction that proprietor of public place of amusement was under duty to "inspect" amusement devices *held* proper, although word "test" might have been more appropriately used.

14. Theaters and shows ⇐6

In action against amusement park for injuries sustained in sliding down chute, instruction which disregarded rule that knowledge on part of amusement park of defective condition of chute was not essential to establish liability was properly refused.

15. Theaters and shows ⇐6

Proprietor of public amusement park is held to stricter accountability for injuries to patron than owners of private premises generally.

16. Appeal and error ⇐1052(5)
Theaters and shows ⇐6

In action against amusement park for injuries sustained by adult patron in sliding down chute, testimony of patron's wife, who accompanied patron to park with five children, two of whom were theirs, as to ages of children, *held* admissible to show circumstances under which patron and wife visited park, and was not prejudicial in any event where jury's award of damages was conservative.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Robert Chardon against the Alameda Park Company. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Ford & Johnson and Francis N. Foley, all of San Francisco, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondent.

KNIGHT, Justice.

The defendant owns and operates for profit a public pleasure resort in Alameda known as Neptune Beach, wherein various forms of entertainment are provided, among them being several different kinds of athletic and amusement devices, including swings, horizontal bars, ladders, overhead rings, and slides or chutes, as they are sometimes called, all located on a square of ground which has been covered with sand. The plaintiff, while visiting the resort with his wife and a party of children, descended one of the slides, and in landing on the ground below sustained a fractured spine and serious internal injuries. Claiming that the accident was caused by the negligence of the defendant in failing to keep the landing place at the bottom of the slide in a safe condition for patrons using the slide, he brought this action for damages, and a jury awarded him a verdict for $4,000. From the judgment entered thereon, the defendant prosecutes this appeal, contending that the evidence is insufficient as a matter of law to support the verdict, and that the court erred in giving, and refusing to give, a number of instructions and in ruling on the admissibility of certain evidence.

[1-5] It is held generally that one who patronizes an amusement device must be regarded as assuming any risk naturally and obviously arising from the proper use and operation of the device if it is properly designed, constructed, and maintained. But it is also well settled that the proprietor of a public place of amusement is required to

exercise the precaution, skill, and care commensurate with the circumstances to maintain the place and every contrivance used in its operation in a reasonably safe condition for the use intended, and that, for any injury proximately caused by a failure to perform such legal duty, he is liable in damages to the injured party. 26 R. C. L. 714, 715. He is not an insurer of the safety of his patrons, nor liable if contributory negligence be shown; but the law imposed upon him the duty of exercising that degree of care which would be expected of an ordinarily careful and prudent person in seeing that all devices operated by him are properly constructed and maintained in fit condition for the purposes for which they are intended to be used and are managed by agents of competent skill with that degree of skill which an ordinarily prudent person would exercise under like circumstances in a like situation (Carlin v. Smith, 148 Md. 524, 130 A. 340, 44 A. L. R. 193; 26 R. C. L. 714–715); and if, through failure to perform such legal duty, he allows any such devices to become in fact unsafe, which results in injury to a patron, his knowledge or ignorance of the defect is immaterial. 26 R. C. L. 714; Hart v. Washington Park Club, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298. Furthermore, it is well established that the questions of the negligence of the proprietor and of the contributory negligence of the patron are for the jury to determine. Firszt v. Capitol Park Realty Co., 98 Conn. 627, 120 A. 300, 29 A. L. R. 17.

The evidence in the present case shows there were two slides located on the recreation ground mentioned. Plaintiff was injured while using the larger one. It was 21 feet in length, 12 feet high at the upper end, and 12 or 14 inches above the surface of the ground at the lower end; the chute was straight with two "humps" about equal distance apart, and the lower end was curved slightly upwards. It was wide enough to accommodate adults, and was used alike by adults and children. The defendant employed a man to look after the devices on said recreation ground, and part of his duty was to see that the ground at the bottom of the slides was kept covered with sand of sufficient depth to prevent injury to patrons using the slides and to replenish the sand whenever necessary to keep the landing places safe. Evidence was introduced in behalf of plaintiff to show, however, that the landing place at the bottom of this particular slide was not maintained in a safe condition; that most of the sand at the bottom of the chute had become scattered and had not been replenished, so that, when plaintiff descended the slide, he landed in a sitting position on a hard surface of ground at the bottom of a depression about three feet in diameter and eighteen inches deep, thereby fracturing his spine and causing very serious injury to certain abdominal organs. He was rendered practically helpless for several weeks, but, after undergoing much surgical and medical treatment, was able at the time of trial to get about in an impaired condition with the aid of a steel and leather body brace.

[6, 7] It is apparent, therefore, that, under the law of the cases above cited, it was a question of fact for the jury to determine whether plaintiff's injuries were proximately caused by the failure on the part of the defendant to exercise reasonable care in keeping the ground beneath the slide in a safe condition or were contributed to in any manner by negligence on plaintiff's part; and, the jury having found in plaintiff's favor on both issues, the evidence is legally sufficient to support the conclusion reached by the jury. Fishbaine v. White Star Line, 224 Mich. 173, 194 N. W. 494; Murphy v. Electric Park Amusement Co., 209 Mo. App. 638, 241 S. W. 651. The two cases just cited are directly in point; the facts thereof showing that the accidents there happened exactly the same as the one did here. In the Fishbaine Case sand at the bottom of the slide had become scattered and was not replenished. The trial court directed a verdict for the defendant, but on appeal its ruling was reversed. And in the Murphy Case pads used at the bottom of the slide to break the fall were not kept in place. The verdict was in favor of the plaintiff, and on appeal the judgment entered on said verdict was affirmed.

[8-10] In contending that plaintiff was guilty of contributory negligence, defendant calls attention to evidence showing that plaintiff did not examine the condition of the sand at the bottom of the slide before descending. The courts have held, uniformly, however, that a patron of a public resort is not obliged to make a critical examination of the device or contrivance he is about to use in order to determine whether or not it is safe, but, on the contrary, has the right to assume that those in charge have exercised due care in the matter of inspection and have taken proper precautions for the safety of its patrons. See note, 22 A. L. R. 616 et seq. It is argued also that plaintiff must have observed the condition of the landing place, because, before using the slide, he had been sitting for some time with his wife within ten or fifteen

feet of it. He denied having noticed the depression, however, and his denial in this regard is legally sufficient to support the jury's conclusion on this point. Nor is there any merit in defendant's contention that the use of the slide was restricted to children. There were no signs displayed so restricting its use, and, as already stated, it was located on the recreation ground with many other adult amusement contrivances, and was in fact used generally by adults; defendant's adult employees themselves having frequently used the same for their own pleasure.

[11-15] The remaining assignments of error are likewise without merit. With respect to the instructions, the record shows that the jury was fully and fairly advised as to the law upon all material issues involved. The subject-matter of the first instruction set forth in section II of defendant's brief was covered by others which the court gave. If, as defendant argues, the latter portion of said instruction was intended to convey the meaning that plaintiff was required to inspect the slide before using it, the instruction was properly refused, because, under the authorities already cited, no such duty was imposed upon him. As stated in substance in the second instruction set out under this same subhead, plaintiff had the right to assume that those in charge of the device had exercised due care in inspecting it and taken the necessary precautions to see that it was safe for the patrons who might use it. 22 A. L. R. page 616, note. The instruction embodied in section III of said brief was evidently based on the principle of law declared in Harvey v. Machtig, 73 Cal. App. 667, 239 P. 78, and, while the word "inspect" instead of the word "test" might have been used more appropriately in connection with the facts of this particular case, it is apparent that the use of the latter word did not render the entire instruction misleading, especially when it is read along with the several others given upon the same subject. The next instruction, quoted in section IV of defendant's brief, was clearly erroneous and therefore properly refused. As shown by the authorities above cited, knowledge on the part of defendant of the defective condition of the slide was not essential in order to establish liability. See, also, Easler v. Downie Amusement Co., 125 Me. 334, 133 A. 905, 53 A. L. R. 847; Durning v. Hyman, 286 Pa. 376, 133 A. 568, 53 A. L. R. 851. The cases cited by defendant in support of its contention on this point are not applicable here. They deal generally with the rule governing liability for injuries to invitees caused by defects on private premises; whereas the proprietor of a public amusement park is charged with a stricter accountability for the safety of those who have paid an admission fee to enter his premises. 22 A. L. R. 611, note. The three remaining instructions complained of were properly given. The first is similar in form to one proposed by defendant and given in its behalf; and the second and third are based respectively upon the authority of Malone v. Hawley, 46 Cal. 409, and Kline v. Santa Barbara, etc., Ry. Co., 150 Cal. 741, 90 P. 125.

[16] The first witness for plaintiff was his wife. In answer to preliminary questions, she stated that on the day of the accident she accompanied her husband to the resort, and that they took with them five children, two of whom were theirs. Then, over defendant s general objection that the testimony was immaterial, she was allowed to give the ages of all the children, none of whom was over twelve. Defendant now contends that the apparent purpose of the testimony of said witness in relating the ages of her own children was "to create prejudice or sympathy with the jury on the question of damages." There is no foundation for such contention. The testimony was clearly admissible, preliminarily at least, for the purpose of showing the circumstances under which plaintiff and his wife visited the resort. Moreover, nowhere does defendant make any complaint about the amount of damages awarded; and, in view of the serious, permanent injuries plaintiff sustained, the pain suffered by him as a result thereof, the cost of the surgical and hospitalization treatment, and his loss of time and earning capacity, it would seem that the conservative amount allowed by the jury completely negatives any intimation that in fixing such amount the jury was actuated by feelings of sympathy or prejudice.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

1 Cal.App.2d 138

SONTAG v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9828.

District Court of Appeal, Second District, Division 2, California.

Sept. 27, 1934.

Rehearing Denied Oct. 17, 1934.

1. Executors and administrators ⇐513(9)

In absence of appeal, settlement of executor's account and allowance thereof is conclusive against all persons interested in estate, but only as to such matters actually included in account or objections thereto and actually passed upon by court.

2. Executors and administrators ⇐513(9) Prohibition ⇐5(3)

Where order settling final account of executor excluded by its terms decision of executor's liability for failure to include mortgage in inventory and for exchanging certain parcels of real estate, executor's liability on such items was not concluded by order, and hence prohibition against subsequent proceedings to amend objections relating to such items and hearing thereon would not lie.

Petition by M. Burnett Sontag for a writ of prohibition against the Superior Court of the State of California, in and for the County of Los Angeles, to prohibit the respondent from taking further proceedings based upon the account of the petitioner as former executor of the last will and testament of Clara Louise Maitland, deceased.

Alternative writ discharged, and peremptory writ denied.

Denio, Hart, Taubman & Simpson, of Long Beach, for petitioner.

Doyle, Clark, Thomas & Johnson, of Long Beach, and Everett W. Mattoon, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

An alternative writ of prohibition was issued herein, prohibiting the superior court in and for Los Angeles county from taking further proceedings based upon the account of petitioner as former executor of an estate of a decedent until further order of this court. An answer has been filed by respondent, and to that petitioner has filed a demurrer. Both parties having submitted their authorities and presented their views in oral argument, the matter stands submitted.

On July 28, 1932, petitioner resigned as executor of the last will and testament of Clara Louise Maitland, deceased, whose estate was in process of administration in the Long Beach department of the superior court, sitting in probate. Western Trust & Savings Bank was on the same date appointed administrator with the will annexed of said estate. After his resignation petitioner filed his final account as executor, to which the new administrator filed written objections, comprising twenty-five items, and the hearing on the account and objections came on regularly on September 19, 1932, upon the conclusion and submission of which, the court on the same date made its order settling the account. Before the making and entry of the order a stipulation between petitioner and the administrator was filed, providing among other things not pertinent herein that the court may settle the account and order transfer of property therein described to the administrator "without prejudice to any action said administrator with the will annexed, or anyone else interested in said estate, may hereafter bring against said M. Burnett Sontag, former executor," for (a) failure to include in the inventory a certain contract or mortgage of $3,500 covering property owned by Edna Brown, or for $3,500 held by him at the time of decedent's death and understood by decedent to have been in the form of a mortgage on property owned by Edna Brown; (b) for damages that the estate may have suffered by reason of his having substituted in place of parcel 1, as described in the inventory, the real property described as lot 12 in block 7 of Long Beach Heights, Long Beach, Cal.; and (c) for damage sustained by the estate by his substituting in place of parcel 5 as described in the inventory the real property described as lots 33 and 34 in block B of Wetherby tract in Long Beach, Cal. The order, based on the evidence and this stipulation, entered September 19, 1932, decreed that the account of petitioner, as former executor, be allowed and settled as thereinafter provided, "without prejudice to any action said Western Trust and Savings Bank of Long Beach, as administrator with the will annexed, or any persons interested in said estate, may bring against said petitioner" by reason of any of the matters stated in paragraphs (a), (b), and (c), above, therein reciting the substance of the stipulation as written and filed.

On May 14, 1934, the administrator moved for permission to file amendments to the objections previously filed and to set a definite date for hearing of said objections, to which

petitioner filed objection; and the motion being made and submitted, was granted, and the court set the hearing thereon for June 12, 1934. On June 11, 1934, petitioner moved the lower court for an order prohibiting further hearing on said account and objections thereto, which motion was denied; whereupon petitioner sought and secured the alternative writ of prohibition issued herein. The amendments to the objections which the court allowed to be filed and on which hearing was set for June 12, 1934, related exclusively to the matters embraced in the paragraphs a, b, and c in the stipulation and the order above recited, being apparently only an amplification thereof with more of detail. Upon comparison of these amendments and the reservations in the order with the objections filed and before the court on the hearing of the account, it is noted that paragraph (a) concerns the same matter set forth in objection No. 21, paragraph (b) refers to and concerns the matters set forth in objections numbered 18 and 22, and paragraph (c) refers to and concerns matters set forth in objections numbered 19 and 23.

It is conceded that no appeal was ever taken from the order settling petitioner's account, and his contention herein is that the order having become final operates as bar to further inquiry as to the account or the objections thereto, under the doctrine of res adjudicata.

[1] The settlement of an executor's account and the allowance thereof by the court, in the absence of appeal, is conclusive against all persons interested in the estate; but only as to such matters as were actually included in the account or objections thereto and actually passed upon by the court. Walls v. Walker, 37 Cal. 424, 99 Am. Dec. 290; Tobelman v. Hildebrandt, 72 Cal. 313, 14 P. 20; Estate of Adams, 131 Cal. 415, 63 P. 838; Estate of Ross, 179 Cal. 358, 182 P. 303, 305; Estate of Clary, 203 Cal. 335, 264 P. 242. In the case of Estate of Ross, supra, certain advancements of money to a Mrs. Scanlan were included in an administrator's account. In a final account, allowance was made of credit for these same advancements. On appeal it was contended that this credit was allowed in the former account and that inquiry into this item was therefore precluded. In the order settling the former account the court expressly reserved "decision as to the advancements to Mrs. Scanlan." In affirming this subsequent allowance of credit the Supreme Court said: "The settlement of an account is not conclusive, 'except as to such items as are included in and actually passed upon by the probate court.' Estate of Adams, 131 Cal. 415, 63 P. 838."

[2] In the instant case the order settling the final account of petitioner by its terms in effect excluded from decision at that hearing any of the matters specified in paragraphs a, b and c, therein recited, and this in consonance with the written stipulation of the parties. This amounts to a reservation for future hearing and decision. The matters and controversies embraced by those reservations were not actually passed upon or decided by the court, sitting in probate; hence they are not concluded under the rule above stated. The subsequent proceedings to amend the objections relating to such matters, and to set the matter for hearing, were but a continuation of exercise of jurisdiction by the probate court on matters originally within its jurisdiction and thus expressly reserved. Clearly, the superior court, sitting in probate, is acting and proceeding to hear and act with full power to determine the matters embraced within the reservations to its order settling petitioner's final account.

The alternative writ is discharged, and a peremptory writ denied.

We concur: STEPHENS, P. J.; CRAIG, J.

MUEHLEISEN et al. v. FORWARD et al.*

Civ. 1164.

District Court of Appeal, Fourth District, California.

Sept. 19, 1934.

Hearing Granted by Supreme Court Nov. 16, 1934.

1. Municipal corporations ⇐159(1)

Where a recall petition substantially conforming with the law is filed with city clerk and certified by him as containing a sufficient number of signatures, city council has no discretion as to calling of an election (St. 1931, p. 2858, § 23).

2. Municipal corporations ⇐159(1)

Recall elections in chartered cities are governed by charter provisions rather than by general laws (St. 1931, pp. 567, 2858, §§ 17, 23).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 46 P.2d 969.

3. Municipal corporations ⇐159(1)

Where city charter clearly prescribed requisites of petition for recall of elective city officials, general law providing for publication or posting of intention, service upon officers sought to be recalled, and additional matters in petition *held* inapplicable (St. 1931, p. 563, and pp. 567, 2858, §§ 17, 23).

4. Municipal corporations ⇐159(1)

Where city charter specifying requisites of recall petitions provided that they should be on forms prescribed by ordinance, ordinance also requiring recall petitions to contain copies of printed or posted notices of intention, answers of officers sought to be recalled, or statement that no formal answer had been made *held* void, since delegation of power to prescribe form of such petitions authorized prescription of form consistent with charter provisions (St. 1931, p. 2858, § 23).

5. Municipal corporations ⇐159(1)

City clerk's failure to stamp on recall petitions and supplemental petitions dates when filed could not nullify recall proceeding (St. 1931, p. 2858, § 23).

6. Municipal corporations ⇐159(1)

General law requiring that recall petition be filed within 60 days from date of first publication or posting of notice of intention *held* inapplicable to recall petitions in city whose charter clearly prescribed requisites of recall petitions (St. 1931, p. 563, and p. 2858, § 23).

7. Evidence ⇐413

Where city recall petitions were first certified by city clerk as containing insufficient number of signatures, and thereafter supplemental petitions were filed and original certificates of insufficiency were removed and petitions were certified as sufficient, parol evidence was admissible to show when petitions and supplemental petitions were first filed and different certificates were made (St. 1931, p. 2858, § 23).

8. Municipal corporations ⇐159(1)

Where city charter made no provision for conduct of recall election, general law governed (St. 1931, p. 563, and p. 2858, § 23).

9. Municipal corporations ⇐159(1)

Where city charter clearly prescribed requisites of recall petitions, provisions of statute providing for filing of petitions demanding election of successors of officers sought to be recalled and their election *held* inapplicable to city recall petitions conforming with charter or election thereunder (St. 1931, p. 563, and p. 2858, § 23; St. 1933, p. 2153).

10. Officers ⇐70½

Laws securing to the people right to determine whether their public servants should be removed from office should be liberally construed, and exercise of such right should be interfered with only upon clear showing that law has been violated (St. 1931, p. 2858, § 23).

11. Mandamus ⇐74(2)

Where petitions to recall four members of city council and city attorney conformed with the law and were certified by the city clerk as containing sufficient number of signatures, mandamus should issue to compel city council to call an election (St. 1931, p. 2858, § 23).

Application by Adolph Muehleisen and others for a writ of mandate addressed to John F. Forward, Jr., as Mayor and Member of the Council, and others to compel respondents to call an election forthwith for the purpose of determining whether the voters of the city of San Diego will recall certain officers as demanded in petitions filed in the office of the city clerk.

Peremptory writ of mandate to issue as prayed for in the petition.

Charles C. Crouch, George H. Stone, Frank M. Downer, Jr., James G. Pfanstiel, and Nicholas J. Martin, all of San Diego, for petitioners.

C. L. Byers, City Atty., of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an original application for a writ of mandate to compel the respondents to forthwith call an election for the purpose of determining whether the voters of the city of San Diego will recall certain officers as demanded in petitions filed in the office of the city clerk.

Five petitions demanding the recall of four members of the city council and of the city attorney, respectively, were delivered to the city clerk on June 30, 1934. On July 10, 1934, the city clerk attached to each of said petitions a certificate to the effect that the number of valid signatures thereon was insufficient, and gave notice of such insufficiency to the persons filing said petitions. Within ten days thereafter supplemental petitions with additional signatures were delivered to the city clerk, and within ten days thereafter, to wit, on July 23, 1934, the city clerk attached to each petition a certificate setting forth facts showing that it contained a sufficient number of signatures of qualified voters, and on the same day presented all of the pe-

titions to the city council. At the time of attaching said certificate of sufficiency to each of the petitions the city clerk removed from each the certificate of insufficiency which had been previously attached thereto.

[1] The city council refused to call an election as demanded in the petitions, and this proceeding followed. A city council has no discretion as to the calling of an election where a petition is filed which substantially conforms to the provisions of law and which is properly certified by the clerk as containing a sufficient number of signatures. Martin v. Board of Trustees, 96 Cal. App. 705, 274 P. 1015. No attack is made upon the petitions here in question in so far as the number of qualified signers is concerned.

The principal contention of the respondents is that these petitions are insufficient both as to form and as to preliminary requisites, for the reason that the requirements of the general law of the state governing recall elections in cities (St. 1931, p. 563) were not complied with. In this connection it is pointed out that no notice of intention to submit such a petition for signatures, accompanied by a statement of the reasons for the proposed recall, was published or posted as required by said statute; that no such notice or statement was served upon any of the officials sought to be recalled and no affidavit of such service has been filed with the city clerk; that these petitions do not bear a copy of any such printed or posted notice of intention, or of any accompanying statement, or of any answer to said statement, if any, made by any of said officers; and that they do not contain any statement to the effect that the officers sought to be recalled have failed to make an answer. The first question to be determined then is as to whether these provisions of the statute referred to are controlling here.

[2] Section 17 of the 1931 statute above referred to reads as follows: "This act is not intended to apply to those cities having a freeholders' charter, adopted under the provisions of section 8 of article XI of the constitution, and having in such charter provision for the recall of elective officials by the electors." This is in accord with the established rule that recall elections in chartered cities are governed by charter provisions rather than by general laws, where such provisions are conflicting. In Bricker v. Banks, 98 Cal. App. 87, 276 P. 399, 400, it is said: "The recall of officers in a city having a special charter which provides for such a recall is a municipal affair and is not controlled by general laws inconsistent with the charter provisions in relation thereto." In Scheafer v. Herman, 172 Cal. 338, 155 P. 1084, 1086, the court said: "The rule is that, where a freeholder's charter has provided a mode of removal of officers and that mode is resorted to, the general law cannot control the exercise of the power in that manner, or change the procedure required by the charter." It has even been held that, where the charter has omitted so important a requirement of the general law as the one requiring that the petition shall contain a statement of the grounds on which the recall is sought, a petition conforming to the charter requirement is sufficient. Sidler v. City Council of Bakersfield, 43 Cal. App. 349, 185 P. 194.

Section 23 of article 3 of the charter of San Diego (St. 1931, pp. 2838, 2858) contains provisions for the recall of city officers, the material portions of which read as follows: "The right to recall municipal officers * * * are hereby reserved to the people of the City; such powers shall be exercised in the manner provided by the Constitution and general laws of the State of California. * * * And any elective official may be recalled from office, under the provisions of the Constitution and the general laws of the State, provided * * * that for the recall of an elected officer it shall require a petition signed by twenty-five per cent of the entire vote cast in the City at the last preceding election for the office of governor. Petitions for the Initiative, Referendum, or Recall shall be on forms prescribed by an ordinance of the Council and shall state in full the ordinance to be initiated or referred or the officer to be recalled with reasons for such recall. This statement shall appear at the head of each petition, followed by the signature and legal residence of each petitioner written in ink or indelible pencil, and by the affidavit of the person in charge of the petitions that the signatures have all been made in his presence by the persons whose names they purport to be, and are legal signatures to the best of his belief. The City Clerk shall pass on the number and legality of the signatures attached to each petition and shall give notice of the sufficiency or insufficiency of signatures on each petition. Supplementary petitions or additional signatures may be presented in the form and procedure provided above."

[3] It is thus provided that to recall an elected officer of this city requires a petition signed by the requisite number of voters; that the petition shall be on a form prescribed by ordinance; that the petition shall state the officer sought to be recalled with the reasons

therefor; and that this statement shall appear at the head of each petition, followed by the signature and legal residence of each petitioner written in ink or indelible pencil, and by an affidavit of the person in charge of the petition covering certain facts. While certain details, such, for instance, as the time allowed to the clerk for checking the signatures on the petition, the time allowed for obtaining additional signatures, the time within which an election must be called, and the manner of conducting the election when called, are not covered by the charter provisions, and would undoubtedly be governed by general laws, we think the charter provision sufficiently sets forth that a recall election may be demanded by the filing of a petition and sufficiently enumerates what the petition shall contain. Since the only requirement of the charter is a petition signed by the requisite number of voters, and since the charter clearly states what the petition shall contain, the requirements of the general law that a notice of intention be published or posted, that the officers sought to be recalled shall be served, and that certain additional matters be included in the petition, are inconsistent with the charter provisions, and those portions of the general law can have no application. The petitions here in question comply with these charter provisions, and, in our opinion, are not rendered insufficient by any failure to comply with the additional requirements of the state law relied upon by the respondents. A procedure provided by charter which omits the requirement for publishing and serving notice of the grounds upon which a recall is sought is certainly a less drastic departure from the general law than a charter provision permitting a petition which does not even state the grounds upon which the proceeding is based. As a practical matter, it may be expected, under modern conditions, that an interested officer will discover the fact that recall proceedings have been initiated almost as soon without as with the formal notice.

It is also contended that these petitions for recall are insufficient in that they do not comply with the requirements of Ordinance No. 47 (new series) of the city of San Diego, in that they do not contain a copy of the printed or posted "Notice of Intention to Petition for Recall," and that they contain neither any answer made by the officer sought to be recalled nor a statement that such officer has not made formal answer.

[4] In the charter provision above quoted, the requirements as to what should be stated in the petition are preceded by the following: "Petitions for the Initiative, Referendum, or Recall shall be on forms prescribed by an ordinance of the Council." Ordinance No. 47, above referred to, prescribes a form for petitions for recall. This form closely follows the requirements of the general law (St. 1931, p. 563) and, among other things, provides that the petition must contain a copy of the printed or posted notice of intention to petition for recall prescribed by that general statute, and also a copy of the answer made by the officer sought to be recalled or a statement to the effect that such officer has made no formal answer. The petitions in question were in the form prescribed in the ordinance, with the exceptions above mentioned. If we are correct in our conclusion that the charter provisions, rather than the general law, are controlling with reference to the contents of the petition and with reference to the necessity of publishing or posting a notice of intention, the additional requirements of Ordinance No. 47, herein referred to, are not controlling and cannot affect the sufficiency of these petitions. The charter having determined what is requisite to initiate a recall proceeding and what the petition shall contain, these requirements could not be changed by a city ordinance. If city officers who are themselves subject to recall could thus change the fundamental law, they could so add to the requirements as to make any recall election impossible. We think this clause of the charter, requiring a petition for recall to be on a form prescribed by an ordinance of the council, relates only to the ministerial act of preparing a form of petition, that it does not attempt to delegate the power to determine what shall be in the petition, and that it only authorizes the preparation of a form consistent with the provisions of the charter and in which the material required by the charter shall be set forth in an orderly manner.

[5-7] It is next argued that it appears from the face of these petitions, one of which was admitted in evidence as an exemplar of all that such petitions were filed more than sixty days after the date of the earliest signature appearing thereon, and that evidence as to what actually occurred could not be received, as the same would tend to vary the terms and contents of a public document. The date of the earliest signature on the petition before us is May 16, 1934. The clerk's certificate of the sufficiency of the petition, attached thereto, is dated and marked filed on July 23, 1934. At the hearing in this proceeding the city clerk testified that the

original petitions were filed with him as city clerk on June 30, 1934; that he checked the petitions within ten days to ascertain the number of signatures of qualified electors appearing thereon; that on July 10, 1934, he attached to each petition a certificate, a certified copy of which is before us, to the effect that the number of signatures on each petition was insufficient; that on that day he notified the man who brought the petitions to his office that the same were insufficient; that within ten days thereafter supplementary petitions with additional signatures were delivered to him as city clerk; and that, after checking the same and within ten days thereafter, to wit, on July 23, 1934, he removed from each petition his original certificate of insufficiency and attached to each petition a certificate of sufficiency. If we are to be technical in this matter, it does not appear from the face of the petitions that they were filed more than sixty days after the date of the earliest signature thereon. While the petitions were finally certified as sufficient on July 23, 1934, if allowance be made for the time the clerk had in which to examine and check the signatures on the supplemental portions of the petitions, they could easily have been filed with the clerk within sixty days after May 16. While the clerk did not stamp upon the petitions the date when they were originally filed with him or the date when the supplemental portions thereof were filed with him, we take it that the failure of the clerk to perform these ministerial acts could not nullify the proceeding. Moreover, there is nothing in the general law (St. 1931, p. 563) which requires that such a petition be filed within sixty days after the date of the first signature thereon. The only requirement of that statute is that the petition be filed within sixty days from the first publication or posting of the notice of intention, an act which was not required under the provisions of the charter. However, parol evidence as to what actually occurred cannot be said to have varied the terms and contents of a public document. This evidence related only to what had been done with a public document and when it was done. The certificates of insufficiency removed by the city clerk were also public documents and were retained by him in his office. These show that the original filing was within sixty days of the date of the earliest signature, if any such showing is considered necessary. In our opinion, the contention here made is without merit. Box et al. Young, 219 Cal. 243, 26 P.(2d) 290.

[8, 9] In 1933 an act was passed by the Legislature purporting to provide for the recall of officers of cities of the second and one-fourth class (St. 1933, p. 2153), which act is referred to in the briefs herein as the "Harper Bill." The respondents assert that an attempt has been made in these proceedings to follow the provisions of the Harper Bill. It is then earnestly contended that this act is unconstitutional, since it does not apply uniformly to all cities, but is a special and local law upon a subject where a general law can be made applicable. It is further argued that, in any event, this act has no application to the city of San Diego, for the reason that the Legislature, in approving a new charter for that city in 1931, changed the classification thereof. It is unnecessary to consider these contentions for the following reasons: The recall petitions here involved, and all of the proceedings so far, conform to the charter provisions, and none of them refer to, relate to, or depend upon the provisions of the Harper Bill. Each petition demands the recall of the officer named therein. The Harper Bill provides that a petition shall be filed "demanding the election of a successor to the person sought to be removed." The petitions herein contain no such a demand. Nor is this merely a technical difference. While the charter of the city of San Diego provides what the petition shall contain, it makes no provision for the machinery for conducting a recall election if one is called. Recourse would then be had to the general law (St. 1931, p. 563) for the method of holding the election. That general law provides that in such an election the electors shall be given an opportunity to vote, not only upon the question as to whether the officer shall be recalled, but also upon the question of whether the vacancy shall be filled by appointment or by special election, in the event the officer is recalled. Assuming that the electors could waive this right by signing a petition in the form required by the Harper Bill, no such waiver here appears, and the Harper Bill, even if valid and available under some circumstances, can have no application either on the questions before us or with respect to any future proceedings based upon these petitions which do not conform to its requirements. A further serious question as to whether the provisions of the Harper Bill are not inconsistent with the provisions of the city charter in requiring a different kind of petition than the one required by the charter need not be here considered.

[10, 11] Laws securing to the people the right to determine whether or not their public servants shall be removed from office should be, and are, liberally construed, and a court is not justified in interfering with the exercise of this right except upon a clear showing that the law has been violated. Brown v. City Council, 103 Cal. App. 113, 281 P. 254. Especially should this salutary rule be applied to charter provisions reserving to the people of a city control over this purely local and municipal matter. In our opinion, the people of the city of San Diego, through their charter, have fixed the essential requirements for filing a petition for a recall, and a substantial compliance with those requirements appears in each of the petitions before us. It follows that it is the duty of the city council to call an election in accordance with the demand of the petitions.

It is therefore ordered that a peremptory writ of mandate be issued as prayed for in the petition, the petitioners to have their costs.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.App.2d 122

C. A. HOOPER & CO. v. FREEMAN, SMITH & CAMP CO.

Civ. 9259.

District Court of Appeal, First District, Division 2, California.

Sept. 27, 1934.

Corporations ⇐472

Evidence that demand for repurchase of corporate bonds was made more than two years after sale and more than a year after steady decline in market price of bonds sustained finding that demand for repurchase was not made within a reasonable time and that buyer could not, therefore, recover for seller's alleged breach of contract.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by C. A. Hooper & Company against Freeman, Smith & Camp Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

McKee, Tasheira & Wahrhaftig, of Oakland, for appellant.

Bacigalupi, Elkus & Salinger, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff filed a "Complaint for Money" seeking to recover the sum of $9,900. The cause was tried by the court sitting without a jury, and from a judgment in favor of defendant, plaintiff appeals.

The transaction out of which this controversy arose took place on or about March 25, 1930. The defendant corporation was engaged in selling securities and, on or about the date mentioned, sold to plaintiff ten bonds of the Felice & Perrelli Canning Company for the sum of $9,900. On April 27, 1932, being more than two years later, plaintiff sent a letter to defendant claiming that defendant had agreed to repurchase said bonds at the price paid by plaintiff, stating that plaintiff elected to avail itself of said agreement and demanding that defendant repurchase the bonds. Defendant denied the existence of any such agreement and refused to comply with the demand. Thereafter plaintiff sought to rescind the sale, offered to return the bonds upon payment of the money, and demanded the purchase price. Upon the refusal of defendant to pay said sum, plaintiff brought this action.

The trial court found against plaintiff on the issue of the existence of said agreement and further found "that the demand made by plaintiff upon defendant under date of April 27, 1932, to repurchase the said bonds in accordance with said alleged agreement was not made within a reasonable time after the purchase of said bonds by plaintiff from defendant."

Appellant makes several attacks upon the findings of the trial court, but it is conceded that the judgment should be affirmed if the evidence was sufficient to sustain the finding above quoted relating to appellant's failure to demand a repurchase within a reasonable time.

There is no written agreement signed by both parties in connection with the sale of the bonds. The customary letter confirming the sale was delivered to appellant, together with the statement covering the transaction. Neither the letter nor the statement made any reference to any agreement to repurchase the bonds and appellant took no exception to the contents of these instruments. Appellant claimed that the alleged agreement had been

made by a salesman of respondent corporation. There was testimony to show that said salesman had made a pencil memorandum on a prospectus at the time of taking the order as follows: "Less one point on block of 10M or more. We to give guarantee bid of same." There was also testimony to show that the salesman had previously said that the respondent corporation would repurchase the bonds at the price paid "at any time." The evidence offered by respondent showed that the salesman had no authority to make any such statement or agreement. The vice president of respondent testified that agreements by investment bankers to repurchase securities sold "were most extraordinary and unusual" and that no agreement of this kind had ever been made by the respondent company unless approved by the officers. He further testified that he had never heard of an investment banker making such an agreement without limitation as to time. We will nevertheless assume for the purpose of this discussion that the alleged agreement was made by the salesman and that respondent was bound thereby. Thereafter appellant held the bonds for over two years. More than one year before attempting to assert its alleged rights, the market price of the bonds started to decline and continued to decline steadily thereafter.

In support of the contention that the above-quoted finding is not sustained by the evidence, appellant cites and relies upon Kaplan v. Reid Bros., Inc., 104 Cal. App. 268, 285 P. 868. In that case there was a written agreement signed by the parties whereby the defendant agreed to repurchase "at any time." It was nevertheless recognized that plaintiff was bound to exercise his right within a reasonable time. The trial court's determination in that case that plaintiff had exercised his right within a reasonable time under the circumstances was sustained, but the court said on page 272 of the opinion in 104 Cal. App., 285 P. 868, 869, that: "* * * the question of what was a reasonable time was primarily a question to be decided by the trial court." In Hoppin v. Munsey, 185 Cal. 678, at page 684, 198 P. 398, 400, the Supreme Court said: "The question of what is a reasonable time depends in each case upon its own particular circumstances. It is primarily a question of fact for the determination of the trial court." See, also, Hougland v. Roth Blum Packing Co., 99 Cal. App. 631, 635, 636, 279 P. 159; Singh v. Cross, 60 Cal. App. 309, 315, 212 P. 946. In this connection, attention may be called to the language found in Leadbetter v. Price, 103 Or. 222, 202 P. 104, at page 109, where the court said: "The cases relating to option contracts for the purchase of corporate stock disclose that courts are inclined to measure a reasonable time for the exercise of such options by months rather than years." In the instant case the trial court was dealing with the question of what constituted a reasonable time within which to make a demand to repurchase corporate securities of fluctuating value. As the evidence showed that the demand was made more than two years after the sale and more than one year after the market price had started to steadily decline, it cannot be said that the evidence was insufficient to sustain the finding that said demand was not made within a reasonable time. It being conceded that this appeal must fail if the evidence was sufficient to sustain said finding, we deem it unnecessary to discuss the other points raised.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

1 Cal.App.2d 13

LOSSON v. BLODGETT et ux.

Civ. 8223.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1934.

Hearing Denied by Supreme Court Nov. 19, 1934.

1. Husband and wife ⇐17

That husband conducted preliminary negotiations for contract and gained some benefit from his wife's execution of contract did not make husband, who was not party to contract, liable thereon.

2. Landlord and tenant ⇐24(1, 2, 3)

Valid real property lease must contain names of parties, description of premises, rental to be paid, and term lease is to run.

3. Vendor and purchaser ⇐3(2)

Instrument for "letting" of real property which did not name term, provided for interest on deferred payments, down payment of one-seventh of total price, and option to purchase property for $1 when payments were completed, was agreement for purchase and sale and not "lease."

[Ed. Note.—For other definitions of "Lease," see Words & Phrases.]

4. Property ⇐6
Vendor and purchaser ⇐2
Transactions affecting title to real property and executory contracts relating thereto are governed by law of country in which property is situated.

5. Contracts ⇐103
Where consideration for contract is unlawful, contract is void (Civ. Code, §§ 1607, 1608).

6. Vendor and purchaser ⇐39
Where Mexican Constitution prohibited ownership of certain land by foreigners, contract to convey such land to United States citizen *held* unenforceable.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by L. D. Losson against Louis M. Blodgett and his wife. From a judgment for the plaintiff, the defendants appeal.

Reversed.

G. C. DeGarmo and W. M. Crane, both of Los Angeles, for appellants.

Frank C. Shoemaker, of Los Angeles, for respondent.

W. J. WOOD, Justice pro tem.

Plaintiff obtained judgment in the trial court for the amount of certain installments claimed to be due under the terms of an instrument which he alleges to be a lease and which defendants allege to be an agreement for the purchase and sale of real estate. The land involved is situated in the republic of Mexico. The two defendants Louis M. Blodgett and N. A. Blodgett are husband and wife, and the judgment appealed from is against both of them. The instrument which is the basis of the action was signed by Mrs. Blodgett only, and the husband, Louis M. Blodgett, insists that, regardless of the question of the validity of the contract, he is not a party to it and is not legally bound by it.

[1] Among the findings of the trial court are the following: "The said agreement was entered into for the mutual benefit of Louis M. Blodgett and N. A. Blodgett, and that any benefits they derived by reason of the execution of said instrument were for the mutual benefit of the defendants, and their community property. * * * That the said Louis M. Blodgett represented to the plaintiff that he was contracting with the plaintiff for the lease upon said property, and that said Louis M. Blodgett made said representations for the purpose of deceiving said plaintiff and with the intent to get possession of said property, and to get possession of said property under the terms of said lease by and through the name of his wife N. A. Blodgett, and was with the intent of avoiding any liability on his part." Further findings are, substantially, that at the time of the execution of the agreement, plaintiff was eighty years of age and of limited business experience, and that Louis M. Blodgett, who conducted all of the negotiations preceding the signing of the instrument, was of middle age and wide business experience. The plaintiff and both defendants were present when the document was signed. It is conceded that plaintiff read the instrument or that it was read to him. It is not claimed that he was unaware of its contents or that he was mentally incompetent. The name of Louis M. Blodgett does not appear at any place on the instrument. Under these circumstances it cannot successfully be contended that Louis M. Blodgett became bound to fulfill the terms of the contract. If plaintiff expected to hold Louis M. Blodgett under the contract he should have required him to sign as a party thereto. No false statements as to the existence of facts were made. Defendant Louis M. Blodgett did not become liable under the contract by reason of his having conducted the preliminary negotiations nor by reason of his having gained some benefit through his wife's execution of the instrument.

[2, 3] Defendants contend that the instrument sued upon is in reality an agreement for the purchase and sale of real estate and that it cannot be enforced for the reason that the Constitution of Mexico prohibits defendants, American citizens, from owning realty in the territory in which the land in question is situated. The instrument was not prepared by a lawyer, a form of contract for conditional sales of automobiles being used by the parties. Plaintiff is referred to as lessor and defendant N. A. Blodgett as lessee. It is set forth that the lessor "lets" to the lessee the property described, and this language thereupon appears: "The lessee agrees to pay to the lessor as rental for use of said property the sum of ($3,500.00) three thousand five hundred dollars, to be paid in the following manner: A credit for ($350.00) three hundred and fifty dollars which has already been paid, and ($150.00) one hundred and fifty dollars to be paid on the signing of this lease, and ($30.00) thirty dollars a month thereafter until the full ($3,500.00) three thousand five hundred dollars has been fully paid with the interest on the deferred payments at (7%) seven

per cent per annum." Attached to the main instrument and separately signed by the parties are two contracts, each entitled "option to purchase on condition." In the first "option to purchase" it is provided that if the lessee complies with the terms of the lease, the lessor "will sell to the person hereinabove mentioned as lessee the above described property for the sum of ($1.00) one dollar." In the second "option to purchase" the "lessee" is given the option "to purchase the additional five acres, which the lessor owns in the above described tract * * * by paying to the lessor the additional sum of ($250.00) two hundred and fifty dollars."

We are of the opinion that the contract between the parties is in effect an agreement for the purchase and sale of real estate and that the trial court erred in construing it as a lease. It will be noted that no term whatever is mentioned in the instrument. A valid lease of real property must set forth, in addition to the parties, a description of the premises, and the rental to be paid, the *term* for which the property is demised. In Levin v. Saroff, 54 Cal. App. 285, 201 P. 961, 963, it is said: "To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental, and the time and manner of payment." Dodd v. Pasch, 5 Cal. App. 686, 91 P. 166; Enlow v. Irwin, 80 Cal. App. 98, 251 P. 658. Manifestly, the instrument lacks one of the necessary elements of a lease. The conclusion is necessarily reached that the parties intended to contract for the actual sale of the property involved. Provision is made for "interest on the deferred payments," a provision rarely, if ever, found in leases and almost always found in contracts of sale. The payment of $500, amounting to one-seventh of the total price, before or upon the execution of the contract indicates most persuasively a sale rather than a lease. The option to purchase the property for only $1 is a provision generally in use in contracts of purchase and sale; and the second option "to purchase the additional five acres" compels the conclusion that the parties intended the transaction to be a sale of the property.

[4-6] The Constitution of the Republic of Mexico, duly admitted in evidence, contains the provision that "within a zone of 100 kilometers from the frontiers, and of 50 kilometers to the seacoast, no foreigner shall under any conditions acquire direct ownership of lands and waters." All of the parties to this action are citizens of the United States and have never been citizens of Mexico. The land involved is within the zone in which persons other than Mexican citizens are prohibited from ownership of real estate. At the time of the execution of the contract all of the parties to the action were ignorant of the aforementioned provision of the Mexican Constitution. It is well established that transactions affecting the title to real property are governed by the law of the country in which the property is situated. Williams v. Nichol, 47 Ark. 254, 1 S. W. 243; Wheeler v. Walker, 64 Ala. 560; Meylink v. Rhea, 123 Iowa, 310, 98 N. W. 779; Lyndon Lumber Co. v. Sawyer, 135 Wis. 525, 116 N. W. 255. In Redwood Investment Co. v. Exley, 64 Cal. App. 455, 221 P. 973, 975, the rule is set forth: "There can be no question that real property is exclusively subject to the laws and jurisdiction of the state where located, and that no other laws or courts can affect it." The rule is well stated in 13 Corpus Juris, p. 256, § 28: "The lex rei sitae—the law of the place in which the property is—controls the title to, and the alienation and transfer of, land, and the effect and construction which is to be accorded to agreements intending to convey or otherwise to deal with it, the most frequent application of this rule being to deeds, mortgages, assignments for creditors and agreements for sale. Where in the performance of a contract conveyances and transfers of property situated in several states are to be made, such conveyances and transfers must be made in accordance with the law of the place where the particular property is situated." Executory contracts relating to real property are governed by the same rule. 12 Cor. Jur. p. 478, § 76. Under the express mandate of the Mexican law the defendants could not acquire title to the property involved. Plaintiff contracted to convey title to Mrs. Blodgett and this he could not legally do. If the consideration for a contract is unlawful, the contract is void. Civ. Code, § 1607, 1608; Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Industrial D. & L. Co. v. Goldschmidt, 56 Cal. App. 507, 206 P. 134. Since plaintiff was prohibited by law from conveying the property to Mrs. Blodgett, it follows that the contract is unenforceable.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

1 Cal.App.2d 144

KARLE v. REED et al.*

Civ. 1115.

District Court of Appeal, Fourth District, California.

Sept. 27, 1934.

Hearing Denied by Supreme Court Nov. 26, 1934.

1. Appeal and error ⇐1053(3)

In action by injured automobile guest against highway contractor and employee, admission of provision of construction contract requiring that contractor should station guards on both sides of equipment to protect public from injury *held* error as regards employee but cured by instruction that failure to observe contract would be negligence of contractor only (St. 1907, p. 215, as amended).

2. Appeal and error ⇐1170(7)

Any error in admitting provision of highway contract requiring contractor to station guards on both sides of equipment to protect public from injury in support of complaint alleging that proximate cause of collision was negligence of contractor's driver and muddy pavement *held* harmless where judgment for plaintiff was supported by evidence and there was no miscarriage of justice (Const. art. 6, § 4½).

3. Automobiles ⇐309(1)

In action by injured automobile guest against highway contractor, instruction that contractor's failure to station guards on both sides of equipment to protect public from injury as required by contract with department of public works would be negligence and submission of question of proximate cause to jury *held* proper (St. 1907, p. 215, as amended).

4. Appeal and error ⇐843(2)

In action by injured automobile guest against highway contractor, that instruction stated that contractor's failure to comply with provision of contract requiring contractor to station guards, wearing red coats and white hat bands bearing title "flagman" plainly printed thereon, on both sides of equipment to protect public from injury, would be negligence, was immaterial where contractor furnished no guards (St. 1907, p. 215, as amended).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Katie Karle against James A. Reed and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Harry P. Sweet, of San Diego, and Joe Crider, Jr., of Los Angeles, for appellants.

Glen H. Munkelt, of San Diego, for respondent.

MARKS, Justice.

The plaintiff was injured on January 20, 1933, while riding as a passenger of William Gillick in a light sedan, traveling north on the state highway, about one mile south of Laguna Beach. James A. Reed was an employee of Daley Corporation, and was acting on his employer's business and within the scope of his employment in driving a truck at the time of the accident.

The jury returned a verdict against both defendants in the sum of $3,500, which was reduced to $2,500 at the time of the denial of the motion for new trial. This appeal is taken from the judgment, the verdict, and from the order denying the motion for new trial.

At the time of the accident, a portion of the highway was under construction by Daley Corporation. This corporation was under contract with the department of public works, division of highways, of the state of California. The road runs in a general northwesterly and southeasterly direction. The paved portion in the center had been completed, but work was being done on the shoulders and on culverts and bridges.

On the day of the accident a cement mixer was standing on the easterly shoulder of the pavement. A coupé was standing on the westerly shoulder. It had been raining, and the pavement was wet, and was covered with a thin coating of mud which had been deposited on it by the trucks of Daley Corporation and the elements. The highway from the south approaches the place of the accident, where the cement mixer stood, down a 6 per cent. grade.

When Gillick approached from the south, he saw the cement mixer and the coupé, but did not see a truck which was behind it and thus was concealed from his view. He was proceeding at a speed of about 20 miles an hour. When about 100 feet from the cement mixer, he saw the truck back out from behind the coupé and proceed onto the pavement, moving in the direction of the mixer. Gillick applied his brakes lightly to reduce his speed, but, as the truck continued to back across the pavement at a speed of 2 or 3 miles an hour, he applied his brakes as hard as he could in an endeavor to stop. His automobile skidded, two wheels went off the pavement into a mud hole and turned over on its side, its top striking the right front fender of the truck, which had one or both of its

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⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 37 P.(2d) 694.

front wheels on the pavement with its rear a few feet from the mixer.

[1] The plaintiff offered, and the trial court admitted in evidence, section 7 (a) of the contract between the department of public works, division of highways, of the state of California, which covered the work being done at the place of the accident. This section contained provisions for the convenience and safety of the public traveling the road under construction. Among its provisions was the following: "The contractor shall station guards or flagmen at his own expense on both sides of equipment or operations in progress, and sufficiently distant therefrom to warn and protect public traffic from injury. Flagmen and guards shall wear red coats and white hatbands with the title 'Flagman' plainly printed on each band. Such coats and hatbands shall be furnished by the contractor at his own expense." Defendants objected to the introduction of this evidence upon the ground that it was incompetent, irrelevant, and immaterial and did not bind Reed, who was not a signer of the contract. The objection was overruled.

In his instructions to the jury the trial judge read the portion of the contract we have quoted, and added the following: "A failure to perform that part of the contract would be negligence, and that particular negligence would involve only the Daley Corporation, because, of course, Mr. Reed was not involved with that situation or that part of the contract."

The only grounds for a reversal of the judgment urged by defendants is the ruling of the trial court in admitting in evidence section 7 (a) of the contract and in giving the one instruction we have quoted.

Reed's objection to the admission of the evidence should have been sustained, as he was not a party to the contract and could not be bound by any of its provisions. This error was cured by the quoted instruction. There are no other grounds urged by Reed for the reversal of the judgment. Therefore it must be sustained as to him.

Defendants urge that their objection to the admission in evidence of the portion of the contract above quoted should have been sustained because the complaint alleged that the negligence of Reed, coupled with the muddy condition of the pavement, was the proximate cause of the accident, without any allegation of the absence of a flagman. From this they argue that the contract pertaining as it did to the absence of the flagman was outside the issues formed by the pleadings.

Plaintiff, in making reply to this argument, says that the very general objection that the evidence was incompetent, irrelevant, and immaterial was not sufficient to call the trial court's and counsel's attention to the real ground of the objection, which was that there was a variance between the pleadings and proof. In support of this theory she cites Boyle v. Coast Improvement Co., 27 Cal. App. 714, 151 P. 25, 27, where it is said: "No objection was made to this testimony by the defendants, except upon the usual general grounds or either on the ground that a proper foundation had not been laid for it or that the questions designed to bring out those facts were leading. And counsel for the defendants went into the question upon cross-examination apparently upon the assumption that the issue was raised or tendered by the pleadings. The objection to the testimony on the general grounds was not sufficient to raise or test the question whether the negligence thus sought to be established was pleaded or made an issue by the pleadings. If counsel were of the opinion that the complaint stated no cause of action, or if they conceived that the negligence to the proof of which the testimony was directed was not the negligence pleaded and relied upon in the complaint, they should have objected to the evidence upon that specific ground, and their failure to do so supplied the deficiency of the complaint in that respect or any omission to allege therein facts essential to the statement of a cause of action." See, also, Russell v. Ramm, 200 Cal. 348, 254 P. 532.

[2] Even though we assume that this contention of defendants is sound and that their objection should have been sustained, under the provisions of section 4½ of article 6 of the Constitution we cannot reverse the judgment, as we are satisfied, after studying the record, that the judgment is supported by the evidence and that there has been no miscarriage of justice. If the judgment were reversed the complaint could be amended before a second trial, and with proper amendment the questioned evidence would become admissible. It would seem an idle act to reverse a judgment because of the admission of evidence which would be admissible at the second trial.

Defendants maintain that the judgment must be reversed because of the instruction of the trial judge to the jury that a failure to perform the portion of the contract which we have quoted would constitute negligence. They cite the following cases in support of this contention: Styles v. F. R. Long Co., 67

N. J. Law, 413, 51 A. 710; Wymer-Harris Const. Co. v. Glass, 122 Ohio St. 398, 171 N. E. 857, 69 A. L. R. 517; Lewis v. La Nier, 84 Colo. 376, 270 P. 656; and Davis v. Mellen, 55 Utah, 9, 182 P. 920, 7 A. L. R. 1193. The first three cases cited support the theory of defendants, but the last case gives them little comfort. In this last-cited case it was held that the provisions of the contract in question there were inserted for the protection of the work and not for the safety of the traveling public. The judgment was reversed because the court was of the opinion that the proximate cause of the accident was not the violation of the terms of the contract, but the negligence of others than the contractor.

In the instant case the portion of the contract introduced in evidence was undoubtedly for the protection of the traveling public. The contract was executed in accordance with law by proper officers of the state of California who are given possession and control of state highways, their construction, maintenance and repair, together with the right to execute contracts to carry out these purposes. St. 1907, p. 215, as amended. The contract was executed by Daley Corporation. This corporation owed the traveling public the common-law duty of protection from injury resulting from its negligence. The contract established a standard of care to be used by the contractor in performing this duty. We can see no reason why the contractor should not be held to this standard of care to which it formerly consented.

In County of Alameda v. Tieslau, 44 Cal. App. 332, 186 P. 398, 400, it is said: "The contract required the obstructions to be guarded or warning lights to be placed. Warning lights were furnished by the defendants, but they were not placed on the continuous rock pile. The defendants, of course, knew the road was open for traffic. The failure to place the lights on the road was negligence." The following cases support the rule thus announced: Metcalf v. Mellen, 57 Utah, 44, 192 P. 676; Owens v. Fowler (C. C. A.) 32 F.(2d) 238; Plater v. W. C. Mullins Const. Co., 223 Mo. App. 650, 17 S.W.(2d) 658; Ulmen v. Schwieger, 92 Mont. 331, 12 P.(2d) 856; Sullivan v. Staten Island Electric R. Co., 50 App. Div. 558, 64 N. Y. S. 91; St. Paul Water Co. v. Ware, 16 Wall. 566, 21 L. Ed. 485; Martin v. Farr Bros. Co., 211 Ill. App. 235; McMahon v. Second Ave. R. Co., 75 N. Y. 231. In Sullivan v. Staten Island Electric R. Co., supra, it was said: "This action was brought and tried upon the theory that the defendant was liable to the plaintiff under a written contract with the local authorities of the township in which its street railroad was constructed, in which it had agreed that, 'during the continuance of such work of construction on said railroad tracks, roadbed, turn-out, switches, and connections, to so conduct said work as to at all times leave said streets, roads, and highways, and the sidewalks thereof, in a safe and passable condition for vehicles and foot passengers, keep all dangerous or unsafe places lighted at night from sunset to sunrise, and properly guarded both by day and night.' This duty is admitted by the answer, and there can be no doubt that contractors with the state or a municipal corporation who assume, for a consideration received from the granting power, by covenant, expressed or implied, to do certain things necessary for the safety or well-being of the public, are liable, in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance."

[3] In the instant case it is clear that there was equipment belonging to Daley Corporation at the place of the accident; that the contract provided for flagmen on each side of the work to warn travelers of impending danger; that no flagmen were provided. This evidence was undisputed and constitutes a clear violation of duty by the contractor. The violation of duty being admitted, the negligence was admitted, and the trial court properly instructed the jury that the violation of the duty was in itself negligence. The question of whether this negligence was a proximate cause of plaintiff's injury was left to the determination of the jury by proper instruction.

[4] Defendants urge that the instruction told the jury that the watchmen must wear red coats and that it would be negligence for them to wear coats of any other color. This question is not presented, as there were no watchmen stationed along the work. There being none, the color of their clothes became immaterial.

The attempted appeal from the verdict and the order denying motion for new trial is dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.App.2d 115

SALMON v. ALLEN et al.

Civ. 8916.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1934.

Hearing Denied by Supreme Court Nov. 26, 1934.

1. Schools and school districts ⇐141(5)

Under statute forbidding school board to discharge probationary teacher during school year except for cause, but permitting it to dispense with services for following year by giving notice before June 10th, finding that resolution of board on June 4th discontinuing services of probationary teacher whose duties ended June 5th referred to ensuing school year *held* authorized (School Code, §§ 5.660 to 5.670, 5.680 to 5.682).

2. Appeal and error ⇐1008(1)

Conclusion of trial court with respect to meaning and intent of writing consistent with circumstances relevant thereto will not be disturbed on appeal, although another conclusion might be equally tenable.

3. Evidence ⇐83(2)

Schools and school districts ⇐141(5)

Under statute permitting school board to dispense with services of probationary teacher for ensuing year by giving notice before June 10th, notice of such action by school board signed by its secretary as such and duly mailed and received was sufficient, since in absence of proof it would be presumed that official duty had been regularly performed (Code Civ. Proc. § 1963, subd. 15; School Code §§ 5.660 to 5.670, 5.680 to 5.682).

4. Trial ⇐404(1)

Findings should be liberally construed in support of judgment.

5. Schools and school districts ⇐141(5)

Finding that resolution of school board on June 4th discontinuing services of probationary teacher whose teaching duties ended June 5th for not meeting teaching standards did not amount to finding that teacher was discharged for cause within school year without hearing, so as to render ineffectual notice to teacher of resolution of board, since only reasonable interpretation of findings was that resolution referred to ensuing year (School Code, §§ 5.660 to 5.670, 5.680 to 5.682).

6. Mandamus ⇐187(4)

In proceeding to compel school board to classify teacher as permanent teacher, where petitioner's theory was that notice of resolution of school board discontinuing her services as probationary teacher was insufficient, entitling her to permanent classification after three years of probationary teaching, petitioner could not contend on appeal that resolution of board was dismissal for cause which was invalid because made during school year without hearing (School Code, §§ 5.660 to 5.670, 5.680 to 5.682).

7. Appeal and error ⇐882(3)

Theory upon which case is tried must be adhered to on appeal.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Petition by Grace M. Salmon against John J. Allen, Jr., and others, as members of the Board of Education of the City of Oakland, County of Alameda, for a writ of mandate requiring the respondents to classify her as a permanent teacher in the Oakland City High Schools. From an adverse judgment, the petitioner appeals.

Affirmed.

Aaron Turner and John Felton Turner, both of Oakland, for appellant.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Agnes R. Polsdorfer, Deputy Dist. Atty., all of Oakland, for respondents.

PER CURIAM.

Appellant filed in the superior court of the county of Alameda a petition, alleging in substance that she had been employed as a probationary teacher in the Oakland city high schools for three successive school years and thereupon became entitled to be classified as a permanent teacher therein, that respondents refused to so classify her, and she prayed for a writ of mandate requiring such classification to be made. An order to show cause issued.

Respondents demurred to the petition, and also denied certain of its allegations and admitted others.

At the hearing it was stipulated that in the event the court found that a certain notice sent to petitioner was sufficient to accomplish her dismissal from her employment as a teacher, no finding should be made with respect to the successful or unsuccessful character of her services.

The parties agree that the only evidence adduced at the trial consisted of a resolution of the board of education and a letter mailed and received by petitioner. The other facts, except such as were admitted by the pleadings, were stipulated in open court.

The trial court made findings, from which it concluded that petitioner should take noth-

ing by her petition. A judgment was accordingly entered, from which petitioner has appealed.

She claims that certain of the court's conclusions are unsupported. According to the stipulation petitioner was employed by resolution of the board, adopted on June 12, 1928, to serve as a teacher for the school year 1928–1929. She served as such for two complete consecutive school years, namely, 1928–1929 and 1929–1930. She continued to serve during the school year 1930–1931 to and including June 5, 1931, the date on which the schools closed for the summer vacation. On June 4, 1931, the board adopted the following resolution: "That in keeping with the School Code of California, art. IV, secs. 5.680, 5.681 and 5.682 the services of Mrs. Grace Salmon, probationary teacher, who has not met the Oakland standard of teaching, be discontinued." Following this a letter was mailed by the board to petitioner and received by her. The letter was as follows:

"Mrs. Grace Salmon,
"369 Adams street,
"Oakland, Calif.

"Dear Mrs. Salmon:

"In keeping with the provisions of the School Code of California, art. IV, paragraph 5.681 you are hereby notified that your services will not be needed in the Oakland Public Schools after the close of the present school year on June 5, 1931.

"John W. Edgemond,
"Secretary Board of Education."

Respondents refused to permit petitioner to serve as a teacher during the school year 1931–1932, or to pay her any salary for that year.

The court found that the school year 1930–1931 ended on June 30, 1931; that it was the rule of the board not to classify employees as occupying positions requiring certification qualifications as permanent employees until the month of July following the completion by such employees of three complete successful consecutive school years of employment by the district; that the board on June 4, 1931, and before the end of petitioner's third complete consecutive school year of employment duly resolved that her services as probationary teacher be discontinued, in keeping with the provisions of section 5.680, 5.681, and 5.682 of the School Code, for the reason that she had not met the Oakland standards of teaching; and that the board's notice in writing, advising her that her services would not be required for the ensuing year, was on June 6, 1931, deposited by the secretary of the board in the United States registered mail, postage prepaid, addressed to petitioner at her last known place of address, and was received by her on June 9, 1931; further, that instruction of pupils in said schools ceased for the school year on June 5, 1931, and that petitioner has not at any time since June 6, 1931, been an employee of the school district.

Petitioner admits that she received her full salary for the school year 1930–1931. She contended at the trial that the notice given her was not the notice of dismissal required by the School Code, and that consequently she completed the third consecutive school year of her employment and was entitled to classification as a permanent teacher.

Permanent employees in positions requiring certification qualifications can only be dismissed for cause after notice and hearing. School Code, §§ 5.660 to 5.670, inclusive. Petitioner was a probationary teacher; and the board had to dismiss such during the school year for cause only, as in the case of permanent employees (School Code, § 5.680); but they might on or before the 10th day of June in any year dismiss such an employee by giving notice in writing that his services would not be required for the ensuing year (School Code, § 5.681); and, according to section 5.682 of the same Code, such notice shall be deemed sufficient and complete when delivered in person to such employee by the clerk or secretary of the board, or deposited in the United States registered mail postage prepaid, addressed to the employee at his last known place of address.

[1-3] It has been held that except for cause a board cannot discharge a probationary teacher before the end of the school year, nor after June 10th of any year, except for cause, dispense with his services for the ensuing year. Blalock v. Ridgway, 92 Cal. App. 132, 267 P. 713. They may, however, if proper notice be given, dispense with his services for the ensuing year either with or without cause. School Code, § 5.681; Montgomery v. Board of Education (Cal. App.) 31 P.(2d) 243. While the resolution here adopted gave a reason for the board's action, namely, that the petitioner had "not met the Oakland standards of teaching," it also stated they were acting in conformity with the provisions of sections 5.680, 5.681, and 5.682 of the Code; and it was neither alleged nor found that the board's action was based upon charges made against petitioner. It was the conclusion of the trial court that the resolution had reference to the ensuing school year;

and the language of the resolution and the notice both show that such was the case. The circumstances were relevant to this question, and the conclusion of the trial court with respect to the meaning and intent of a writing, where it appears to be consistent therewith, will not be disturbed on appeal, although another conclusion might seem equally tenable. Barnhart Aircraft, Inc., v. Preston, 212 Cal. 19, 297 P. 20; Kautz v. Zurich, etc., Ins. Co., 212 Cal. 576, 300 P. 34. It will be presumed in the absence of proof that official duty has been regularly performed (Code Civ. Proc. § 1963, subd. 15), and the notice of the action of the board, which was signed by its secretary as such and duly mailed and received, was sufficient. Fleming v. Board of Trustees, 112 Cal. App. 225, 296 P. 925; Steele v. Board of Trustees, 121 Cal. App. 419, 9 P.(2d) 217.

[4-7] Plaintiff now claims, however, that the court found that she was dismissed for cause and, it being conceded that no charges against her were filed and no hearing had, that the action of the board was ineffective for any purpose.

The findings referred to allegations in the petition and answer; and from these references petitioner wishes to have the inference drawn that findings to the effect that she was dismissed for cause were made. We cannot agree with this interpretation. The court expressly found "that before the end of the third complete consecutive school year of petitioner's employment, to wit, on the 4th day of June, 1931, the Board of Education of the City of Oakland and of Oakland High School District of Alameda County at its regular meeting resolved and ordered that the services of petitioner as a probationary teacher of the Oakland High School District of Alameda County be discontinued, in keeping with the provisions of sections 5.680, 5.681 and 5.682 of the School Code, for the reason that said petitioner had not met the Oakland standards of teaching." Findings are to be liberally construed in support of the judgment. Ames v. City of San Diego, 101 Cal. 390, 35 P. 1005. This was the only finding which the evidence reasonably supported, and that nothing more was intended is the only reasonable interpretation which the findings bear. Moreover, it was not claimed at the trial that petitioner was dismissed for cause, or that any action was taken by the board other than to discontinue her services as a probationary teacher, the contention of her counsel then being that the notice of dismissal was insufficient, and that consequently she finished the full three years as a probationary teacher and became entitled to permanent classification. It is well settled that the theory upon which a case was tried must be adhered to on appeal. 2 Cal. Jur. Appeal and Error, § 68, p. 237.

There is no material conflict between the findings, and the conclusion of the trial court upon which it based its judgment is fairly supported by the evidence.

The judgment is affirmed.

1 Cal.App.2d 69

GUTTER v. NIESLEY.

Civ. 8926.

District Court of Appeal, First District, Division 2, California.

Sept. 25, 1934.

1. Trial ⇐219

Where court properly defined defense of contributory negligence with all its elements, subsequent repetition of definition was unnecessary, and court could properly refer to "the defense of contributory negligence" without again defining it.

2. Automobiles ⇐246(25)

Instruction that it was motorist's duty to make reasonable use of his faculties and of ordinary care to avoid collision at intersection *held* not error.

3. Automobiles ⇐246(25)

Where case was heard before 1931 amendment of Vehicle Act, instruction that, if motorist approached and crossed intersection in excess of legal speed, he was guilty of negligence per se, *held* proper (St. 1927, p. 1436, § 113).

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Justin Gutter against Myron Niesley. From a judgment for defendant, plaintiff appeals.

Affirmed.

Ford & Johnson, of San Francisco, for appellant.

Ralph E. Bancroft and R. G. Partridge, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

This appeal presents the common case of two operators of motor vehicles each trying to beat the other across a street intersection. The collision which is the subject of the litigation occurred at the intersection of Columbus avenue and Jackson street in the business section of the city and county of San Francisco. The testimony presents the usual conflict, each party stating that he approached the intersection at a reasonable rate of speed, that the other party approached at an excessive and illegal rate, and that the collision was due wholly to the fault of the other. The jury believed the evidence of the defendant and gave him a verdict. After the verdict was returned for the defendant, the plaintiff made a motion for a new trial, which was heard and denied by the trial judge. From this we may assume that the court and jury did not accept plaintiff's version of the collision.

[1] Plaintiff has specified certain paragraphs of the instructions covering the defense of contributory negligence which he terms formula instructions and which he criticizes because they do not repeat every element of the defense of contributory negligence. We do not consider any of these paragraphs as formula instructions, but, taking the instructions as a whole, we conclude that they clearly and adequately cover this defense. Though the paragraphs complained of are arranged in appellant's brief in an inverse order to that given, it appears from the transcript that, when first approaching the subject of contributory negligence, the trial court gave a correct and approved definition of that defense with all its elements. In the paragraphs following, this defense was referred to as the defense of contributory negligence. The jury must have understood that the trial court was referring to the defense as it had theretofore defined it. It certainly was not necessary to repeat the definition in every paragraph referring to that issue.

[2] Complaint is also made of that portion of the instructions telling the jury that it was the duty of the appellant to have made a reasonable use of his faculties and of ordinary care to avoid the collision. This merely states a legal truism that it is the duty of a party to exercise reasonable care to avoid injury to another.

[3] No prejudice can be claimed from the portion of the instructions that, if appellant approached and crossed the intersection in excess of the legal speed, he was guilty of negligence per se. The cause was tried and the judgment was entered before the 1931 amendment (St. 1931, p. 2120) to section 113 of the California Vehicle Act (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436); hence the rule followed in Pilcher v. Tanner Motor Livery (Cal. App.) 33 P.(2d) 58, does not apply.

Other errors claimed do not require consideration. The cause was fairly tried, and the jury was fully and fairly instructed on the essential issues of the controversy. The record discloses unmistakably that the jury rejected appellant's testimony and that no other verdict could have been justly returned.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

PEOPLE v. VAILE.*

Cr. No. 3763.

Supreme Court of California.

Sept. 24, 1934.

Rehearing Granted Oct. 22, 1934.

1. Criminal law ⇐1202(7)

Entry of second judgment, three years after rendition of first judgment, that accused was habitual criminal, and not subject to parole, *held* not prejudicial, where first judgment stated that accused, being convicted of two felonies with three prior convictions of felony, was ordered to be confined in state prison (Pen. Code, § 644).

2. Criminal law ⇐1202(6)

Where defendant has been found to be habitual criminal, trial court should include as part of judgment formal adjudication that defendant was habitual criminal, but omission of such formal adjudication in final judgment does not impair its effectiveness so long as judgment contains adjudication that defendant has been convicted of several crimes which, when committed by single person, renders him an habitual criminal (Pen. Code, § 644).

In Bank.

Appeal from Superior Court, Yolo County; Forrest A. Plant, Judge.

Alton H. Vaile was adjudged an habitual criminal, and he appeals.

Appeal dismissed.

Prior opinion, 29 P.(2d) 233.

Alton H. Vaile, in pro. per.

U. S. Webb, Atty. Gen., Jess Hession, Deputy Atty. Gen., and Neal Chalmers, Dist. Atty., of Woodland, for the People.

CURTIS, Justice.

The appellant was charged by an information filed August 15, 1930, in the superior court of the county of Yolo with the commission of four felonies and also with three prior convictions of a felony. He was found guilty of two of the felonies charged, and pleaded guilty to the three prior convictions of a felony, pronounced judgment as follows: "And no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment: That whereas the said Alton H. Vaile has been duly convicted in this court of the crimes of lewd and lascivious conduct, and infamous crime against nature, with three prior convictions of felony, it is therefore ordered, adjudged and decreed that the said Alton H. Vaile be punished by confinement in the State Prison of the State of California, and that the said Alton H. Vaile be taken to the Warden of the State Prison at Folsom." Said minute entry further showed that the court then ordered that the defendant be remanded to the sheriff of the county of Yolo, to be by him delivered into the custody of the warden of the state prison at Folsom, Cal. A copy of this minute entry, certified as provided by law, was by the sheriff of said county delivered to the warden of the state prison at Folsom, at the time of the delivery of the defendant by said sheriff to said warden. On June 9, 1933, which was almost three years after said judgment was pronounced, the trial court made an order directed to the sheriff of said county to take defendant from the state prison at Folsom and bring him before said court for such further proceedings as to the court might seem meet and proper. It was recited in said order that the same was made for the reason that "the court had omitted to find that the defendant was an habitual criminal without right of parole, and it appearing to the court to be a proper order in the premises." In compliance with this order, the sheriff brought said defendant before the trial court, and said court again pronounced judgment against him, which said judgment was in all respects substantially like the first judgment pronounced against defendant, except that in said second judgment the court expressly adjudged defendant to be an habitual criminal by reason of said three prior convictions and the conviction in this action, and adjudged that said defendant "as such habitual criminal be punished by confinement in the state prison of the state of California, without the right of parole." It is from this judgment that the present appeal has been taken.

[1, 2] Appellant assigns various reasons why the judgment should be reversed. His main contention is that he has been prejudicially affected by the entry of the second judgment by reason of the fact, as claimed by him, that by the second judgment he had been adjudicated to be an habitual criminal and pun-

*For subsequent opinion see 42 P.2d 321.

ished as such habitual criminal, while by the first judgment he was sentenced and punished only for the two felonies of which he was convicted in the superior court of the county of Yolo. We think the appellant has misconceived the legal effect of the first judgment pronounced against him by said superior court. In that judgment the court expressly found and adjudicated that the defendant had been convicted of two felonies after three prior convictions of a felony. It then directs that defendant be imprisoned in the state prison of the state and that the sheriff deliver him to the warden of said state prison. The commitment which was delivered to the warden, being a certified copy of the court's judgment, clearly showed that defendant had suffered the three prior convictions of a felony as well as his conviction of the two felonies charged against him in the information herein. Section 644 of the Penal Code as then in force declared that a defendant so convicted should "be punished by imprisonment in the state prison for not less than life and shall not be eligible to parole." There is no basis whatever for the claim of defendant that under the first judgment he was sentenced and punished only for the two felonies with which he was charged in said information, as said judgment expressly adjudicated his three prior convictions of a felony as well as the subsequent conviction of two felonies. There was therefore in legal effect no difference between the two judgments, and the defendant was in no way injured by the entry of the second judgment. It is true that the second judgment contains a formal adjudication that the defendant was an habitual criminal. The procedure leading up to the pronouncement of this second judgment apparently followed the suggestion made by this court in the case of In re Boatwright, 216 Cal. 677, 683, 15 P.(2d) 755. The validity of a judgment like the first judgment pronounced herein was not before us in that proceeding, and what was said in our opinion relative to such a judgment cannot be held to be a judicial determination of that question. In cases where a defendant has been found to be an habitual criminal, we think, as stated in our opinion in the Boatwright Case, that the trial court should include therein as part of said judgment a formal adjudication that the defendant was an habitual criminal. But the omission of such formal adjudication in a final judgment would not vitiate said judgment nor in any way impair its effectiveness so long as the judgment contained an adjudication that the defendant had been found guilty of the several crimes which, when committed by a single person, rendered him an habitual criminal. The defendant, therefore, was not aggrieved by the pronouncement of said second judgment. If the second judgment is erroneous for any reason, the first judgment is in full force and effect, and in pursuance thereof he is subject to punishment as an habitual criminal. If the second judgment is valid, it neither adds to nor detracts from the force and effect of the first judgment. It would avail defendant nothing to have the second judgment set aside, reversed, or in any way modified.

This appeal, therefore, should be dismissed, and it is so ordered.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

1 Cal.2d 577

GREENZWEIGHT v. TITLE GUARANTEE & TRUST CO. et al.

L. A. 13476.

Supreme Court of California.

Oct. 2, 1934.

1. Escrows ⇐14(1)

Delivery by escrow agent contrary to terms of deposit in escrow is void.

2. Evidence ⇐21

It is common knowledge that checks and drafts are usual means of transferring money in transaction of business.

3. Bills and notes ⇐429

Credit given for amount of check by drawee bank will be treated as payment of check.

4. Escrows ⇐14(1)

Where defendant bank, as escrow holder in refinancing transaction, was instructed by plaintiff to deliver trust deed reconveyance when it could "hold" certain money for plaintiff, and defendant, on receiving refinancing checks, transmitted them to correspondent bank for clearance and correspondent credited defendant with proceeds, defendant, which thereupon delivered reconveyance, *held* to have complied with instructions, so that, if defendant violated duty in leaving proceeds with correspondent until defendant ceased business, it did so as agent of plaintiff who,

as against innocent third parties, should bear loss.

[Ed. Note.—For other definitions of "Hold," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Alpheus H. Greenzweight against the Title Guarantee & Trust Company, the Fidelity Savings & Loan Association, and another, in which, on plaintiff's death, W. E. Greenzweight, as administrator of the estate of Alpheus H. Greenzweight, deceased, was substituted as plaintiff. Judgment for plaintiff, and named defendants appeal.

Reversed.

Prior opinion, 28 P.(2d) 381.

Charles I. Baker, Arch H. Vernon, Gilbert E. Harris, and Charles H. Brock, all of Los Angeles, for appellants.

James B. Comer, of Los Angeles, for defendant Jack J. Levy.

Joseph F. Rank and Willard W. Wallace, both of Los Angeles, for respondent.

WASTE, Chief Justice.

This is an action for declaratory relief, in which the plaintiff seeks to have canceled a trust deed reconveyance and the indorsement of payment upon the trust deed note, and also to have both instruments reinstated in full force and effect. From a judgment for plaintiff, two of the defendants prosecute this appeal.

The transaction giving rise to this litigation involved the refinancing of a loan upon the dwelling of the defendant Levy. Plaintiff held the then existing incumbrance thereupon, a trust deed in which the defendant Title Guarantee & Trust Company was named as trustee. The plan was to pay off plaintiff's incumbrance with the funds derived from a new loan to be made by the defendant Fidelity Savings & Loan Association and likewise secured by a trust deed. To consummate the refinancing, an escrow was opened at the Belvedere State Bank, into which plaintiff deposited his trust deed, his trust deed note, and an executed request for reconveyance by the Title Guarantee & Trust Company, all pursuant to a letter of instructions to said bank to which reference is hereinafter made. About the same time the defendant Fidelity Savings & Loan Association transmitted to said State Bank, as escrow agent, its instructions with reference to securing the new loan upon the said dwelling, and, on November 25, 1930, delivered to the escrow agent its check in the sum of $2,425.87 to be used in accordance with its instructions. The defendant Levy and his wife executed and delivered to the escrow holder a new trust deed and a trust deed note in favor of the defendant Fidelity Savings & Loan Association and also deposited therein a check for $161.98, being the excess amount required to make up the payment due the plaintiff. The Belvedere State Bank had a separate escrow department, which department carried a separate commercial checking account with the Belvedere State Bank. The checks so received were credited to the escrow account in the commercial department of the Belvedere State Bank. This bank was not a member of the Los Angeles Clearing House Association, but it maintained a commercial account with the Bank of America through which it cleared its checks. The checks above mentioned were sent to the Bank of America for clearance. They were paid and credit was given by that institution to the Belvedere State Bank account on November 30, 1930. At about this time there was standing to the credit of Belvedere State Bank with Bank of America a deposit of over $18,000. On December 3, 1930, Belvedere State Bank delivered the reconveyance executed by plaintiff, and caused the trust deed note to be canceled, and the reconveyance recorded. It also caused to be recorded a deed of trust against said dwelling in favor of the defendant Fidelity Savings & Loan Association. Thereafter it transmitted to said defendant its new trust deed note secured by the deed of trust, and, on December 13, 1930, mailed to the plaintiff the check of the escrow department drawn on said department's account in the Belvedere State Bank for the amount due him under his instructions. December 13th was a Saturday. Plaintiff received the check on the evening of December 15th and deposited it with his bank for collection on the morning of December 16th. On the following day, before the check had cleared, the Belvedere State Bank was closed by order of the superintendent of banks. At the time of its closing the Belvedere State Bank had in its vaults the sum of $8,250.73. No part thereof, however, was held for plaintiff, but was subject to the use of the closed bank for its general business, including the payment of presented checks upon depositor's accounts. On the same day the Bank of America exercised its banker's lien on all the credits of the Belvedere State Bank on deposit with it.

It was plaintiff's claim at the trial that the Belvedere State Bank did not hold for him the moneys, as required by his instructions, at the time it delivered the reconveyance and canceled the note and trust deed; that therefore such delivery and cancellation were void and of no effect; and that his note therefore still remained in force and he retained his first lien upon the property as against the trust deed of the defendant Fidelity Savings & Loan Association. As stated, judgment went in favor of the plaintiff and the defendants Title Guarantee & Trust Company and Fidelity Savings & Loan Association appealed.

[1] Plaintiff presents the same argument here as he did below in support of the judgment. The argument is grounded upon the premise that plaintiff's escrow instructions did not authorize the Belvedere State Bank to hold or accept checks in lieu of money, but, on the contrary, required that money alone was to be held. The law is well established that a delivery by an escrow agent contrary to the terms of a deposit in escrow is void and of no force or effect. Los Angeles City High School Dist. v. Quinn, 195 Cal. 377, 234 P. 313. Defendants do not question this rule but contend that the escrow instructions permitted the escrow holder to accept checks for sums of money to be paid to it and that "after the check of the Fidelity Savings and Loan Association was cashed and the proceeds left with the Bank of America to the credit of Belvedere State Bank, subject to its check, the Belvedere State Bank 'held' that sum of money within the meaning of the escrow instructions of plaintiff, and the escrow holder was not required to draw out the actual coin or currency and keep it in its physical possession at all times until delivered to plaintiff."

The sole issue therefore, as agreed by the parties, is, Did the Belvedere State Bank violate the terms and conditions of the escrow agreement? Plaintiff's instructions on this subject provided: "These documents you are authorized to use when you can hold for me the sum of $2,450.00, and interest on $3,218.84, from August 1st, 1930, to date money is received by me."

[2, 3] It is a matter of common knowledge that checks and drafts are usual and ordinary means of transferring money in the transaction of business. California Stearns Co. v. Treadwell, 82 Cal. App. 553, 559, 256 P. 242. A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of the check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account or for the use for which the credit is given. Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156, 164, 162 P. 631. In other words, the giving of credit is practically the same as paying the money to the depositor and receiving the cash again on deposit.

[4] Therefore, when the check of the Fidelity Savings & Loan Association was cleared and the Bank of America deposited the proceeds thereof to the account of the escrow holder, the situation for all practical purposes was the same as though the escrow holder had actually received from the Bank of America the cash payable on the check, which would satisfy the conditions of the escrow, and then, for safe-keeping, had redeposited the money with the Bank of America. Had the escrow holder accepted the check, cashed it, and held the money, and then delivered the instruments, there would be no question as to compliance with the instructions. The mere acceptance of the check did not violate the instructions. In our opinion the terms of the escrow instructions were fully complied with when the check of the Fidelity Savings & Loan Association was cleared and its proceeds made available to the escrow holder by the credit given therefor by the Bank of America. The escrow holder then had control or dominion over such proceeds and "held" them for plaintiff within the meaning of the instructions. From that time on, the escrow holder became the agent of the plaintiff as to such money and any impropriety in its subsequent conduct with regard thereto must be borne by plaintiff and not by the defendants. In other words, if the escrow holder violated its duty in so "redepositing" the proceeds of the check with the Bank of America, or in permitting the credit therefor to stand until such time as conditions compelled its cessation of business, it did so as the agent of the plaintiff who, as against innocent third parties, should now bear the loss. In Shreeves v. Pearson, 194 Cal. 699, 707, 230 P. 448, 451, we held that "whenever a deed is deposited in escrow by the grantor to be delivered to the grantee upon payment by him to the escrow holder of a sum of money to be by the latter delivered to the grantor upon the production by the latter of a satisfactory certificate of title, the escrow holder is, as to such deed and money, the agent of both parties until such time as the said satisfactory cer-

tificate of title is produced, but he thereupon becomes the agent of the purchaser as to such deed, and of the seller as to such money."

The judgment is reversed.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

1 Cal.2d 604

SHEA v. KERR, Registrar of Voters.

L. A. 14978.

Supreme Court of California.

Oct. 4, 1934.

Stipulations ⇐3

Mandamus to compel omitting from ballot of name of candidate for justice of peace, on ground candidate was not attorney as required by statute for judicial townships having populations of 30,000 or more, was denied, where no judicial determination of population had been made and federal census showed township to have less than 30,000 population, although counsel stipulated that population in fact exceeded 30,000 (Pol. Code, § 4185a; Code Civ. Proc. § 81 as amended by St. 1933, pp. 1810, 2476; § 112 as amended by St. 1929, p. 834; § 159a as added by St. 1933, p. 1827, § 46).

In Bank.

Mandamus proceeding by Timothy Shea against William Kerr, as Registrar of Voters of the County of Los Angeles, State of California.

Alternative writ discharged, and peremptory writ denied.

Mott, Vallee & Grant, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and Fred M. Cross, Deputy County Counsel, both of Los Angeles, for respondent Kerr.

J. Vincent Hannon and J. W. Faulkner, both of Los Angeles, for intervener Daniel S. Sorey.

SHENK, Justice.

Mandamus to compel the respondent registrar of voters to omit from the ballot to be used at the ensuing general election the name of Daniel S. Sorey as a candidate for justice of the peace of El Monte township in Los Angeles county.

At the primary election held August 28, 1934, Sorey and eleven others were candidates for said office. Sorey received the highest number of votes, but did not receive a majority of all votes cast for the office. It is alleged in the petition that El Monte township contains a population of over 30,000; that Sorey has not been admitted to the practice of law in this state; that he was not holding the office of justice of the peace of said township at any time during the year 1929; and that, if elected, he would not be eligible to hold said office under the provisions of section 4185a of the Political Code, and section 159a of the Code of Civil Procedure, as added by St. 1933, p. 1827, § 46, and under the authority of Felt v. Waughop, 193 Cal. 498, 225 P. 862, and other cases to like effect.

The respondent has interposed a general demurrer to the petition and an answer in which it is alleged, and is not disputed, that according to the federal census of 1930 the population of said township is 26,334. At the hearing it was stipulated that the population of the township, by reason of its recent consolidation with two other townships, is in fact in excess of 30,000.

In 1929 section 112 of the Code of Civil Procedure was amended (St. 1929, p. 834) to increase the jurisdiction of justices' courts in townships of over 30,000 population. No method was prescribed by the Legislature for the ascertainment of such population. This court, in October, 1929, exercising its original jurisdiction in a mandamus proceeding and by a reference determined the fact as to certain townships in Los Angeles county. County of Los Angeles v. Justice's Court, 208 Cal. 429, 281 P. 611. See, also, Shipp v. Superior Court, 209 Cal. 671, 289 P. 825.

In 1933 section 81 (the second of the same number; see Stats. 1933, pp. 1810, 2476) of the Code of Civil Procedure directed that judicial townships having a population of 30,000 or more should be known and designated as justices' courts of class A, and that judicial townships having a population of less than 30,000 should be known and designated as justices' courts of class B. The section then provided: "For the purpose of determining the jurisdiction of any justice's court therein, the population of a judicial township shall be deemed to be above or below thirty thousand as may have been found by the Supreme Court of this State to be the fact in

any proceeding in mandamus, prior to January 1, 1931, to compel the justices of such townships to exercise original jurisdiction in certain causes; otherwise such population shall be deemed to be as shown by the last preceding census taken under the direction of the Congress of the United States." No determination of the population of El Monte township as heretofore or as now constituted was made by this court prior to January 1, 1931, or at all. As stated, the 1930 federal census shows the population of the three townships now comprising El Monte township to be 26,334. This is the only authoritative determination of the population of said township and under it the justices' court therein is of class B. Any concession or stipulation of counsel as to actual population is of no controlling significance when, as here, jurisdiction of a court is involved and has been established in the manner provided by law.

There is no legal requirement that a justice of the peace of a class B justices' court shall be admitted to practice law in this state, and therefore the claimed ineligibility of Daniel S. Sorey does not exist. This conclusion is determinative of the present proceeding and other points need not be discussed.

The alternative writ is discharged, and the peremptory writ is denied.

We concur: WASTE, C. J.; THOMPSON, J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

1 Cal.2d 583

GOODALL et al. v. BRITE et al.

L. A. 14714.

Supreme Court of California.

Oct. 2, 1934.

Appeal and error ⇐458(3)

County and members of its board of supervisors *held* entitled to writ of supersedeas, staying proceedings for contempt in violating injunction against admitting into county hospital patients able to pay for hospital care elsewhere pending decision on appeal from decree granting injunction.

In Bank.

Action by O. P. Goodall and others against Perry Brite and others, individually and as members of the Board of Supervisors of Kern County, and such County. Judgment for plaintiffs, and defendants appeal. On defendants' application for a writ of supersedeas.

Writ granted.

Borton & Petrini, Thomas Scott, and W. A. McGinn, all of Bakersfield, for appellants.

Matthew S. Platz, Siemon & Claflin, and Alfred Siemon, all of Bakersfield, for respondents.

WASTE, Chief Justice.

Appellants, defendants in this action, constituting the board of supervisors of Kern county, apply for a writ of supersedeas. More than ten years prior to the commencement of the action, Kern county, acting by and through a former board of supervisors, built, furnished, and equipped a county hospital in said county, since its establishment, and now, generally known and designated as "Kern General Hospital." At all times during its existence, the expense of the operation of the hospital has been, and now is, paid from county funds. It is contended by the plaintiffs, who are taxpayers in the county, that the defendants purpose and intend to use and employ their offices, and the control and authority which they have and hold by reason of their positions as members of the board of supervisors, to maintain, operate, and conduct the hospital as a general hospital for the care, treatment, and cure of persons who are residents of the county of Kern, without regard to whether such persons may be in any of the classes provided by law as being entitled to hospital treatment at public expense; that the defendants have, during the last ten years, conducted, and it is now their fixed and determined policy to conduct and operate, the hospital at the cost and expense of Kern county for the general hospitalization, care, and treatment of persons who are neither indigent sick persons, nor dependent poor persons, nor needy sick, dependent or partially dependent citizens in cases of emergency. The prayer of the complaint is that the defendants be perpetually enjoined from permitting admission into the hospital of persons other than those legally entitled, under the general law, to such care and treatment. Defendants answered the allegations contained in the complaint, and set out the con-

ditions established by rules duly adopted by the board, the manner in which all persons needing treatment are admitted to the hospital; and further alleged that it was necessary, for the maintenance of the public health of the county, that a hospital be maintained therein equipped with complete and modern facilities, wherein, pursuant to the adopted rules, all persons having the financial capacity should pay for such care and treatment; and admitted that it was their intention and purpose to continue to conduct and manage the hospital in such manner, unless restrained by order of the court.

On the issues joined, the court made its findings, substantially as alleged by the plaintiffs, and further found that the defendants have incurred, and are now incurring, great expense in the operation of the hospital, and paying the same from county funds; that the amounts received from persons able to pay for such treatments at the hospital, when received, are paid into the general fund of the county for the purpose of reducing the general tax rate, and are not used to maintain the hospital. On these findings, the trial court entered its order restraining and enjoining the defendants from admitting or taking any person into the hospital or furnishing any medical, surgical or hospital care, treatment, or service to any person in the hospital who is able himself or by others legally liable for his support to pay for or obtain proper or necessary medical or surgical hospital care for himself elsewhere than in the county hospital.

The findings, judgment, and decree were duly given and made on December 4, 1933, and the decree was entered on December 5. Notice of appeal was given on December 13, on which date it appears the board of supervisors filed certain rules and regulations governing the management and control of the Kern General Hospital.

Since the issuance and service of the injunction and the adoption of these rules, defendants have been charged in the court below with the violation of the terms of the injunction, and an order to show cause why defendants should not be punished for contempt of court has been issued thereon. Such proceeding in the matter of the alleged contempt is now pending for hearing and trial before the superior court of the county of Kern. Notwithstanding the fact that an appeal to this court from the order and decree of injunction has been taken, which will determine the merits of the matters on which said injunction has been granted, the defendants maintain that, in order to purge themselves of the pending charge of contempt, and to avoid similar future charges, it will be necessary for the defendants to change their plans, policies, and methods of conducting the hospital in such manner as to disrupt the organization thereof, reduce the staff of physicians, nurses, and other employees, permit extensive and costly installation of apparatus and machinery and appliances to remain idle, and deny the benefits of the hospital and its organization to many persons believed by petitioners to be entitled to such benefits, and who would be so entitled were this court to reverse the judgment of the lower court herein; that all of said results would bring irreparable injury to the hospital and to the people of Kern county and to patients and persons who would thus be denied the benefits of the hospital and its organization pending the appeal. On these grounds, the defendants prayed for an order to show cause, which has been duly issued, directing the plaintiffs and others to show cause why a stay of proceedings should not be granted and a writ of supersedeas issued by this court staying further proceedings in said cause pending the determination and adjudication of the appeal now on file, together with an order staying all proceedings in the lower court pending the final determination of this application.

We deem it unnecessary to determine whether the injunction granted by the trial court is prohibitory or mandatory. It appears to partake of the nature of both. Any of its provisions that are mandatory are stayed by the appeal. Other portions appear to be sufficiently prohibitory to warrant a stay of proceedings pending the final determination, on the appeal, of the question whether or not the board of supervisors possesses the power to conduct the hospital in the manner found by the trial court. The policy controlling the conduct of the institution appears to be one of long standing. No doubt, to literally obey the mandate of the injunction would cause interruption and perhaps confusion in the organization and conduct of the hospital. Prompt action on the part of the parties will lead to an early hearing of the appeal.

It is therefore ordered that a writ of supersedeas issue staying all proceedings in this cause in the court below until the final determination by this court of the cause on appeal.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SPENCE, Justice pro tem.

1 Cal.2d 497

PEOPLE v. LAMI.

Cr. 3725.

Supreme Court of California.

Sept. 26, 1934.

1. Homicide ⇐28

That accused prior to killing had partaken of intoxicating liquor *held* no defense (Pen. Code, § 22).

2. Homicide ⇐270

Weight to be accorded evidence of intoxication, and whether intoxication precluded accused from forming specific intention to kill, which intent is necessary element in first-degree murder, *held* for trier of facts (Pen. Code, § 189).

3. Homicide ⇐253(1)

Evidence sustained conviction of first-degree murder (Pen. Code, § 189).

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Mike Lami was convicted of murder in the first degree, and he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., for the People.

WASTE, Chief Justice.

Appellant appeals from a judgment sentencing him to suffer the extreme penalty. The judgment is based upon the verdict of a jury finding him guilty of murder in the first degree without recommendation.

In an information filed by the district attorney of Sacramento county, appellant was charged with having murdered his estranged wife. Upon his arraignment he offered to plead guilty to a charge of manslaughter. To this the district attorney objected, whereupon appellant entered pleas of not guilty and not guilty by reason of insanity. Subsequently and before proceeding to trial, appellant expressed a willingness to plead guilty to a charge of second-degree murder. This offer was likewise rejected. Upon the impanelment of the jury and before trial, appellant withdrew his insanity plea. When the evidence was in and it had been fully instructed on the law the jury retired to deliberate upon its verdict. It returned to the courtroom in fifty-five minutes with a verdict finding appellant guilty as charged.

The evidence, which we shall briefly narrate, left no alternative for the jury but to find appellant guilty of murder in the first degree. The autopsy surgeon testified that the body of the deceased bore five lacerations or stab wounds and that she died as the result of hemorrhages from the heart and liver caused by one of these stab wounds.

The nine year old daughter of the deceased and appellant testified that on the day of the homicide she lived with her mother and brother; that at about 6:30 on the morning of April 3, 1933, she was awakened by her mother's screams emanating from the bathroom; that she went to her and found her in the bathtub; that she saw her father in the act of picking something up; that the father immediately left without saying anything; and that she called her brother, who had been sleeping elsewhere in the house.

The deceased's son, and stepson of the appellant, testified that during the month of April, 1933, and for approximately one year prior thereto, his mother and appellant had been separated; that during this period he (the witness) had been living with his mother and sister; that on the evening preceding the homicide he returned from work at about 12:30 o'clock; that his mother prepared food for him; that they retired shortly thereafter; that at that time there was no one in the house but the deceased, his sister, and himself; that when summoned to the bathroom by his sister he found his mother there bleeding; that he did not see appellant at that time; and that the police were summoned and upon investigation found a knife under the bathtub. On cross-examination the witness testified that a week or two prior to the homicide the deceased and appellant had quarreled over the former "going with some other man."

Several police officers were called to the stand. One testified that he arrived at the scene of the stabbing at about 7 a. m. and found a fourteen-inch butcher knife with blood on it under the bathtub. Another officer testified that he went to appellant's place of residence about three hours after the homicide; that as he approached appellant the latter pulled a knife from his clothing and made two futile attempts to stab himself; that appellant stated to him that he had left his room at 3 o'clock on the morning of the homicide and took a butcher knife with him; that he waited until he saw a man leave the deceased's residence; that he later gained entrance to her home and toward morning

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

when she entered the bathroom he stabbed her. A third officer corroborated the testimony of the preceding witness.

A fourth police officer testified that shortly after being taken into custody the appellant freely and voluntarily made a statement to him, received in evidence upon stipulation of appellant's counsel, in which he admitted having surreptitiously entered the deceased's home, having quarreled with her over another man, and having stabbed her.

As additional evidence of motive, the prosecution showed that several days prior to the homicide the deceased had the appellant arrested for failure to provide.

In his opening statement to the jury counsel for the defense stated that he did not expect a verdict of not guilty, but hoped for a manslaughter or second degree murder verdict. Appellant thereupon took the stand in his own behalf and again related the quarrel he had with deceased over another man during the course of which he testified he "struck her." He also testified that he had been drinking immediately prior to the homicide and was a "little drunk." On cross-examination he stated, "Sure I stab her."

In opposition to the defense of intoxication, two of the police officers testified that when they arrested appellant within three hours after the homicide they did not smell liquor on his breath, that he did not appear to have been drinking, and that "to all appearances he was sober."

[1, 2] The case was submitted to the jury upon this showing. As we have already indicated, the jury had no alternative under the evidence and the law as expounded to them in the instructions but to find appellant guilty of murder in the first degree. The fact that appellant had previously partaken of intoxicating liquor does not exonerate him from the consequences of his unlawful acts. It is settled law that voluntary intoxication is never an excuse for crime. Section 22, Pen. Code; People v. Burkhart, 211 Cal. 726, 730, 731, 297 P. 11. The weight to be accorded to evidence of intoxication, and whether such intoxication precluded the accused from forming a specific intention to kill and murder, which intent is a necessary element in murder in the first degree, are matters essentially for the determination of the trier of the facts. People v. Murphy (Cal Sup.) 32 P.(2d) 635; People v. Yeager, 194 Cal. 452, 474, 229 P. 40. The evidence offered by the defense does not show that appellant, by reason of the use of intoxicants, was so disordered mentally at the time of attack on the deceased as to preclude the resultant killing from being of that "willful, deliberate, and premeditated" character designated in section 189 of the Penal Code as murder in the first degree. The jury might very reasonably conclude that appellant was not so inebriated as to be unable to appreciate the character and gravity of his deliberate and wrongful acts.

We have not been favored with briefs in this cause; when the cause was called, pursuant to notice, for argument at the May, 1934, calendar counsel for appellant was not in attendance at court. The matter was put over one day and the clerk directed to notify counsel to appear. When the cause was again called on May 2d, counsel was given ten days within which to prepare and file his brief; the people to reply within ten days, and the cause to then stand submitted. Though the time has long since expired, no brief has been filed on behalf of appellant and no reply has been received to a letter directed by the clerk to appellant's counsel on June 1st, in which the absence of the brief was mentioned and a query propounded "whether there is any reason why the cause should not be submitted without briefs at the present time." No showing to the contrary having been made, the cause was submitted on June 11th and is now before us for disposition.

[3] The evidence so unmistakably points to the appellant as the perpetrator of an unjustified and deliberate murder that we experience no hesitancy in affirming the judgment on the record as it now stands. The record is singularly free of error. In fact, the objections to the introduction of evidence were comparatively few in number and were properly disposed of by the court below. The instructions were full and correct in their exposition of the law. Counsel for both sides conducted themselves with decorum and the record is destitute of anything approximating prejudicial error.

The judgment and the order denying a new trial are, and each is, therefore, affirmed.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

140 Cal.App. 616

PEOPLE v. BROWN.

Cr. 2547.

District Court of Appeal, Second District, Division 2, California.

Sept. 12, 1934.

1. Criminal law ⇐273

Plea of guilty includes admission of every element entering into offenses charged and does not raise any issue of fact.

2. Criminal law ⇐273

Accused pleading guilty of robbery could not complain on appeal that no witnesses were sworn to testify that robbery was committed or to identify accused as having been connected with any robbery.

3. Criminal law ⇐410

Admission by counsel of accused pleading guilty of robbery that gun was used *held* sufficient to justify conviction of robbery in first degree (Pen. Code, §§ 211a, 1192).

4. Constitutional law ⇐250, 270
Criminal law ⇐995(4)

Conviction of robbery in first degree *held* not void as not showing whether crime was committed by torture, or while armed with dangerous or deadly weapon, because different punishments were provided for such offenses, where facts upon which court determined degree of crime were not required to be shown in commitment, and transcript sent to prison board for use in determining sentence stated that gun was used (Pen. Code, §§ 1168, 1192a).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

George N. Brown was convicted of robbery in the first degree, and he appeals.

Affirmed.

George N. Brown, in pro. per.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WHITE, Justice pro tem.

On December 28, 1932, the district attorney of Los Angeles county filed an information in the superior court against the defendant, who is the appellant herein, charging him with the crime of robbery committed on or about the 5th day of December, 1932, which information further charged the defendant with having been convicted of a prior felony in the county of Los Angeles, in this state, and having served a term therefor in the state prison. There is nothing in the information from which it can be determined whether the offense charged is of the first or second degree. Upon arraignment a date was fixed by the court for defendant to enter his plea, upon which day, January 3, 1933, the defendant regularly and duly entered his plea of not guilty to the charge contained in the information and admitted the prior conviction charged therein. The cause was thereupon set for trial on January 23, 1933. On the last-named date defendant appeared in court with his counsel and by leave of court withdrew his theretofore entered plea of not guilty, and, upon being forthwith rearraigned, the record discloses that the following proceedings were had:

"Mr. Choate [deputy district attorney]: In this information you are charged with the crime of robbery.

"Mr. Hill [public defender]: We waive the further reading.

"Mr. Choate: At this time, how do you plead to this charge, guilty or not guilty?

"The Defendant Brown: Guilty.

"Mr. Choate: May the record so show?

"The Court: Yes.

"Mr. Choate: Counsel, will you stipulate at this time that it was robbery in the first degree?

"Mr. Hill: Yes.

"The Court: A gun was used?

"Mr. Hill: Yes.

"The Court: Very well. Under the stipulation the court will find the robbery to be robbery of the first degree.

"Mr. Hill: We waive time for sentence."

The court then pronounced judgment in the following language, so far as pertinent here: "Whereas the said George N. Brown, having duly pleaded guilty in this court to the crime of robbery, a felony, as charged in the information which the court found to be robbery in the first degree; * * * It is therefore ordered, adjudged and decreed that the said George N. Brown be punished by imprisonment in the State Prison of the State of California at Folsom for the term prescribed by law." No appeal was taken by defendant from the judgment so pronounced against him.

On the 23d day of October, 1933, defendant gave notice that on the 6th day of November, 1933, he would move the court to annul, vacate, and set aside the judgment of convic-

tion, sentence, and commitment pronounced against him on the 23d of January, 1933. Two grounds were alleged as the basis for such motion, to wit: (1) That the court interposed a higher and different punishment than that prescribed by law on the charge of robbery in the information, thereby violating the due process and equal protection of the law clauses of section 1 of the Fourteenth Amendment to the Federal Constitution, in that without evidence to establish the degree of robbery the court fixed the degree as first, contrary to the provisions of section 1097 of the Penal Code. (2) That the judgment imposed by the court is without due process of law and without equal protection of the laws, in violation of section 1 of the Fourteenth Amendment to the Federal Constitution, in that the court issued its commitment for robbery in the first degree, with one prior conviction, without having any evidence before the court to show whether the robbery was first degree by reason of torture inflicted on the victim or because defendant was armed with a deadly weapon; and that under the provisions of section 1168 of the Penal Code the minimum time of punishment for robbery differs when accomplished through torture from that fixed when the offense is accompanied by the use of a deadly weapon. This motion was denied, and, from the order of the court denying such motion, this appeal is prosecuted.

[1, 2] As reason for reversal, our attention is first directed to the claim that no evidence was offered to prove the corpus delicti or that the crime was committed, and that no witnesses were sworn to testify that a robbery was committed or to identify the defendant as having been connected with any robbery. This contention is without merit, because a plea of guilty includes an admission of every element entering into the offenses charged and does not raise any issue of fact. As was said by our Supreme Court in People v. Hickman, 204 Cal. 470, at page 476, 268 P. 909, 912, 270 P. 1117: "Yet a confession of the offense by the party charged, by a plea of guilty, is the highest kind of conviction which the case admits, and submits him to precisely the same punishment as if he were tried and found guilty by a jury. State v. Almy, 67 N. H. 274, 28 A. 372, 22 L. R. A. 744. See, also, West v. Gammon, 39 C. C. A. 271, 98 F. 426." The plea of guilty precluded any such inquiry or taking of evidence as suggested by appellant, because such plea was a conclusive admission of his guilt of the crime charged as against him. People v. Hall, 87 Cal. App. 634, 636, 262 P. 50.

We do not desire to be understood as saying that one may be convicted upon his confession alone without other proof of the corpus delicti; but the plea of guilty in this case removes from consideration such question. Ex parte Hayden, 12 Cal. App. 145, 106 P. 893.

[3] Appellant next insists that no testimony was taken to determine the degree of the crime as required by section 1192 of the Penal Code, and contends that under the authority of People v. Stratton, 133 Cal. App. 309, 313, 24 P.(2d) 174, the stipulation entered into at the time judgment was pronounced was ineffectual, and that evidence should have been taken to determine the degree of the crime. We do not regard the Stratton Case as applicable here, for the reason that in that case it was stipulated that the offense was robbery in the first degree, while in the one now before us, as the hereinbefore quoted portion of the record discloses, the defendant did not stipulate to the degree of the crime, but admitted as a fact that he was, at the time of the robbery to which he pleaded guilty, armed with a deadly weapon; and it was upon this admission of fact that the court determined the degree of the robbery. As was said by this court in Re Huson, 126 Cal. App. 571, 14 P.(2d) 845, 846: "Under the provisions of section 211a of the Penal Code, robbery which is perpetrated by one who is armed with a deadly weapon is robbery of the first degree. During the imposing of sentence, the defendant's attorney admitted that the accused was armed with a deadly weapon at the time of the attempted robbery. This admission is sufficient evidence of the fact upon which the court was justified in finding that he was guilty of attempted robbery of the first degree." See, also, People v. Paraskevopolis, 42 Cal. App. 325, 183 P. 585, 587. In the case last cited the court said, regarding the sufficiency of such evidence: "We think a voluntary statement or plea by the accused would be sufficient to uphold the determination by the court of the degree."

[4] Appellant next contends that the judgment is void on its face, without due process of law, and without equal protection of the laws, for the reason that it does not show whether the crime was perpetrated by torture or by the defendant being armed with a dangerous or deadly weapon, and that under the provisions of section 1168 of the Penal Code the minimum term of punishment for

robbery is greater when the offense is committed by torture than when committed while the defendant is armed with a dangerous or deadly weapon. Appellant argues that under the instant judgment the board of prison terms and paroles is bereft of information upon which to determine the means by which the robbery was perpetrated; that the judgment should have been so framed that on its face it would have shown the facts from which the board of prison terms and paroles could have definitely determined whether appellant's minimum term was five or ten years. We think that the contention is not sound. The law does not require the commitment to show upon its face the facts upon which the court determines the degree of the crime, the fact that the accused was armed with a deadly weapon or any of the other facts upon which the prison board is enabled to subsequently fix the maximum and minimum term of sentence under the provisions of section 1168 of the Penal Code.

It is necessary to inform the prison board as to whether the prisoner was armed with a deadly weapon at the time of the commission of the offense, to enable it to determine the maximum and minimum term of sentence as required by section 1168, supra. These facts may properly be inserted in the commitment, but they are not necessary to the validity of the judgment. They may be ascertained and certified to the prison board in the manner provided by section 1192a of the Penal Code. That section provides in part: "Before judgment is pronounced upon any person convicted of an offense punishable by imprisonment in the state prison, it shall be the duty of the court * * * to ascertain in a summary manner, and by such evidence as is obtainable, * * * facts * * * calculated to be of assistance to the court in determining the proper punishment of such person, or to the state board of prison directors in the performance of the duties imposed upon it by law. * * * Within thirty days after judgment has been pronounced by the court, one copy of such transcript * * * shall be sent by mail * * * to the warden of the prison to which such convicted person shall have been sentenced." Such was the holding by this court in People v. Bayne (Cal. App.) 28 P.(2d) 1068. See, also, People v. Rhodes (Cal. App.) 30 P.(2d) 1026, and People v. Ramirez (Cal. App.) 33 P.(2d) 848. In the case before us the court made the necessary inquiry as to causes of criminal conduct on the part of appellant before pronouncing judgment, as required by section 1192a of the Penal Code, and forwarded such statement to the warden of the state prison, as is indicated by the certified copy of the letter of transmittal to the warden of Folsom state prison which appears in the supplemental clerk's transcript now before us. A perusal of this inquiry, made by the court at the time judgment was pronounced and copy of which was mailed to the state prison officials, contains the information that, in answer to a question propounded by the court as to whether a gun was used, the defendant through his counsel answered in the affirmative. With this information before it we must assume the prison board will necessarily fix a term of sentence on the basis that the prisoner was armed with a deadly weapon and that the robbery here in question was not committed with torture.

For the foregoing reasons, the order appealed from is affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

1 Cal.App.2d 105

PEOPLE v. DU FAULT.

Cr. 2569.

District Court of Appeal, Second District, Division 2, California.

Sept. 26, 1934.

Hearing Denied by Supreme Court Oct. 25, 1934.

1. Criminal law ⇐400(4), 448(2)

In bigamy prosecution, testimony of clergyman who performed wedding between defendant and complaining witness that he was regularly ordained minister was not conclusion, and extrinsic evidence to prove ordination was not necessary (Pen. Code, § 1106).

2. Bigamy ⇐11

In bigamy prosecution, testimony that defendant "cohabited with" complaining witness "as husband and wife" for two weeks after bigamous marriage, that he occupied same room and stayed overnight on alternate nights, that complaining witness put up his lunches and took care of his clothes, and was introduced by her mother to friends as his wife, *held* to establish "cohabitation" (Pen. Code, § 1106).

[Ed. Note.—For other definitions of "Cohabit; Cohabitation," see Words & Phrases.]

3. Criminal law ⇐564(1)

In bigamy prosecution, venue was proved where evidence clearly showed defendant and complaining witness cohabited for two weeks in county in which defendant was tried.

4. Indictment and Information ⇐160

In bigamy prosecution in which information charged ceremony took place in one place and evidence showed ceremony took place elsewhere, amendment to show true place of marriage *held* proper (Pen. Code, § 1008).

5. Criminal law ⇐599

In bigamy prosecution in which information was amended at close of testimony to show true place of marriage, denial of defendant's motion for continuance *held* proper because defendant could not claim surprise or prejudice, since complaining witness had testified at public hearing as to place of ceremony and defendant knew that such would be testimony at trial (Pen. Code, § 1008).

6. Criminal law ⇐1120(3)

Objection to exclusion of portion of testimony taken at preliminary hearing would not be considered where record did not show nature or effect of excluded testimony.

7. Criminal law ⇐881(1)

In bigamy prosecution, verdict finding defendant guilty as charged *held* sufficient without finding of cohabitation (Pen. Code, § 1106).

8. Criminal law ⇐881(1)

In bigamy prosecution, verdict finding defendant guilty as charged in information *held* sufficient without reference to amended information, where information was amended during trial in presence of jury.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Alfred C. Du Fault was convicted of crime of bigamy, and he appeals.

Affirmed.

Lester V. Peterman and W. C. Dalzell, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted of the crime of bigamy. On appeal from the judgment he urges that the evidence is insufficient to support the verdict; that venue was not proved; that the court erred during the trial; and that the verdict is insufficient to support the judgment.

[1] A witness, Rev. W. S. Brown, testified that he was a regularly ordained minister of the Baptist Church and had performed the ceremony between defendant and the complaining witness. Appellant contends that the ordination must be proved by extrinsic evidence and that the testimony of that witness was a mere conclusion. No authority has been cited to support this contention, and it is apparent that the testimony of a preacher to the fact of his ordination is no more a conclusion than the testimony of a husband to the fact of his marriage. No one is better able to testify to what he has seen and heard, and no one is more familiar with the customs and practices of the church than the successful candidate for ordination who has been present through the ceremony and whose very familiarity with church ritual is a prerequisite to his ordination.

[2] Contrary to appellant's further contention, evidence of cohabitation is sufficient when the testimony shows, as in this case, that he "cohabited with" the complaining witness "as husband and wife" for a period of two weeks in Los Angeles county, after their bigamous marriage in Yuma, Ariz., that he occupied the same room with her and stayed overnight on alternate nights, claiming employment on other nights, and that she put up his lunches, took care of his clothes, and was introduced by her mother to friends as his wife.

[3] Appellant's suggestion that venue was not proved is negatived by clear testimony that he and the complaining witness cohabited in the county of Los Angeles for a period of two weeks.

[4, 5] The information as originally drawn and filed charged that the marriage ceremony with complaining witness was performed in Los Angeles. Evidence showed that it took place in Yuma, Ariz. At the conclusion of the testimony the court permitted an amendment to show the true place of marriage. Such an amendment was proper under Penal Code, § 1008. People v. Roth (Cal. App.) 31 P.(2d) 813. Defendant then moved for a continuance, which the court properly denied. Testimony of the complaining witness at the preliminary hearing was that the ceremony had occurred in Yuma, and appellant was fully aware that such would be the testimony at the trial, and could not properly claim surprise or prejudice by reason of the amendment.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[6] Objection is made to the ruling of the trial court in excluding portions of the testimony of the complaining witness which was taken at the preliminary hearing and was read at the trial. Appellant has not informed us of, and the reporter's transcript does not show, the nature or effect of the testimony which was thus excluded, and we are therefore unable to say that it was material to the issues or in any way prejudicial to his case.

[7, 8] Appellant's suggestion that the verdict is insufficient is without merit. The verdict read: "We the jury in the above entitled action find the defendant guilty as charged in the information." The amended information charged defendant with bigamy and set out the marriage and the subsequent cohabitation. It is urged that the verdict to be sufficient must include a finding on the issue of cohabitation. The provisions of Penal Code, § 1106, relate to the matter of evidence to prove the crime of bigamy, and do not vary the well-settled rules with reference to the sufficiency of a verdict such as that returned here. The suggestion that the verdict should have referred to the "amended information" is answered by the fact that there was never more than one information, as amended by interlineation during the trial and in the presence of the jury, and no mistake could have arisen in the mind of any one in that regard.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

1 Cal.App.2d 109

PEOPLE v. CAMPBELL et al.

Cr. 263.

District Court of Appeal, Fourth District, California.

Sept. 26, 1934.

1. Indictment and Information ⇐125(5½)

Information charging conspiracy to obtain property by false promises, with fraudulent intent not to perform such promises, by means of worthless check, *held* not defective as charging several offenses, where information sufficiently disclosed that only offense charged was conspiracy (Pen. Code, § 182, subd. 4, and § 476a).

2. Indictment and Information ⇐59

Information charging conspiracy to obtain property by false promises, with fraudulent intent not to perform such promises, by means of worthless check, *held* not defective on ground that it could not be determined what punishment should be in event of conviction because felony and misdemeanor were charged, where information attempted to charge only conspiracy (Pen. Code, § 182, subd. 4, and § 476a).

3. Conspiracy ⇐51

Conspiracy to commit misdemeanor is punishable under statute providing punishment for criminal conspiracies, and conspiracy to commit misdemeanor is considered misdemeanor or felony according to punishment prescribed by sentence; offense being punishable by imprisonment in county jail or in state penitentiary (Pen. Code, §§ 17, 182).

4. Conspiracy ⇐32

Essence of charge of conspiracy to obtain property by false promises with fraudulent intent not to perform such promises is common and prearranged intent not to perform at time promises are made (Pen. Code, § 182, subd. 4).

5. Conspiracy ⇐43(9)
Indictment and Information ⇐71

Information charging conspiracy to obtain property by false promises with fraudulent intent not to perform such promises *held* void for uncertainty and for failure to set forth essential facts, where information charged only one conspirator with knowledge at time of making promises that check promised to be sent in payment of goods obtained was worthless (Pen. Code, § 182, subd. 4).

6. Conspiracy ⇐43(4)

Defect in information which charged conspiracy to obtain property by false promises with fraudulent intent not to perform such promises, in that information charged only one conspirator with knowledge that check which was promised in payment of goods obtained was worthless, *held* not cured by subsequent allegation that at time goods were obtained both conspirators knew that check was worthless, since to charge conspiracy both conspirators must have had knowledge of worthlessness at time promise was made (Pen. Code, § 182, subd. 4).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Lee Campbell and another were convicted of conspiracy to obtain property by false promises with fraudulent intent not to perform such promises. From an order granting

a motion in arrest of judgment, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and D. H. Wolford, Deputy Dist. Atty., both of El Centro, for the People.

Buel R. Wood, of Los Angeles, W. I. Wilson, of Brawley, and Frank Birkhauser, of El Centro, for respondents.

BARNARD, Presiding Justice.

The defendants were charged, under subdivision 4 of section 182 of the Penal Code, with having conspired to obtain property by false promises with fraudulent intent not to perform such promises. Following a conviction by a jury, the trial court granted a motion in arrest of judgment. From the order granting this motion, the people have appealed. The evidence is not before us, and the only matter presented is as to the sufficiency of the information.

The charging part of the information reads as follows:

"The District Attorney of the County of Imperial hereby accuses Lee Campbell and C. A. Switzer of a felony, to wit, Criminal Conspiracy, in that on or about the 20th day of November, 1932, in the County of Imperial, State of California, the said Lee Campbell and C. A. Switzer unlawfully conspired, agreed and confederated together to obtain property by false promises with fraudulent intent not to perform such promises.

"In the furtherance of said conspiracy said defendants, Lee Campbell and C. A. Switzer, in the County of Imperial, State of California, stated to said George M. Conley, in substance that they would purchase mixed hay from said George M. Conley, and that the said Lee Campbell would send with the truck driver hauling said hay, a check in payment thereof, and that in furtherance of the said conspiracy, the said Lee Campbell did cause to be delivered to said George M. Conley after securing said Hay, a check in the sum of One Hundred Dollars ($100.00), which said check was delivered to said George M. Conley by defendant C. A. Switzer, and which said check purported to be signed by one Chas. McCabe; and that at the time defendants Lee Campbell and C. A. Switzer made the promises aforesaid, the defendant Lee Campbell well knew that he did not have sufficient funds in or credit with the bank upon which said check was drawn, to meet the same in full and well knew that said check would not be paid when presented and that the promises made by said defendants to said George M. Conley to pay for said hay were made knowingly, unlawfully and fraudulently and with a fraudulent intent then and there not to perform said promises or any thereof, and that there was not in the bank upon which said check was drawn, sufficient funds or credit in or credit with said bank to meet said check in full.

"In furtherance of said conspiracy, on or about the 23rd day of November, 1932, in the County of Imperial, State of California, the said defendant Lee Campbell, unlawfully, knowingly and with the intent then and there to assist in the carrying out of said conspiracy, affixed the name 'Chas. McCabe' upon said check and this he did by reason of an unlawful agreement between him and said Chas. McCabe, who, for the purpose of carrying out said conspiracy, as was then well known to the defendant Lee Campbell, unlawfully permitted and authorized his name to be subscribed to said check, which said check was then and there intended to be used, and was used by the defendants Lee Campbell and C. A. Switzer for the purpose of falsely and fraudulently obtaining said hay from said George M. Conley."

The first questions raised concerning the sufficiency of the information are whether it attempts to charge several offenses without separating the same into various counts, and whether it can be determined, under the wording of the information, what the punishment should be. In addition, the appellant asks us to pass upon the question as to whether a conspiracy to commit a misdemeanor is punishable under section 182 of the Penal Code and whether or not such a crime is a felony.

While the first paragraph of the information charges that the respondents conspired to obtain property by false promises, with fraudulent intent not to perform such promises, this portion of the information fails to mention any overt act and sets forth no facts as to the property sought to be obtained, the value thereof, or from whom it was to be obtained. All such facts are set forth in the second and third paragraphs, which become material parts of the information.

[1] The respondents argue that an attempt is made to charge several offenses, notably a violation of subdivision 4 of section 182 of the Penal Code and a violation of section 476a of that Code in intentionally passing a check with knowledge that there are not sufficient funds in the bank on which it is drawn to pay the same. Assuming that another in-

formation might have been filed under section 476a, based upon some of the facts involved here, we think it sufficiently appears from this information that the only offense here charged is a violation of subdivision 4 of section 182, and it follows that this particular objection to the information is without merit.

[2] It is further argued by the respondents that it cannot be determined what the punishment should be in the event of a conviction based upon this information. It is argued that a violation of section 476a is a felony, and that, so considered, the punishment would be that provided in the first paragraph of that portion of section 182 of the Penal Code which provides the punishment for violations of that section. It is then argued that, since the property here involved was of the value of $100, the punishment for a violation of subdivision 4 of section 182 would be governed by the second paragraph of the penal provisions of that section. Under the first view, it is argued, a felony is involved, while under the second view the crime is a misdemeanor. We are not impressed with this argument, as we regard the information as one attempting to charge only a violation of the latter part of subdivision 4 of section 182. While the obtaining of property of the value of $100 by what amounts to false pretenses would be petit theft, and would be a misdemeanor, an information properly charging such a violation of subdivision 4 of section 182 as that with which we are here concerned would charge a crime which is punishable under the second paragraph of the punishment provided by that section. Doble v. Superior Court, 197 Cal. 556, 241 P. 852.

[3] It seems entirely clear that a conspiracy to commit a misdemeanor is punishable under section 182 of the Penal Code. Under the second paragraph of the punishment provisions of that section, such an offense may be punished by imprisonment in the county jail or by imprisonment in the state penitentiary. The crime would then be considered a misdemeanor or a felony, according to the punishment prescribed by the sentence, as in other cases. Pen. Code, § 17.

[4-6] While we think the information before us is not insufficient upon the grounds above referred to, we think it is void for uncertainty and for failure to set forth facts which are essential to the charge therein attempted to be made. The respondents are charged with having conspired to obtain this property by false promises with fraudulent intent not to perform such promises. The essence of this charge is the common and prearranged intent not to perform at the time the promises were made. While the second paragraph of the information alleges that both respondents stated to Conley that they would buy the hay, and that respondent Campbell would send with the truck driver a check in payment for the hay, the further allegations of that paragraph are to the effect that at the time the respondents made this promise the respondent Campbell knew that a check, which was later delivered, was valueless, and that he knew that the promise to pay was made with a fraudulent intent. But no such knowledge is charged to the respondent Switzer, and it is neither alleged that he knew that the check would not be paid nor that at the time the promise was made he knew anything about the check. Nothing is set forth in the second paragraph, so far as respondent Switzer is concerned, other than that both respondents told Conley they would buy the hay and that respondent Campbell would send a check in payment with the truck driver. Nor is this defect cured by the allegations of the third paragraph of the information, although it is therein charged that at that time, three days after the promises were made, this check was intended to be used, and was used, by both respondents for the purpose of fraudulently obtaining the hay. If it can be inferred that respondent Switzer ever knew that this was a bad check, it certainly cannot be inferred that he knew this at the time the promise was made or that at that time he knew there was any intention on the part of respondent Campbell to deliver a worthless check in purported payment for the hay. If it could be assumed that respondent Switzer knew three days after the promise was made that the check was worthless, such a fact would not bring the case within that portion of subdivision 4 of section 182 upon which this charge is based, as the essential requirement thereof is that there shall be a fraudulent intent not to perform at the very time the promise is made. In addition to other uncertainties and inconsistencies in the information, we think the failure to allege these essential facts, with reference to the respondent Switzer, makes the information insufficient as to him. As one person cannot conspire with himself, it follows that the information is insufficient as to respondent Campbell also.

While we are not in accord with respondents' general contentions as to the law, we are

unable to hold that the court erred in setting aside a verdict based upon this particular information.

For the reasons given the order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.App.2d 222

PEOPLE v. POWELL et al.

Cr. 2581.

District Court of Appeal, Second District, Division 2, California.

Oct. 3, 1934.

1. Threats ⊜5

Failure of information in attempted extortion case to set out precise offense with which defendants threatened to accuse victim did not render information insufficient, since, under extortion statute, accusation of any crime was sufficient (Pen. Code, § 519, subd. 2).

2. Criminal law ⊜304(4)

Trial court may take judicial notice of meaning of terms which are used with colloquial application by persons of criminal class, and is not restricted to academic definitions which would render absurd a transaction or conversation and artificially defeat ends of justice (Code Civ. Proc. § 1875, subd. 1).

3. Threats ⊜7

In extortion case, evidence that one of defendants stated to one of victims that he had trailed liquor truck into "plant" which would be "knocked over" if money were not paid *held* to support conviction as showing that defendants were attempting to extort money from victims by threatening accusation of a crime (Pen. Code, § 519, subd. 2; Code Civ. Proc. § 1875, subd. 1).

4. Threats ⊜1(1)

In extortion case, conviction would not be disturbed although dealings between defendants and victims were conducted informally and lacked legal precision and detail (Pen. Code, § 519, subd. 2).

Appeal from Superior Court, City and County of Los Angeles; William C. Doran, Judge.

Forrest Powell and Dean Walker were convicted of attempted extortion, and they appeal.

Affirmed.

George E. Cloud and W. C. Dalzell, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendants were convicted by the court without a jury of attempted extortion. In this appeal from the judgment they contend that both the information and the evidence are insufficient.

[1] The information charged that defendants attempted to wrongfully obtain a sum of money from three individuals by threatening to accuse two of them of a crime. The nature of the crime of which they threatened to accuse the victims is not set out in the information. Section 519 of the Penal Code declares: "Fear, such as will constitute extortion, may be induced by a threat * * * 2. To accuse him * * * of any crime." Since the accusation of *any* crime is sufficient under the section cited, the failure of the information to set out the precise offense in question is at the most one of uncertainty and does not go to the sufficiency of the information as stating a public offense.

Appellants were police officers of the city of Beverly Hills. The alleged victims were Irl Fewell, L. R. Pilkington, and Joe Summers. The testimony shows that appellant Powell called Fewell and told him "he had a federal officer that knew of a plant running near Beaumont" and arranged to have Pilkington meet appellant Walker, who was known as "Ross" and who represented himself to be a federal officer. Walker demanded $1,500 from Fewell and Summers, stating that he had "trailed some liquor trucks into a plant at Beaumont" and "it is going to be knocked over if I don't get the money." Later Pilkington, within view of two Los Angeles police officers, met Walker and handed him a roll of bills which was taken from the latter's pocket after his arrest.

[2-4] Appellants profess uncertainty as to the meaning of the terms "plant" and "knock over," even when used with the context as in this case. It may be announced as an established principle of law that the trial court may properly take judicial notice of the meaning of terms which are used with colloquial application by persons of the criminal

class, and it is not restricted to academic definitions which would render absurd a transaction or conversation and artificially defeat the ends of justice. "Courts take judicial notice of * * * 1. The true signification of all English words and phrases." Code Civ. Proc., § 1875. The court, in Vaccaro v. Collier (D. C.) 38 F.(2d) 862, at page 869, recognized this rule when it remarked: "* * * The phrase 'knock off' being the vernacular for 'arrest,' in common use among Canadian and United States government officials in dealing with the criminal class generally." In the instant case the language employed supports the determination by the trial court that defendants were attempting to extort money from the persons named by threatening to accuse them of a crime, and the judgment will not be disturbed even though the dealings between accused and the parties were conducted informally and lacked somewhat in legal precision and detail.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 91

GUE v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 1162.

District Court of Appeal, Fourth District, California.

Sept. 25, 1934.

1. Costs ⇐174(1)

Under statute providing that fees for reporting paid by party to whom costs were awarded must be taxed as costs, fees payable to court reporters are court costs (Code Civ. Proc. § 274).

2. Courts ⇐57(2)

Under statute providing for payment of fees for reporting, payment of fees to court reporters for their services in all cases is required (Code Civ. Proc. § 274).

3. Courts ⇐57(2)

Under requirement of wage collection law that commissioner of labor statistics should pay no court costs, commissioner could not compel trial court to permit trial of contested civil action to be commenced without cash deposit of portion of official court reporter's fees, where commissioner had not requested that trial proceed without being reported (Rules of Superior Court of San Diego County, Rule XVI; St. 1931, p. 1707, § 7; Pol. Code, § 4295; Code Civ. Proc. § 274).

4. Courts ⇐57(2)

Under statute prohibiting court reporter from performing any service in civil action until fees for reporting had been deposited with clerk, trial court cannot compel court reporter to officiate during trial of civil action unless statutory fees are first paid (Code Civ. Proc. § 274).

5. Courts ⇐57(1)

Employment of court reporter is not mandatory in trial of all civil cases.

6. Master and servant ⇐80(18)

Sheriff's fees were excepted from requirement of wage collection law that commissioner of labor statistics should pay no court costs in civil actions arising under the law because sheriff was not connected with official machinery provided for execution of court orders, though services for which he was entitled to compensation might be necessary for disposition of action (St. 1931, p. 1707, § 7).

7. Courts ⇐57(2)

Court reporter is not compensated for services in civil cases from public treasury nor are his fees paid into public treasury, but fees are paid directly to him by litigants, so that court reporter's fees are excepted from requirement of wage collection law that commissioner of labor statistics should pay no court costs in civil action arising under law (St. 1931, p. 1707, § 7).

Original application by Stanley M. Gue, as Deputy of the Division of Labor Statistics and Law Enforcement, Department of Industrial Relations, against the Superior Court in and for San Diego County, Hon. L. N. Turrentine, Judge. On respondent's demurrer to petition.

Demurrer sustained, and alternative writ of mandate discharged.

Arthur L. Johnson, of San Francisco, for petitioner.

Thomas Whelan, Dist. Atty., and Edward W. Goodman, Deputy Dist. Atty., both of San Diego, for respondent.

JENNINGS, Justice.

This is an original application for a writ of mandate. The petition alleges that the applicant is a deputy of the chief of the divi-

sion of labor statistics and law enforcement, Department of Industrial Relations, state of California; that, in accordance with the provisions of a certain statute which is known as the "Wage Collection Law," the chief of the above-mentioned division and his representatives duly authorized by him in writing are empowered to take assignments of wage claims and other claims of workers for collection in the courts of California without being required to pay court costs of any nature; that, pursuant to the authority granted by the above specified statute, petitioner took written assignments of claims for unpaid wages and for mechanics' liens of certain designated laborers and workers against certain specified individuals who were alleged to be employers of the assignors of said claims and owners of property upon which the labor of said assignors had been bestowed; that petitioner thereupon filed the statutory "Notice of Claim of Lien," and thereafter instituted an action in the respondent court in his official capacity as deputy of the division of labor statistics, etc., for the collection of such claims and for the foreclosure of the mechanics' liens securing the same; that the defendants in said action were duly served with process, and the said action was set for trial before the respondent court; that on the day appointed for trial the petitioner as plaintiff and the various defendants in said action appeared before the court and announced their readiness to proceed with the trial of said cause, but that the judge of the respondent court before whom said action was to be tried refused to permit the trial to be commenced until petitioner deposited in cash a portion of the fees required to be paid to the official court reporter designated by said judge to report the proceedings in the trial of said cause, and further ruled that it was compulsory that a phonographic reporter be employed in all contested matters in said respondent court; that thereupon petitioner announced to the court that he was unable to deposit with the clerk of the court the reporter's fees so ordered to be paid, whereupon the judge of said court continued the matter until the following day, at which time all parties to said action again appeared and announced readiness to proceed with the trial, and petitioner particularly requested the judge to proceed with the trial without requiring payment by petitioner of the reporter's fees on the ground that such fees constitute court costs which are not required to be paid by petitioner acting in his official capacity as deputy labor commissioner; that the respondent judge again refused to permit the trial to proceed unless petitioner first deposited the reporter's fee in advance and thereupon made an order striking the cause from the trial calendar of the court "to be restored when the plaintiff pays or indicates that he is ready, willing, and able to pay the reporter's fee." The petition further alleges that the claims for wages for the collection of which the action was instituted are, in the judgment of petitioner, valid and enforceable in the courts, and that the assignors of said claims are financially unable to employ counsel; that petitioner has no plain, speedy, or adequate remedy in the ordinary course of law nor has he any remedy whatever other than by this petition for the writ of mandate, since he is powerless to compel the court to proceed with the trial, and likewise powerless to compel the department of finance of the state of California to supply funds for the payment of fees demanded to be paid by the respondent court. To the petition thus drawn respondent has interposed a demurrer on the ground that the petition does not state facts sufficient to constitute any ground for the issuance of a writ of mandate.

The statute upon which petitioner particularly relies as establishing his right to the issuance of the writ of mandate herein is section 7 of the Statutes of 1883, c. 21, p. 27, as amended by chapter 228 of the Statutes of 1919, page 330, by chapter 257 of the Statutes of 1923, page 511, by chapter 231 of the Statutes of 1929 (page 433), and by chapter 824 of the Statutes of 1931 (page 1707). This statute is commonly referred to as the "Wage Collection Law." Section 7 of said statute provides in brief that the chief of the division of labor statistics and law enforcement, etc., also designated therein as "the Commissioner" and his representatives duly authorized in writing, shall have the authority to take assignments of wage claims and to prosecute actions for the collection of wages of persons who, in the judgment of the commissioner or his representative, are financially unable to employ counsel, in cases in which, in the judgment of the commissioner or his representative, such claims are valid and enforceable in the courts. The section also provides as follows: "When civil action is brought by the commissioner, or his duly authorized representative, no court costs of any nature shall be payable by the said commissioner, or his said representative, in connection with same and any sheriff or constable requested by said commissioner, or his said representative, to serve the summons in the said action upon any person, firm, association, or corporation within his jurisdiction or

levy an attachment, garnishment or execution in the said action upon any money or property of any defendant within his jurisdiction, shall do so without costs to the said commissioner, or his said representative, except for keeper's fees, mileage fees and storage charges; provided, however, that he must specify when such summons or other process is returned, what costs he would ordinarily have been entitled to for such service, and such costs and the other regular court costs that would have accrued were the action not an official action shall be made a part of any judgment recovered by the said commissioner, or his said representative, and shall be paid by him if sufficient money is collected by him to cover same over and above the wages or other demands actually due the claimants on whose behalf he sued, and not otherwise."

Petitioner also relies on section 4295 of the Political Code of California which provides that: "State, county and township officers shall not, in any case, except in proceedings upon habeas corpus, perform any official services unless upon the payment of such fees as are prescribed by law, for the performance of such services; provided, that except where otherwise specifically provided the state or any county, city, city and county, district, or other political subdivision, or any public officer, or board or body, acting in his or its official capacity on behalf of the state, or any county, city, city and county, district, or other political subdivision, shall not be required to pay or deposit any fee for the filing of any document or paper, or for the performance of any official service. * * *"

In support of the general demurrer to the petition, respondent contends, first, that the fees payable to court reporters are not court costs, and, second, that section 274 of the Code of Civil Procedure requires the payment of fees to court reporters for their services in all cases without exception.

[1] The first of the above-stated contentions is not particularly impressive, for the reason that the very statute upon which respondent places chief reliance, viz., section 274, Code of Civil Procedure, specifically provides that "the fees for reporting and for all other transcriptions ordered by the court to be made must be paid by the parties in equal proportion, and either party may, at his option, pay the whole thereof; and, in either case, all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case."

[2] Respondent's second contention is more persuasive. Section 274 is found in chapter 3, title 4, of part 1 of the Code of Civil Procedure. The title of the chapter is Phonographic Reporters and the title of section 274 is "Fees." It deals generally with the compensation fixed for court reporters for the rendition of specified services. The closing paragraph is in the following language: "In civil cases the fees for reporting and for all other transcriptions ordered by the court to be made must be paid by the parties in equal proportion, and either party may, at his option, pay the whole thereof; and, in either case, all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case. The fees for transcripts and copies ordered by the parties must be paid by the party ordering the same. No reporter shall perform any service in a civil action other than transcriptions until his fee therefor has been deposited with the clerk of the court."

[3] It is our opinion that respondent's demurrer to the petition is well taken and must be sustained. It appears that rule XVI of the rules of the superior court of San Diego county provide that "all contested civil actions or proceedings where oral evidence is taken, shall be reported, unless otherwise ordered." The petition fails to allege that petitioner moved the court for the issuance of an order that the trial proceed without being reported. For all that appears in the petition, petitioner desired to have the services of the court reporter without paying therefor. This he was not entitled to have. Section 274 provides that the fees for reporting must be paid by the parties in equal proportion, and that, when so paid, they shall be taxed as costs in the case to be recovered by the party to whom costs are awarded. The court obviously lacked the power to comply with petitioner's request to order the trial to proceed and to be reported without payment by petitioner of one-half of the reporter's fees, since section 274 specifically prohibits a court reporter from performing any service in a civil action until his fee therefor has been deposited with the clerk of the court. The court could not disregard the plain mandate of the statute and order the reporter to perform a service which he is expressly forbidden to perform unless payment therefor be first made. Whatever the status of the court reporter may be, it is certain that he cannot be compelled to act in the capacity which was here sought without payment of the fees fixed by the statute.

[4] The language of the last sentence of section 274 is clear and positive, and would appear to preclude the possibility of a trial court being required to attempt to compel a court reporter to officiate during the trial of a civil action unless the statutory fees are first paid.

[5] It may not be entirely superfluous to observe that the employment of a court reporter is not mandatory in the trial of all civil cases. If petitioner had been willing to proceed with the trial of the action without a reporter, he should have made this plain to the trial judge. If he had done so, the court would undoubtedly have ordered the trial to proceed without the participation of the court reporter unless the defendants should elect to pay the whole amount required as reporter's fees as provided by the above-mentioned statute. Petitioner is not justified in demanding the luxury of the reporter's services without payment of his share of the fees. Arrival at this conclusion does not mean that petitioner may properly be deprived of the right of trial without a reporter. It simply means that he is not entitled to the service of a reporter without payment of the fees.

[6, 7] It is significant that the "Wage Collection Law" in the very sentence which specifies that no court costs of any nature shall be payable by the commissioner or his representative makes an exception with respect to fees charged by a sheriff or constable in connection with the service of process or the levy of writs of attachment, garnishment or execution. With respect to the service performable by these officers, keeper's fees, mileage fees, and storage charges are specifically excepted from the blanket provision that no court costs shall be payable by the commissioner or his representative. The framers of this statute evidently recognized that there were certain charges that might conceivably be required to be paid before the final outcome of the action, although such charges would in the final analysis be properly included in a memorandum of costs to be filed by the commissioner if he should be successful in the suit, and costs of the action should be awarded to him. The exception also indicates a recognition by the framers of the statute that certain persons not connected with the courts or with the official machinery provided for the proper execution of court orders, and not receiving compensation from the public exchequer, might, in the accomplishment of certain statutory remedies, be called upon to render service for which they would be entitled to compensation which would be payable upon the rendition of such service. The obvious reason underlying the exception is applicable to the fees which the law provides shall be paid to the court reporter for the service which he performs. Although the reporter is a ministerial officer of the court (Stevens v. Truman, 127 Cal. 155, 59 P. 397), he does not in civil cases receive his compensation from the public treasury, nor are the fees which he receives paid into the public treasury. All fees which he receives are paid directly to him, and in civil actions they are paid by the litigants for a service which is for their benefit and which they desire shall be performed.

Petitioner places much reliance upon the opinion of the Supreme Court in Meacham v. Bear Valley Irrigation Co., 145 Cal. 606, 79 P. 281, 68 L. R. A. 600, as a decision that the fees of a court reporter are court costs. We have heretofore indicated our opinion that such fees are costs of an action, but that in the instant case the plain language of section 274, Code of Civil Procedure, prohibited the court from taking the action which petitioner requested. The above-cited case bears sufficient similarity in certain respects to the situation which is here presented to warrant some consideration. It was an action in ejectment in which, after a witness had been called by the plaintiff, the court made an order requiring the defendant to pay one-half of the reporter's per diem within 5 minutes or judgment would be rendered in plaintiff's favor as prayed for. The defendant's counsel thereupon stated to the court that the defendant had no money with which to pay the reporter's fee and that he excepted to the court's order. Upon the expiration of the time designated in the order, the defendant having failed to deposit the reporter's fee as required, the court, without any trial of the cause, ordered judgment to be entered in plaintiff's favor. On appeal it was held that it was not within the power of the trial court to render a judgment giving to the plaintiff the right to property of which the defendant was in possession without any evidence of such right and without affording to the defendant an opportunity to reply to whatever evidence the plaintiff might adduce. The mere failure of the defendant to pay costs in advance of trial did not authorize the court to deprive him of his defense to the action.

It is immediately apparent that there is at least one important distinction between the cited decision and the instant case. In the Meacham Case the court arbitrarily rendered judgment in plaintiff's favor without hearing

a syllable of evidence, evidently as a penalty for noncompliance with an order requiring payment of reporter's fees in advance. In the instant case the court simply ordered that the action be stricken from the trial calendar to be reset when the petitioner should pay the reporter's fees or indicate his willingness and ability to pay. Petitioner was not, therefore, by the court's order, deprived of his right to have the action tried. He was deprived of the privilege of an immediate trial to be reported by the court reporter when he declared his inability to pay the reporter's fee without indicating, so far as appears, that he was willing to proceed with the trial without the service of the reporter.

Because of this obvious distinction, we think that the Meacham Case is by no means decisive of the present proceeding.

For the reasons herein stated, respondent's demurrer to the petition for a writ of mandate is sustained, and the alternative writ of mandate issued herein is discharged.

We concur: BARNARD, P. J.; MARKS, J.

140 Cal.App. 707

PEOPLE v. GRANILLO.

Cr. 2572.

District Court of Appeal, Second District, Division 2, California.

Sept. 18, 1934.

1. Criminal law ⇐1160

Verdict, approved by trial judge, cannot be set aside for insufficiency of the evidence, unless it clearly appears, after assuming every fact which jury could reasonably have deduced from the evidence, that there is no substantial evidence to support verdict.

2. Homicide ⇐254

Evidence sustained conviction for second-degree murder.

3. Criminal law ⇐722½
Witnesses ⇐337(6)

Where defendant charged with murder testified, he waived privilege of keeping from jury admission of conviction of assault with intent to murder also charged in information and protection of codal provision forbidding any allusion to such admission (Pen. Code, §§ 1025, 1093).

4. Criminal law ⇐369(1)
Witnesses ⇐362

Where one charged with crime testifies, prior conviction charged in information may be shown only to impeach him as a witness, or lessen his credibility as such, but not to prove commission of crime charged, or to show predisposition on his part to commit crime charged, or to expose or prove his character or disposition in respect of crimes, either past, present, or future (Code Civ. Proc. §§ 2052, 2065; Pen. Code, §§ 1025, 1093).

5. Criminal law ⇐1171(1)

Judgment will not be reversed on ground of misconduct of district attorney unless it resulted in injustice to defendant.

6. Criminal law ⇐1144(10)

District attorney's misconduct will not warrant granting of a new trial if upon the whole case, and in light of presumption that jury obeyed court's instruction, it can be said that the possible effect of the misconduct was removed by a proper admonition to the jury.

7. Criminal law ⇐304(2)

It is common knowledge that where average juror learns that defendant has previously been convicted of a crime of the same class as that for which he is being tried, he will allocate defendant to a type or class notwithstanding instructions of trial court.

8. Criminal law ⇐730(13)

In murder prosecution where defendant testified, district attorney's repeated references to defendant's admission of prior conviction of assault with intent to murder, characterization of defendant as a "killer," and unwarranted argument that certain witnesses knew of defendant's prior conviction, *held* misconduct, but not prejudicial in view of trial court's prompt admonition to jury (Pen. Code, §§ 1025, 1093).

9. Homicide ⇐319

Denial of motion for new trial in murder prosecution on ground of newly discovered evidence *held* not abuse of discretion.

10. Criminal law ⇐938(1)

Evidence which is designed to contradict a witness or is merely cumulative does not justify a new trial.

11. Criminal law ⇐933(1)

Motions for new trial on ground of newly discovered evidence are not favored, and question as to effect upon the case of newly discovered evidence is addressed to discretion of trial court.

12. Criminal law ⇐1156(3)

In absence of abuse of discretion or showing that the case would or should result

differently on a new trial in view of the newly discovered evidence, order denying new trial will not be disturbed.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Demecio Granillo was convicted of murder of the second degree, and he appeals.
Affirmed.

J. Harvey Hearn, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WILLIS, Justice pro tem.

Defendant was charged by information with the crime of murder, to which was added the charge of a previous conviction of the crime of assault with intent to commit murder. Upon arraignment he entered a plea of not guilty to the charge of murder and admitted the previous conviction. He was tried before a jury which returned a verdict of guilty of murder of the second degree. A motion for new trial was made and denied and judgment was entered. From the judgment and the order denying the motion for new trial defendant has brought this appeal.

The grounds upon which appellant relies for reversal of the judgment and order are as follows: (1) That the evidence is insufficient to support the verdict and judgment, in that the evidence shows that the wounds of which the deceased died were inflicted during a scuffle by a gun in the hands of deceased, and that there was no gun used by or in the possession of the defendant. (2) That the jury was unduly and prejudicially influenced by the closing argument of the district attorney in referring to the prior conviction and to the defendant as a "killer" by reason of such prior conviction. (3) That the trial court abused its discretion in denying defendant a new trial upon the ground of newly discovered evidence.

The evidence discloses that deceased, Antonio Loya, with his family, and defendant with his family, were next-door neighbors in West Los Angeles, and that some trouble had existed between them for some three months prior to the affray which resulted in the death of deceased. On February 14, 1933, deceased returned to his home from work, ate his dinner in the kitchen and went into the dining room and proceeded to read a newspaper. His wife and children then proceeded to eat their dinner in the kitchen. Defendant came to the back door between 6 and 7 o'clock in the evening, knocked at the door, and then came into the kitchen and asked for deceased, who came to the door from the dining room and conducted defendant into the front or living room of the house. There is undisputed testimony that at the time defendant was drunk. In a few minutes deceased and defendant went out the front door, deceased apparently assisting defendant to walk, and they passed out to the front walk along the front of defendant's house and then to the rear thereof. Presently three shots were heard, and in a few moments deceased was seen to come to the front of the house with a gun in his hand. He proceeded to his own front lawn, where he fell and remained until an ambulance came and removed him. He had a bullet wound in the posterior surface of the calf of the left leg, ranging downward at an angle of about 30 degrees, and one in his chest about 2½ inches below the right nipple and two inches to the left of the nipple line. The bullet causing that wound was later found in his body beneath the right twelfth rib. It had ranged downward at an angle of 30 to 35 degrees. From the effects of that wound he died on February 27, 1933. Defendant, after the affray, left his yard by the back way, got in his automobile and disappeared. He was found and apprehended in El Paso, Tex., in February of 1934, and brought back to Los Angeles.

As to what took place in the rear of defendant's house there is a conflict in the evidence, and it is upon the basis of the evidence creating this conflict that appellant assigns his claim of insufficiency of evidence.

Willie Loya, stepson of deceased, aged fourteen years, was called and testified as a witness for the people. He testified that he was in the kitchen with his mother and other small children when defendant entered and passed into the front room; that he heard no sound of quarrel but saw deceased and defendant go out the front door; that presently he heard three shots, which sounded as coming from the rear, and that he at once ran out the front door, along the walk and then to the rear of defendant's house on the side farthest from his home; that his mother went at the same time to the front, but did not follow him around the house; that when he reached the rear corner of defendant's house he saw deceased and defendant fighting; that defendant had a gun grasped in his right hand, with his finger through the trigger guard, and that deceased was trying to get the gun away from

him; that deceased had hold of defendant's hand with the gun in it, while defendant struck deceased two blows with the other hand, on the face; that deceased finally got the gun away from defendant and started toward him but fell, and that defendant then ran away; that deceased arose and went to the front with the gun in his hand, while the witness, on his father's direction, ran to the police station for help and a doctor; that he was not with the witness Henry Varella, but met him on the way to the police station.

Mrs. Loya testified that Willie Loya was in the kitchen when defendant entered, and was eating his dinner when she heard the three shots, and that Willie ran out the front door; that she also went to the front and there saw Mrs. Granillo; that she saw deceased come around to the front of defendant's house with the gun in his hand; that she had never seen that gun before and that there was no gun in her house that night.

Defendant testified that on the evening in question he went to the home of deceased on his invitation, and then bought a pint of liquor from him, of which each drank some; that he then left the house, deceased going with him; that deceased insisted they go to the rear of defendant's house instead of entering by the front door, and that when they arrived at the rear deceased said, "Do you know that complaint that you put against me some time ago?" and then said, "Now I am going to show you a man"; that deceased then struck him and threw him to the ground; that he arose and saw deceased with a pistol in his hand; that he grabbed deceased by the hands and a shot was let out, passing between them; that they continued to struggle for about fifteen minutes, and a second shot went downwards, and then a third shot, while they were still struggling. He further testified that he at no time had a gun in his possession; that after the three shots had been fired the two continued to struggle and he gave deceased a shove and then ran towards the alley, took his automobile and came to Los Angeles; that at no time did he see Willie Loya at the scene of the struggle.

Mrs. Granillo, wife of defendant, testified that she saw Willie Loya with her nephew, Henry Varella, across a way or alley on the same side of the street as her house, in front of a Filipino's house, at the time she heard a single shot; that she was just returning home from her sister's house.

Henry Varella, nephew of defendant, testified that he was just opening the front door of defendant's house, where he lived, when he heard one shot; that he immediately ran out to where his aunt, Mrs. Granillo, was; that he at that time saw Willie Loya seated on the steps of the Filipino's house, and that he told Willie to go with him to the police station; that Willie Loya did not go towards defendant's house; that his aunt told him to call the police officers.

Sam Mandivil, a witness called by the people, testified that he was approaching deceased's house when he heard and saw Mrs. Granillo screaming; that he had heard no shots; that at Mrs. Granillo's direction he started to go back of defendant's house and met deceased coming out to the front, holding his stomach, leaning over, with a small gun in his hand; that he had seen that gun in defendant's possession at defendant's house about two months before but had not closely examined it; that deceased handed him the gun, which he later delivered to the police officers; that he did not see defendant on that night; that some two months before this he had been called by deceased to come to his house, where he saw defendant just getting into an automobile with two or three other men, and heard Mrs. Granillo say to defendant: "Just because you got a gun you think they are afraid of you."

A police officer testified that the gun handed over to him was a .25-caliber Colt's automatic; that two empty shells fitting that gun were picked up by him at the scene of the affray and one empty shell was found jammed in the gun; that the clip still held two loaded cartridges.

[1] The first point for consideration herein is whether the evidence is sufficient to justify the verdict. It is clear that there exists in the record a dispute as to the presence of the witness Willie Loya in the back yard of defendant's house and of his viewing the struggle he described; and, granting that he was present and viewed the struggle there, pyramided on that is the dispute between his version and that of appellant as to which of the contending parties had possession of the gun and caused the shots to be fired. Upon these disputes the jury found against the defendant and his evidence. The necessary implications from the verdict are that the jury believed that Willie Loya saw the affray as he described it and that the wounds inflicted on deceased were from a gun in the hands of defendant and fired by him with homicidal intent and malice aforethought. These findings are supported by direct evidence and inferences, and must be given full faith and credit. "The rule, upon an appeal in a crim-

inal case, is that the court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether or not the guilt of the defendant is deducible therefrom. The question for the court to pass upon is whether there were facts before the jury to justify the inference of guilt." People v. Hennessey, 201 Cal. 568, 258 P. 49, 50. This case cites People v. Tom Woo, 181 Cal. 315, 184 P. 389, 393, wherein it is said: "For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below."

[2] The facts which were before the jury in this case, as shown in the summarized statement thereof above, were ample to justify the verdict of guilty found by the jury. The jury were constituted judges of the weight of the evidence and the credibility of the witnesses. By their verdict they presumably gave credence to Willie Loya and his version of the affray, and disbelieved that of defendant, and perforce believed that Willie Loya was present at the latter part of the affray and not at the Filipino's house. The adoption as true of the testimony of Willie Loya, in connection with the other evidence in the case relating to previous ill will, previous possession of the gun by defendant, his flight and the physical facts relating to the wounds and their position and direction, made it almost a necessity to find defendant guilty. The verdict is thus fully sustained by the evidence.

[3] Appellant's next assignment of error is predicated on the remarks of the district attorney in argument in reference to the previous conviction of defendant. On cross-examination of defendant, who offered himself as a witness, he was asked by the district attorney if he had not been convicted of assault with intent to commit murder, a felony, to which defendant answered, "Yes," and that he had pleaded guilty to that charge. There was no objection offered to this inquiry by defendant, and of course such cross-examination was permissible for purposes of impeachment of defendant as a witness. Sections 2052 and 2065, Code Civ. Proc. By presenting himself as a witness he waived the privilege accorded a defendant by section 1093 of the Penal Code, of keeping from the jury the knowledge of the presence of an admitted charge of previous conviction in the information, and also the privilege accorded by section 1025 of the same code, which forbids allusion to such admitted charge of previous conviction at the trial. People v. Arnold, 116 Cal. 682, 48 P. 803; People v. Rogers, 94 Cal. App. 470, 271 P. 351.

[4] The waiver of these privileges operates only to the extent of permitting the use of such evidence of previous conviction to impeach defendant as a witness—to lessen his credibility as such but not to expose or prove his character or disposition in respect to commission of crimes, either past, present or future. When the defendant in this case surrendered these privileges by presenting himself as a witness, he nevertheless still stood under the protection of the general rule that evidence of previous independent crimes or convictions thereof cannot be used at the trial for the purpose of proving the commission of the crime charged therein or to show a predisposition on the part of the defendant to commit the offense with which he is charged. People v. Pozzi, 91 Cal. App. 150, 266 P. 860; 8 Cal. Jur. 58.

To understand and weigh the significance and effect of the remarks of the district attorney hereinafter quoted, and which were at the time assigned as misconduct, it is necessary to advert first to a portion of the testimony of the witness Sam Mandivil. On direct examination by the district attorney he had testified that some two months before the affray in question he had seen the gun which deceased had handed to him, in the possession of defendant. This he repeated on cross-examination when he was confronted with the transcript of the testimony he gave at the coroner's inquest, wherein in answer to the question, "Did you ever see Granillo have a gun?" he said, "I have not, no sir." He admitted he did give such answer to that question and that he had changed his testimony. Then the following questions were asked by the court and the following answers given:

"Q. Why did you change it? A. Because I wanted to.

"Q. Well, why did you want to? A. Well, if you want to do something go ahead and do it.

"Q. Well, which is true? A. Well, what I am talking about now.

"Q. In other words, it is true that you did see a gun in his hands two months before? A. It is true that I did.

"Q. Well, why did you tell the coroner that you did not? A. Well, Granillo wasn't present at the time.

"Q. You mean that Granillo was not at the inquest? A. He was not."

Just preceding this the witness had said: "If you wish me to explain it, I will"; to which the court said, "All right, make your explanation now." The witness then said: "You are trying to give the jury the impression that the gun belonged to Loya—," and, "I didn't have any intention of bringing this up, and I am telling you the truth, just what it was."

In his closing address to the jury the district attorney said: "Sam Mandivil has come in for considerable comment. There is no deep mystery about anything that happened in this case, but Mr. Hearn would have you think there are a lot of mysterious angles to this case. It is all very simple. I will tell you this, that the fellow that was scared to death was Sam Mandivil; that is the reason he testified the way he did at the coroner's inquest. Why? Because he knew that this man had been up before for assault with intent to commit murder. That is true, and what does it mean? It means that somewhere, some time ago, this man assaulted somebody and intended to kill him. And hence Sam Mandivil knew that this man was a killer, and Sam did not want to get scalped. That is all there is to that and nothing else. Then between the coroner's inquest and this trial Sam gets up a little courage and tells us the truth." After a few remarks on another subject the district attorney addressed the jury as follows: "Well, just to show you that there isn't any reason for a doubt and to get you closer to the facts so that you can see them a whole lot more clearly, would you mind if I transported you folks out there to the scene of this crime at the very time it happened? Let me put you in the shoes, say of Willie Loya, and let us assume that Willie knew that this man had before been convicted—not found guilty but he pleaded guilty. He got up in court and said, 'I assaulted a man and intended to kill him.' That is what he said on this previous occasion. Let us assume that Willie knew that and you are placed in Willie's shoes. * * * Now let me tell you in closing just the type of chap that is asking you to give him a break. That is what he is asking for in the parlance of some of us less intellectual fellows in court. He has passed judgment on two human beings. He did it two years ago. He said at that time, 'I intended to kill you,' but he missed." At this point counsel for defendant interrupted, saying: "Now, just a moment, if your Honor please; I assign that as misconduct and ask that it be stricken." To which the court responded: "I think you have gone beyond the proper limit in arguing the question on the prior conviction. The evidence of a prior conviction may be considered for the sole and single purpose of weighing the credibility of the defendant as a witness, and you are instructed, ladies and gentlemen, to disregard any argument of the district attorney based upon the alleged prior conviction other than for that one single purpose." Counsel for defendant then stated: "Thank you, your Honor. I would like to have those remarks assigned as error because he should not have discussed it." Thereupon the district attorney said: "And I will also join with counsel in his request. And he also passed judgment out at 1630 Cotner Street on Mr. Loya as to whether he should live or die. That is the type of man that you have before you."

That the repeated reference to the previous conviction of defendant as quoted above constituted misconduct is patent. There was no evidence before the jury that either Mandivil or Willie Loya knew of such previous conviction; yet the district attorney asserted that it was knowledge of that fact that caused Mandivil to testify falsely at the coroner's inquest, and the reference to it in connection with Willie Loya was entirely irrelevant. It is clear that the repeated reference was for the purpose of calling to the jury's attention the type of man who was on trial, and to impress on them the conclusion that he was a "killer" type. Did this misconduct result in prejudicially affecting the jury's consideration of the case and to so control the verdict as to amount to a miscarriage of justice, despite the court's instruction to disregard the remarks?

[5, 6] Each case of misconduct must be judged by its own particular circumstances, and before a judgment is reversed on that ground it must appear that the misconduct reached the point where injustice resulted to the defendant. And it is a general rule that misconduct of the district attorney will not suffice to justify the granting of a new trial if upon the whole case it can be said that the possible effect thereof was subsequently removed by a proper admonition of the trial court to the jury, having in mind the presumption that the jury obeyed the court's instruction. It has wisely been said that for the protection of the innocent who may be accused of crime the law very properly has prescribed

certain rules of practice in the trial of the accused which are to be observed as well in the case of the guilty as of the innocent. In carrying out these humane and wise provisions of the law it becomes the duty of the court, however, not to allow the ends of justice to be defeated by any refined technicalities. In connection with the charge of misconduct, therefore, something must be allowed to the zeal of counsel on either side in discussing the case before the jury, and before judgment is reversed on that ground it must appear that such misconduct transcended the bounds of propriety and prejudiced the defendant in the minds of the jurors. People v. Warner, 147 Cal. 546, 82 P. 196.

[7, 8] Herein, in his zeal of closing argument, the district attorney only emphasized, improperly we believe, what the jury already had before it, viz., the fact that defendant had previously pleaded guilty to a charge of assault with intent to kill. It is true that that fact was admitted in evidence only for the purpose of impeaching defendant's credibility as a witness, and not to prove that he was of the "killer" type. Such is the refinement of the law in respect to admission of such evidence that notwithstanding an admitted previous conviction pleaded in an information may not be alluded to at the trial, nevertheless it may be admitted in evidence and used in argument to impeach credibility of the defendant once he offers himself as a witness. It is a matter of common experience and knowledge that once the average juror learns that the defendant has previously been convicted of a crime of the same class as that for which he is being tried, that juror will consciously or unconsciously consider and allocate to a type or class the man on trial, as distinguished from the admeasuring of his credibility as the witness on the stand; and this despite all instructions by the court, for the court may not, except by virtue of presumption, control the ordinary process of the human mind and its natural gravitation toward the ordinary and usual inferences or implications which flow from knowledge of an established fact. So herein, when the evidence of the previous conviction was once lawfully before the jury, the members thereof were, in natural course, in position to draw the same conclusions as were reflected by the district attorney's statements. What he said was an improper reminder to them that defendant had once before tried to kill a man, but they already knew that through the legal channel of evidence. Upon objection being made—and herein it was somewhat belated—the court promptly and properly admonished and instructed the jury. In the light of these circumstances it cannot be said that the remarks assigned as misconduct operated to the prejudice of the defendant or in any degree affected the jury in arriving at its verdict.

[9-12] There was no abuse of discretion by the trial court in denying the motion for a new trial. The motion was urged on the ground of newly discovered evidence, and was supported by two affidavits to the effect that the witness Willie Loya was in the presence and view of each affiant from the time of the shooting until he ran to the police station, hence he could not have been in the rear of the house as he testified and could not have viewed the struggle as to which he gave testimony. It is clear that the testimony of these two affiants, if admitted, would have been contradictory of that of Mrs. Loya and Willie Loya, and cumulative as to that of Mrs. Granillo and Henry Varella. Evidence which is designed to contradict a witness or is merely cumulative is not justification of a new trial. People v. Anthony, 56 Cal. 397; People v. Weber, 149 Cal. 325, 86 P. 671; People v. Loveless (Cal. App.) 35 P.(2d) 574. And it has been held that newly discovered evidence which, if admitted, would be corroborative merely of the testimony of the defendant, tending to impeach the prosecuting witness, was not of itself sufficient ground for granting a new trial. People v. Vejar, 93 Cal. App. 259, 269 P. 671. The claim of newly discovered evidence as ground for new trial has always been regarded by the courts with a great deal of suspicion and disfavor. (People v. Freeman, 92 Cal. 366, 28 P. 261); and the question as to the effect upon the case of newly discovered evidence is from its nature peculiarly one that it addressed to the discretion of the trial court (People v. Oxnam, 170 Cal. 215, 149 P. 165). "The claim of newly discovered evidence is viewed with distrust and disfavor, and in the absence of the strictest showing of diligence, or upon the tender of merely cumulative evidence, or evidence which would not strongly tend to produce a different result, a new trial will be denied." People v. Staigers, 92 Cal. App. 628, 268 P. 923, 926. The motion and questions arising thereunder were for the consideration of the trial court in the first instance and were addressed to its sound legal discretion, and unless it is plainly shown that this discretion has been abused—that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial in view of the newly discovered evidence—the order of the trial court refusing a new trial will not be disturbed. No such showing

appears herein. Furthermore, there is in the record no sufficient showing of diligence on the part of defendant to secure these witnesses for the trial. He was not taken by surprise by the testimony of Willie Loya, whose previous testimony at the preliminary examination he had heard, and the witnesses were neighbors and easily discoverable upon use of diligence. This absence of showing of diligence would in itself justify the order refusing a new trial.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 172

PEOPLE v. WOODS.

Cr. 1391.

District Court of Appeal, Third District, California.

Sept. 28, 1934.

1. Robbery ⇐24(1)

Evidence sustained conviction for robbery of the second degree.

2. Criminal law ⇐720(3)

In prosecution for robbery, where no objection was made to evidence that an hour before robbery defendant, who had asked to be taken to town where robbery was later committed by masked man, was seen with mask over his face, reference to mask by district attorney in argument was not misconduct.

3. Criminal law ⇐369(1)
Robbery ⇐23(1)

Evidence that an hour before robbery, defendant, who had asked to be taken to town where robbery was later committed by masked man, was seen with mask over his face, *held* competent to prove preparation for robbery and not incompetent as evidence of another offense.

4. Criminal law ⇐824(1)

Where evidence clearly showed that defendant was guilty of robbery of the second degree, failure of court on its own motion to instruct that defendant might be found guilty of larceny *held* not error.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

William C. Woods was convicted of robbery of the second degree, and he appeals.

Affirmed.

R. C. Colombe, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of the crime of robbery of the second degree. On appeal it is contended the verdict and judgment are not supported by the evidence; that the court erred in admitting evidence of another offense and in giving to the jury certain instructions. It is also asserted the prosecuting attorney was guilty of prejudicial misconduct in referring to the evidence of another offense in his argument to the jury.

[1] There is ample evidence of the identity and of the guilt of the defendant. The robbery occurred at 3 o'clock on the morning of May 20, 1934. Mr. Burch, the night clerk of the Hotel Maywood at Corning, then had custody of a sum of money in excess of $28.45 which was contained in the cash register in the lobby of the hotel. The clerk was alone in the lobby. The defendant, who had operated a barber shop in the vicinity of the hotel, was known to the clerk. At the time above mentioned the defendant walked into the lobby of the hotel clothed in a light gray suit with his face masked below the eyes. His left hand was covered with a handkerchief which evidently concealed a weapon. Hastily stepping up behind Mr. Burch, he poked the hidden weapon into the clerk's ribs and said: "This is a hold-up. Get over to that cash register. Be quick and be quiet and I won't hurt you, but get a move on you. * * * Don't you ring that bell (or) I will bore a hole through you." The frightened clerk promptly obeyed the command. Opening the cash register, he told the man to help himself. The robber replied: "No, I won't touch anything. You take that money out of there and put it on that piece of paper—wrap it up and give it to me." The clerk did so. He placed the money on the designated paper. He was then asked if he had any more money about the place. The clerk hastily opened a roll-top desk near by, where he had previously placed other money, and added this to the cash register coin. Wrapping the money in the paper as he had been directed to do, he handed the package to the robber, who took it in his right hand and placed it in his pocket. The defend-

ant then said to the clerk, "Come on, we are going to take a ride." The robber marched Mr. Burch out through the side door, accelerating his speed by means of an occasional punch in the ribs with the concealed weapon. Regarding the nature of the weapon with which the clerk was threatened, he testified: "It felt like it might be the barrel of a gun or a piece of iron, or might have been a stick, but I thought it was a revolver, and I think so yet." In this fashion the defendant and his victim proceeded down a side street and up an alley, where the clerk was left with the admonition to remain quiet for at least five minutes if he wished to escape harm. The robber then disappeared. The clerk immediately ran back to the hotel to telephone to an officer. When he entered the lobby, he turned off the lights. As he did so, he glanced through the window and chanced to see a man crossing the street towards a garage on the opposite side of the street. The corner was illuminated by a street lamp which enabled him to recognize the man as the same person who had robbed him. He promptly telephoned to the city marshal for assistance. He then went to the window and watched the defendant as he conversed with three other men at the garage. These men soon entered an automobile which was parked near by and drove westerly.

Within a few moments after the robberry occurred, Mr. Jobe, the city marshal, in company with his deputy, Le Roy George, arrived at the hotel. They were told of the robbery and the recognition of the defendant at the garage across the street. The officers immediately went to the garage and interviewed James Siler, who was then in charge. Siler told the officers of the visit of the defendant and his companions, and informed them that the men had driven in an automobile to Camp Olive, which is a resort situated about a mile west of Corning. The officers promptly drove to the Camp Olive resort, where they found the defendant counting his coin and placing it on the counter. He had previously asked the proprietor of the resort to exchange currency for the silver which he possessed. While the defendant was counting his money the officers stood behind him with their weapons drawn. After the money was counted and placed on the counter, they arrested the defendant. This arrest was made within half an hour of the time when the robbery occurred. The officers took possession of the money, which aggregated the sum of $28.45. In the course of his examination of the defendant, Mr. Jobe asked him if he got the money at the Hotel Maywood, to which he replied: "Yes, I know I done wrong." The other officer asked the defendant why he held up the hotel clerk and he replied that it was because he was drunk. The defendant explained these admissions of guilt by testifying that he supposed the officers were merely joking with him when they asked those questions. The explanation is absurd, in view of the fact that the officers had just placed him under arrest for stealing the money, and in making the arrest they had displayed their weapons. The conduct of the officers left no reasonable opportunity for the defendant to assume that his arrest was a joke. Moreover, the defendant was impeached by evidence that he had been previously convicted of another felony.

The defendant was immediately returned by the officers to the hotel where they found the clerk, who positively identified Woods as the man who had robbed him. The defendant was recognized by the light gray suit of clothes which he wore, by his features, his voice, and the color of his eyes and hair. Mr. Burch said in that regard: "I recognized his voice and I recognized his face, what I could see above the mask. Those black eyes above the mask can't fool me. That's the man that held me up. There ain't enough lawyers in this county to shake me."

Upon the foregoing evidence the defendant was tried and convicted of the crime of burglary of the second degree. There can be no reasonable doubt of the identity of the defendant as the man who robbed the clerk, or of his guilt of the crime of which he was convicted.

[2, 3] There was no prejudicial error with relation to the evidence adduced to the effect that a customer at the Camp Olive resort was asked by the defendant to take him to Corning about an hour before the robbery occurred, and that when he went out to his automobile to do so he found the defendant with a handkerchief over his face. An objection to this testimony was sustained. Later in his testimony, the same witness voluntarily stated that "he (the defendant) had a cloth over his face." There was no motion to strike this answer from the record. We are of the opinion the evidence that the defendant had a handkerchief over his face just before he was driven into Corning one hour before the robbery occurred was competent as tending to show preparation for the commission of the crime, rather than participation in another offense. Amos Hazen, the customer of the Camp Olive resort, testified that the defendant came to the camp about 2 o'clock the morning of the robbery, and asked him to drive him into Corning. That was just an

hour before the robbery occurred. In reply to the question, "Will you tell us what happened out there?" Mr. Hazen replied, "The defendant asked me to bring him into town and about five minutes later I went out and drove my car up to pick him up and he came up and had a handkerchief over his face." Upon objection this answer was stricken from the record. Later in the examination of the same witness, in describing his appearance, after he had said that the defendant was wearing a light gray suit of clothes when he demanded that he be taken to Corning an hour before the robbery occurred, in reply to the question, "When he came out to get in the car didn't you notice anything else he had on?" the witness replied, "He had a cloth over his face." This answer was followed by the question, "Did he have a hat on?" An objection to this last question was overruled. The preceding answer remained in the record without objection. Moreover, the court of its own motion subsequently charged the jury as follows: "Counsel made an assignment of misconduct [in the course of the opening statement of the prosecuting attorney to the jury] as he called it. I want to instruct the jury that you will remember the testimony given by this witness [Amos Hazen] and *any reference to any other offense*, if any incidentally made by counsel in discussing this matter, *is stricken from the record and you are instructed to disregard it.*"

It was not prejudicial misconduct for the district attorney to have referred in his final argument to the jury to the fact that the defendant had a handkerchief over his face when he came out of the Camp Olive resort to be taken to Corning by Mr. Hazen an hour before the robbery occurred. No objection to the statement was made by the defendant's counsel. It may seem improbable that the defendant would have exposed himself with his face masked, to Hazen, the driver of the automobile, if he was then planning a robbery. The defendant denied at the trial that he was then masked. It may be that he was then trying to adjust the mask preparatory to carrying out the robbery which he planned to accomplish when he arrived at Corning. He may not have realized that Hazen saw him with the handkerchief over his face. At least there is no evidence to indicate that he was then masked to hold up the Camp Olive resort or to commit any other offense. It was competent evidence tending to show preparation for the very robbery for which he was being tried. When he held up the Hotel Maywood an hour later, he was in fact masked. The weight of this evidence was a matter for the determination of the jury. Evidently the district attorney considered that evidence competent as tending to show preparation for the robbery. He said in the course of his argument to the jury: "We find the defendant is out at Camp Olive, * * * west of Corning, * * * in the early morning. * * * It appears he wants to come back to Corning, and he speaks to a man he knows, Amos Hazen, about coming back to Corning, and Amos says, 'Yes, I will bring you back to Corning,' and he goes out and drives his car up. The defendant comes out of Camp Olive. He is dressed in a gray suit and he is wearing a handkerchief over his face. Remember, he is wearing a handkerchief over his face. * * * The technicalities of the law prevent me from saying anything more about it, and our story on that point is censored, but I want to say to you that he was wearing a handkerchief over his face, *just the same as he was wearing a handkerchief over his face as he walked through the east door of the Hotel Maywood.*"

The foregoing statement was based upon evidence which remains in the record without objection. It was competent evidence and legitimate argument that this circumstance shows preparation for the commission of the very offense with which the defendant was charged. It was not evidence of another offense. The challenged argument does not constitute prejudicial misconduct.

[4] The court did not err in giving instructions to the jury. No particular instruction is pointed out by the appellant as erroneous. It is merely contended the court should have given to the jury further instructions on its own motion to the effect that the defendant might have been found guilty of the lesser offense of larceny. No such proposed instruction was offered. Clearly the defendant was guilty of robbery of the second degree. There is no evidence in the record which would warrant the court in instructing the jury that the defendant might be found guilty of mere larceny. The jury was very fully and fairly charged with respect to every essential element of the crime of robbery. There was no miscarriage of justice.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

1 Cal.App.2d 72

In re OLCESE'S ESTATE.

KRAMER v. CAUZZA et al.

Civ. 1141.

District Court of Appeal, Fourth District, California.

Sept. 25, 1934.

Hearing Denied by Supreme Court Nov. 22, 1934.

1. Executors and administrators ⇐439

Where former administrator, whose acts had been approved by all interested parties, was sued by lessor to recover back bonus paid for lease of property belonging to estate, intervention by administrators was proper, and hence they were entitled to credit for amount paid as costs of intervention (Code Civ. Proc. § 387).

2. Executors and administrators ⇐501

Where order allowing fees for extraordinary services to attorneys for administrators became final, it could not be attacked by objection to special account filed by administrators reporting that they had paid the sum theretofore allowed.

3. Executors and administrators ⇐514

Where lack of notice of hearing of administrators' first annual account was waived after order approving such account had become final and before objections were filed to special account reporting payment pursuant to order approving first annual account, but right to object to special account was reserved, on appeal from order approving special account no attack could be made on order approving first annual account for lack of notice (Probate Code, § 1200).

4. Appeal and error ⇐1078(1)

Points made in trial court, but not argued on appeal, are waived.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Special accounting of Jennie Cauzza, Stanley S. Simonson, and Victor Olcese, as administrators of the estate of Louis V. Olcese, deceased. From an order allowing and approving the account, Olcese Kramer appeals.

Affirmed.

See, also, 36 P.(2d) 219.

Edwin H. Williams, of San Francisco, and Rowen Irwin, of Bakersfield, for appellant.

W. H. Metson, of San Francisco, Preston & Braucht, of Merced, and Borton & Petrini, of Bakersfield, for respondents.

JENNINGS, Justice.

The appeal herein is taken by Olcese Kramer, an heir at law of Louis V. Olcese, deceased, from an order of the superior court allowing and approving a special account rendered by the administrators of the estate of said decedent. The account contained a statement of receipts and disbursements during the period which intervened between May 22, 1932, and December 5, 1932. Upon the rendition of the account, appellant filed objections thereto in which he attacked three items of disbursement. His objections were overruled and disallowed, and from the order approving the account in full this appeal has been prosecuted.

The first item to which objection was made is one which shows payment by the administrators of the sum of $12 for costs incurred by them in intervening in an action instituted by a corporation known as the Texas Company against the Bank of America National Trust and Savings Association. The complaint in this action sought recovery from the Bank of America of the sum of $4,800 which was alleged to have been received by the bank for the use and benefit of the Texas Company. The record indicates that the following facts were developed with respect to this litigation: During the year 1930 the above-mentioned bank was acting as administrator of the estate of Louis V. Olcese, deceased. In such capacity, it executed a lease of certain real property of the estate to the Texas Company, and as consideration therefor received the sum of $4,800. During the month of September, 1930, the order by which the bank had been appointed general administrator of the estate was reversed on appeal therefrom, and in the month of October, 1930, the order appointing the bank special administrator was annulled by the Supreme Court of California. Thereafter negotiations were entered into between the various parties interested in the estate which finally resulted in the execution of a ratification agreement by such parties and by the bank. This agreement provided in brief that all parties interested in the estate ratified, confirmed, and approved the entire administration of the estate which had been conducted by the bank and agreed, with certain specified exceptions, that its final account as administrator theretofore filed should be settled, allowed, and approved. In this account the bank charged itself with the receipt of the sum of $4,800 from the Texas Company. The bank's account as administrator was allowed and approved on January 13, 1932.

New administrators of the estate were subsequently appointed by the court, and to these new administrators the bank paid over the balance of the money which was shown to be due the estate by the bank's final account. In the meantime, the Texas Company had become concerned with respect to the status of its lease which had been executed by the bank whose order of appointment as administrator of the estate had been reversed. On January 26, 1931, the Texas Company demanded in writing that a valid lease of the property should be issued to it within three weeks thereafter or that the Texas Company be reimbursed in the full amount of its expenditures in connection with the lease. No new lease was executed and no reimbursement was made. Thereupon, on April 20, 1931, an action was instituted by the Texas Company in the superior court of the city and county of San Francisco, wherein the plaintiff sought to recover the sum of $4,800 which it had paid as consideration for the execution of the lease. This action was brought against the bank in its individual capacity. The complaint contained no allegation that the bank had received the money in its representative capacity as administrator of the estate of Olcese. No mention was made of the estate, and no effort was made by this action to impose any liability upon the estate. Nevertheless, the administrators who succeeded the bank elected to intervene in the action, and as administrators they filed a complaint in intervention. In so doing they paid out the sum of $12 as fees, and in their account they included this item as a proper item of expense incurred by them in the process of administration.

Appellant contends that, since the action brought by the Texas Company was instituted against the bank in its individual capacity, and no effort was made to impose a liability upon the estate, the administrators of the estate were not justified in intervening in the suit and that their action in this regard, taken without leave of the court by whom they were appointed, was purely voluntary and officious. On the other hand, respondents point to the fact that, by the ratification agreement, all parties interested in the estate, including appellant, had expressly ratified all acts of the bank as administrator, that one of such acts was the lease executed to the Texas Company, and that, in its final account which was specifically approved by the ratification agreement, and which was subsequently allowed and settled by the court, the bank charged itself with the receipt of the sum of $4,800 from the Texas Company, and that this sum was included in the funds of the estate which were paid over by the bank to the administrators of the estate. From this it is argued, particularly in the brief filed by attorneys for the bank as amici curiæ, that the action of the administrators in intervening in the litigation brought by the Texas Company against the bank was not officious, but was entirely justified, since, if the Texas Company should succeed in its suit, the administrators of the estate could be certain that a claim would be made against the estate by the bank for reimbursement, whereas, if the Texas Company should fail in its action, the estate would be absolved of any liability to the bank.

Unhappily, there is not included in the record a copy of the pleading filed by the administrators in the action filed by the Texas Company. We may assume that it took the form of a complaint in intervention. We are not, however, apprised of the position taken by the administrators in this pleading. It does appear that the intervention took place without approval of the court by whom the administrators were appointed and without the consent of appellant.

The situation with respect to the intervention is rendered more complicated because of the presence in the ratification agreement of a certain provision, the correct interpretation of which is a subject of sharp dispute between counsel and by reason of the fact that there is now pending in the superior court of Kern county an action instituted by the bank against all parties to the ratification agreement wherein the bank seeks revision of the ratification agreement and for a declaration that, in the event a judgment is obtained by the Texas Company against the bank which becomes final, the amount of such judgment shall be paid out of the estate. The record fails to disclose whether or not the Texas Company action has proceeded to trial.

The provision in the ratification agreement whose interpretation forms the subject of dispute is in the following language: "Whereas, during the administration of said estate conducted by said Bank, certain oil leases or sales of mineral rights were made upon lands in said estate, and certain moneys paid in consideration of the execution of the same, and referred to as bonuses; and whereas suits are now pending for the recovery by the Lessees of the moneys so paid as bonuses, and other litigation for the recovery of such bonuses is threatened; it is agreed that in the event of the recovery of judgment against said estate for the return of such moneys in said or any actions said judgments shall be paid and satis-

fied out of the assets of said estate and shall not be charged to said Bank."

Appellant contends that the language of this provision is clear and unambiguous, and that it affords no justification for the intervention by the administrators in the action brought by the Texas Company against the bank to compel the bank to return money which was alleged to have been received by the bank for the use and benefit of the Texas Company, and in which action no mention was made of the estate and no liability was sought to be imposed upon the bank in its representative capacity.

Respondents contend that the literal construction of the language contended for by appellant is unreasonable and involves an absurdity, since, if it is to be held that the words mean exactly what they say, the effect of the provision is that, if a judgment is recovered against the estate, the estate shall be liable for its payment. It is said that literally the language is meaningless, since it is obvious that, if judgment should be recovered against the estate, payment of the amount specified in the judgment would necessarily be made from funds of the estate and only from such funds.

It is our opinion that we are not here called upon to interpret the above-quoted language of the ratification agreement particularly since it appears that actions are now pending in trial courts in which the proper construction of the language is a problem for determination. The question which is here presented is whether or not, in view of the facts and circumstances which the record discloses, the administrators of the estate were justified in incurring the expense represented by the questioned item of $12 for the purpose of intervening in the action brought by the Texas Company against the bank.

It must be conceded that, in a proper case, an administrator or executor is justified in intervening in an action in the outcome of which the estate which he represents is interested. 11-b Cal. Jur. p. 326, § 912. The right of intervention in such a case is governed by the rules which are generally applicable to the subject of intervention.

Section 387 of the Code of Civil Procedure is the statute which authorizes intervention in an action by one who was not originally a party thereto. It provides that "at any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." In Elliott v. Superior Court, 168 Cal. 727, at page 734, 145 P. 101, 105, it is declared that: "The interest mentioned in the Code which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." In Isaacs v. Jones, 121 Cal. 257, at page 261, 53 P. 793, 794, 1101, it is said that the "interest" specified in the above-mentioned section of the Code "must be direct, and not consequential, and it must be an interest which is proper to be determined in the action in which the intervention is sought." To the same effect are the decisions in La Mesa, etc., Irr. Dist. v. Halley, 195 Cal. 739, 741, 235 P. 999; Lindsay-Strathmore Irrigation District v. Wutchumna Water Co., 111 Cal. App. 707, 710, 296 P. 942, and City of Alhambra v. Jacob Beam Realty Co. (Cal. App.) 31 P.(2d) 1052.

[1] We think that the estate did have an interest in the suit which was brought by the Texas Company against the bank for the recovery of bonus money which the bank had admittedly received in its representative capacity as administrator of the estate as consideration for a lease of real property of the estate, and which the bank had included as a charge against itself in its final account as administrator of the estate. It is obvious that, if the Texas Company should succeed in its suit and judgment should be rendered against the bank for the recovery of the bonus money, an action would be instituted by the bank against the estate to compel the estate to reimburse the bank in the amount of such judgment. The estate's interest in the matter in litigation was therefore direct and not consequential, and it was an interest which was proper to be determined in the action. Under these circumstances, it can hardly be declared that intervention by the administrators in the suit brought by the Texas Company was officious and unwarranted. It is our opinion, therefore, that the trial court did not err in allowing the item of $12 paid as costs of intervention in said action as a proper item of disbursement.

[2] The second item of the account to which objection was made is one which shows payment on September 17, 1932, by the administrators of the sum of $9,825 to certain attorneys. The exact language of this item is as follows: "Sept. 17. Paid W. H. Metson, Preston & Braucht, et al., * * * $9,825.00." The record shows that the above-mentioned sum represents fees allowed to the attorneys for the present administrators of the estate for extraordinary services by an order of the

superior court made on July 11, 1932, which order settled and approved the first annual account of the present administrators. The record also discloses that approximately $2,200 of the amount was paid to the firm of Borton & Petrini, and that this firm did not become attorneys of record for the present administrators of the estate until November 28, 1932, when, upon motion of the attorneys who were then representing the administrators, the firm of Borton & Petrini was added to the attorneys of record for the administrators.

Appellant's attack upon this item of the account is evidently based largely upon the fact that the firm of Borton & Petrini, which had represented the Bank of America during the time it acted as administrator of the estate, received a portion of the sum allowed to the attorneys for the present administrators for extraordinary services. As one ground of his attack upon the receipt by the firm of Borton & Petrini of any part of the sum of $9,825 allowed for extraordinary legal services, appellant urges that this firm did not become attorneys of record for the present administrators until more than four months after the order allowing the above-mentioned sum was made. He further expresses strenuous objection to the receipt by this firm of any part of the sum allowed for extraordinary legal services for various reasons which have to do with the ethics of the legal profession and involve charges of legal misconduct.

It is our opinion that we are foreclosed from a consideration of the merits of appellant's objections to the item now under consideration by reason of the fact that all of them constitute a collateral attack upon an order which had become final long before appellant's objections were filed.

By its order of July 11, 1932, the probate court determined that the sum of $9,825 was a proper amount to be allowed as fees to the attorneys for the present administrators for extraordinary legal services performed by them, and ordered that this amount be paid to the attorneys for such services. This order constituted an adjudication by the court of the matter. After this order became final, the allowance of the specified sum occupied the status of a claim against the estate which had been approved by the court. The administrators of the estate were thereupon fully justified in making payment of the amount which the court had found was the proper compensation for extraordinary legal services. The inclusion of the item in the next special account filed by the administrators was proper. In effect it amounted to a statement that the administrators had paid out of the funds of the estate a specified sum which the court had theretofore approved as a proper charge against the estate and had ordered to be paid. The allowance of the amount might have been directly attacked by appeal from the order which directed it to be paid. After the time for appeal had expired and the order had become final, appellant may not collaterally attack it by contesting payment of the amount specified by presenting objections to a later account in which it was included as an item of disbursement.

Appellant, however, contends that he is entitled to object to the allowance of the above-mentioned amount, for the reason that he had no legal notice of the hearing at which the allowance was made. The record shows that on February 27, 1930, appellant caused to be filed in the superior court of Kern county a document entitled "Notice of Appearance and Request for Special Notice under Section 1380 C. C. P. California." This document was addressed to "the administrator of the Estate of Louis Olcese, deceased, and to Messrs. Borton and Petrini, its attorney." After stating that appellant gave notice that he entered his appearance in the matter of the estate, the document contained a demand that notice be given to him through his attorney therein designated of any and all of various specified proceedings in the administration of the estate. One of the proceedings specifically designated therein was "Filing of Accounts." The document concluded with a statement that the notice might be addressed to appellant in care of his attorney, whose office address was given. The record further shows that the only notice of the hearing of the first annual account of the present administrators of the estate which was given to appellant consisted of a notice which stated that the administrators had on July 1, 1932, filed a verified petition for the settlement of their first annual account, that the same had been set for hearing on July 11, 1932, in the courtroom of department 2 of the superior court in the courthouse in the city of Bakersfield, at which time and place any and all persons interested in the estate might then appear and show cause why the order petitioned for should not be made. This notice specified that it should be posted at the courthouse in Bakersfield at least ten days before the date set for the hearing. Appended to the notice is an affidavit stating that a true and correct copy of the notice was posted at the courthouse in Bakersfield on July 1, 1932.

Appellant contends that he was entitled to special notice of the hearing of the first annual account of the administrators as provided in section 1200 of the Probate Code, and

that proof of notice by posting was insufficient to confer upon the court jurisdiction to proceed with the hearing of the account and to make the order of July 11, 1932, wherein the court settled and approved the account and allowed the sum of $9,825 as compensation for extraordinary legal services. In connection with this objection, however, the record shows that on February 28, 1933, the day following that on which appellant gave notice of this appeal, he entered into a stipulation which is entitled "Stipulation Waiving Notice of Account," and which is in the following language:

"Whereas, Victor Olcese, Jennie Cauzza and Stanley S. Simonson, administrators of the above entitled estate, heretofore filed their 'First Annual Account' which was presented to the above entitled Court and settled by order of Court made in or about June, 1932, said account including transactions from June 12, 1931, to May 21, 1932, and

"Whereas, Olcese Kramer, a party interested in said estate has heretofore asserted that the allowance of said account was improperly made for the reason that no notice thereof was given to him in compliance with his demand therefor, filed in these proceedings:

"Now therefore, it is stipulated, by Olcese Kramer, that he hereby waives notice of said account and waives objections thereto on the ground that no notice was given to him, provided, however, that such waiver shall not be used or construed as in any way waiving the right of said Olcese Kramer to assert any point made by him on his objections to the special account of said Administrators, covering the period from May 22, 1932, to December 5, 1932, or on his appeal from said order overruling said objections as developed on the evidence taken at said hearing, at any stage of this proceeding or otherwise.

"Edwin H. Williams,
"Attorney for Olcese Kramer."

[3] It thus appears that appellant has expressly waived any objection to the settlement of the first annual account on the ground that special notice of its hearing was not given to him in compliance with his demand therefor. The waiver is so qualified, however, that appellant has specifically reserved the right to "assert any point made by him on his objections to the special account of said administrators, covering the period from May 22, 1932, to December 5, 1932, or on his appeal from said order overruling said objections." Unfortunately for appellant, his objections to the special account contain no reference to the failure of the administrators to give him special notice of the hearing of the first annual account. His objection of lack of notice of the hearing of the first annual account which was approved by the order of July 11, 1932, which order had become final before he filed objections to the special account, may not be successfully urged for the first time on this appeal from the order of February 16, 1933, which overruled his objections to the special account and settled and approved the same. Estate of Rohrer, 160 Cal. 574, 577, 117 P. 672, Ann. Cas. 1913A, 479.

[4] In his objections to the special account of the administrators, appellant attacked one other item of disbursement stated in the account. He has not, on this appeal, mentioned this item, and has made no contention that the court erred in disallowing his objection thereto. We are therefore entitled to assume that appellant has abandoned his attack upon this item which was listed in the account as interest paid on a deficiency income tax of the decedent for the year 1928.

For the reasons stated herein, the order from which this appeal has been taken is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

1 Cal.App.2d 83

In re OLCESE'S ESTATE.

KRAMER v. CAUZZA et al.

Civ. 1142.

District Court of Appeal, Fourth District, California.

Sept. 25, 1934.

Hearing Denied by Supreme Court Nov. 22, 1934.

Executors and administrators ⊂504(2)

Where order allowing former administrator's fees had become final and was ratified by all parties in interest, assignment by former administrator of such fees to attorneys representing new administrators and other persons interested in estate could not be attacked on special accounting by new administrators, no item of whose account was objected to.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Special accounting of Jennie Cauzza, Stanley S. Simonson, and Victor Olcese, as administrators of the estate of Louis V. Olcese, deceased. From an order settling and approving the account, Olcese Kramer appeals.

Affirmed.

See, also, 36 P.(2d) 215.

Edwin H. Williams, of San Francisco, and Rowen Irwin, of Bakersfield, for appellant.

W. H. Metson, of San Francisco, Preston & Braucht, of Merced, and Borton & Petrini, of Bakersfield, for respondents.

JENNINGS, Justice.

This is an appeal from an order of the superior court of Kern county settling and approving a special account of the administrators of the estate of Louis V. Olcese, deceased. The account, which covered the period from December 6, 1932, to March 31, 1933, was filed on April 29, 1933. Thereafter, on May 15, 1933, Olcese Kramer filed written objections to said account. The account and the objections thereto came on for hearing on May 15, 1933. At this hearing evidence consisting of the oral testimony of witnesses and documentary evidence was submitted to the court. Upon the conclusion of the hearing, the court made its order overruling and disallowing the objections and settling and approving the account. Thereupon the above-mentioned objector prosecuted this appeal from the aforesaid order.

The principal ground of the objections relates to the allowance by the court of the sum of $10,484.12 as fees of a prior administrator of the estate and the disposition of this compensation by such administrator. Upon the death of Louis V. Olcese, the Bank of Italy National Trust & Savings Association was appointed administrator of his estate and thereupon proceeded to administer it. An appeal was taken from the order of the superior court appointing the bank administrator by Victor Olcese, a brother of the deceased. The appeal was successful, and the order of appointment was reversed by the Supreme Court. Estate of Olcese, 210 Cal. 262, 291 P. 193. After the appeal was taken, the bank was appointed special administrator, and during the pendency of the appeal it continued to act as special administrator. Upon the reversal of the order of appointment, three new administrators of the estate were appointed. These new administrators qualified as special administrators in January, 1931, and as general administrators in May, 1931. In the meantime, some questions had arisen as to the respective rights and liabilities of the bank and the estate with respect to the former's conduct of the administration of the estate. In August, 1931, the bank filed its final account as administrator. After the rendition of this account, the bank filed claims against the estate, the total amount of which was more than $300,000. These claims covered the amount of disbursements from funds of the estate made by the bank during the time that it acted as administrator. In this state of affairs, negotiations were undertaken between the bank and the new administrators which were carried on for several months, and which finally culminated in the execution of an agreement which is denominated in the briefs of counsel the "ratification agreement." The purpose of this agreement was the ratification by all parties interested in the estate of all acts performed and proceedings taken by the bank in its administration of the estate. In this agreement, specific reference was made to the final account of the bank as administrator, and certain items of expense included therein were expressly eliminated. With the exception of such items, it was provided that "in all other respects said account may be settled, allowed, and approved." Thereafter, on January 13, 1932, the final account of the bank was duly allowed and approved. The court's order approving the account specified "that the administration of said estate conducted by said Bank of Italy National Trust and Savings Association is equal to ¾ths of the entire labor of administering said estate and that the estimated amount of entire statutory fees and commissions of the administrators and attorneys is $13,978.83 for the administrator and $13,978.83 for the attorneys of which sum ¾ths amounting to the sum of $10,484.12 is hereby fixed and allowed to said Bank of America National Trust and Savings Association, formerly Bank of Italy National Trust and Savings Association, as its compensation for its service in administering said estate." The order further provided that, upon deduction of the items of the account expressly disallowed and the payment of the fees specifically allowed as compensation to the administrator and the attorneys, the entire balance of the estate should be delivered to the new administrators by the bank, and, upon the filing of their receipt therefor, the bank should be discharged from all further liability in the matter of the estate. On January 30, 1932, all persons interested in the estate, including Olcese Kramer and his attorneys, executed and caused to be filed in the superior court of Kern county a waiver of any right of appeal from the above-men-

tioned order approving the account of the bank as administrator and a stipulation that the same should immediately become final. Thereafter the Bank of America delivered and paid over to the new administrators of the estate all property and assets of the estate which remained in its possession. The new administrators then filed their first annual account covering the period from the date of their appointment on June 12, 1931, to and including the 21st of May, 1932. This account was approved and settled by the court on July 11, 1932. A special account covering receipts and disbursements for the period intervening between May 22, 1932, and December 5, 1932, was filed by these administrators on December 29, 1932. Objections to this account were filed by Olcese Kramer on January 9, 1933, and, after a hearing upon the account and the objections thereto, the court made its order overruling and disallowing the objections and approving the account on February 16, 1933. An appeal was duly taken by Olcese Kramer from this order which will receive consideration in another opinion. 36 P.(2d) 215. Thereafter, the new administrators of the estate filed the special account of receipts and disbursements whose approval forms the basis for the present appeal.

Upon the hearing of this last account and of the objections presented thereto, evidence was produced which showed that at some time during the autumn of 1931 all persons who were interested in the estate, including the Bank of Italy and its successor, the Bank of America, the new administrators, and the various attorneys who represented the new administrators, with the exception of appellant and his counsel, entered into an agreement which provided that all fees which might thereafter be allowed and paid to administrators and attorneys for services rendered subsequent to August 20, 1929, should be added, and that the total amount of such fees should be divided equally between three different firms of attorneys, two of which firms had represented persons interested in the estate other than appellant, and the third firm had acted as attorneys for the bank. The evidence also showed that, pursuant to the above-mentioned agreement, and after its final account had been approved and the order of January 13, 1932, had been made allowing fees in the amount of $10,484.12 to the Bank of America as compensation for its services as administrator of the estate, the bank turned over the aforesaid sum so allowed to the attorneys mentioned in the fee division agreement and each of the three firms of attorneys thereupon received one-third of said sum. The evidence also showed that neither the appellant nor his counsel had any knowledge of the existence of the fee division agreement or of the payment by the Bank of America to the three firms of attorneys specified in such agreement of the amount allowed to it as compensation for its services as administrator until the fee division agreement was read in court at the time of the hearing of the account and appellant's objections thereto.

It is appellant's contention that he was entitled to object to the division of the fees allowed to the bank as administrator among the three firms of attorneys, and that the probate court on the showing made should have ordered the aforesaid sum of $10,484.12 to be repaid to the estate on the theory that payment of said sum was made to the persons who received it in trust for the estate. It is argued that the right of the Bank of America to receive any compensation for its services as administrator of the estate was questionable, due to the fact that the court's order appointing the bank general administrator was reversed on appeal and the order appointing the bank special administrator was declared void and annulled for lack of notice. Olcese v. Superior Court, 210 Cal. 566, 292 P. 964. It is pointed out that the abortive attempt to make the bank administrator involved the estate in numerous difficulties, and that as a result of such attempt serious questions arose as to the legality of its actions during the time that it acted as administrator. In particular, it is said that the bank's right, under the circumstances, to charge the estate with the disbursements made by it during its tenure of office as administrator, was doubtful. It is then urged that the bank, occupying a doubtful position both with respect to its right to charge the estate with the amount of disbursements made by it as administrator and with respect to its right to receive any compensation for its services as administrator, bargained with the new administrators and with their attorneys and by means of the secret fee division agreement secured their approval of the ratification agreement whereby all parties interested in the estate expressly ratified all acts performed by the bank as administrator, and with some few exceptions consented to the allowance and approval of the bank's final account in toto. It is urged that the attorneys who were the recipients of the bank's generosity, all of whom acted as attorneys for the new administrators, were thus enabled to receive fees in excess of the fees ex-

pressly permitted by statute, and that the result of the transaction was that they were thereby permitted to make a secret profit at the expense of the estate. It is said that the facts surrounding the execution of the fee division agreement and the final accomplishment of its provisions showed that extrinsic fraud was perpetrated upon the court in securing its approval of the bank's final account as administrator and in procuring the order providing for the payment of specified fees to the bank and to its attorneys.

Assuming, without here deciding, that appellant's criticism is justified and that the making of the fee division agreement and its accomplishment had the effect which appellant maintains, and that the estate should be reimbursed in the above-mentioned amount, it is nevertheless manifest that it is impossible to sustain appellant's contention in accordance with the rules established in probate procedure. The situation which the record discloses is that we here have objections presented to a special account rendered by the administrators of an estate. These objections do not, however, attack any item of disbursement mentioned in the account. More than that, the objections do not even attack the order which had allowed specified fees to the Bank of America for its services as a prior administrator of the estate and which had become final long before the account to which appellant's present objections were filed was rendered. Appellant evidently recognizes the obvious impossibility of attacking this prior order, for he specifically asserts that he is not attacking it. He maintains that he is attacking the "transaction whereby the bank assigned these fees to the attorneys for the administrators." In this connection it is pointed out that the assignment was not before the court either on the hearing of the bank's final account or at the time the order allowing fees to the bank was made. It is urged, therefore, that there was not any adjudication of the matter, and that the facts upon which the objection is based were presented for the first time at the hearing of the account of the new administrators and appellant's objections thereto.

It may be conceded that the fee assignment transaction was not before the court on the hearing of the final account rendered by the bank as administrator of the estate, and that there was therefore no adjudication of the matter. It may further be assumed for the purposes of this decision that the facts shown by the evidence indicated that the transaction whereby the attorneys to whom the bank assigned its fees were thus permitted to receive fees in excess of the compensation allowed by statute was an improper transaction. Nevertheless, it does not follow therefrom that the disallowance of appellant's objections and the approval and settlement of the account to which these objections were presented was erroneous. The account which was before the court was one that was rendered by different administrators than the one which had assigned its fees. It was a special account of these new administrators wherein they declared that they had received certain sums of money and had made specified disbursements during a definite limited period of time and charged themselves with the possession of a specified balance. The matter of the assignment of fees by a prior administrator was not mentioned in the account, and could have no place in it. It was not material to the account, nor was it incidental to it. Appellant's attack upon the fee division agreement, although it was presented in the form of objections to the account, was not an attack upon the account. The court was not therefore justified in withholding its approval of the account for the reasons stated in the objections. As a matter of fact, appellant's attack was not directed to the final account rendered by the bank as prior administrator of the estate nor to the court's order which approved that account and allowed to the bank a definite sum for its services as administrator. In this connection it is to be remembered that appellant and his counsel were parties to the "ratification" agreement whereby it was expressly provided that "all the parties hereto do hereby ratify, confirm, and approve the entire administration of said estate heretofore conducted by said Bank and adopt the same as and for acts, omissions, and proceedings taken in behalf of and for the benefit of the heirs and persons interested therein." We do not understand that it is now claimed that the amount allowed to the bank as compensation for its services as administrator was in excess of the fees which it was legally entitled to receive therefor. It is suggested that the bank's claim to receive any compensation as administrator was doubtful by reason of the fact that the order of its appointment was reversed on appeal. The fact remains, nevertheless, that more than a year after the reversal was accomplished appellant and his counsel entered into the ratification agreement whereby they specifically ratified, confirmed, and approved the entire administration of the estate by the bank, and with the exception of certain specified items agreed that the bank's account as administrator

should be settled, allowed, and approved. Furthermore, after the bank's account had been approved and settled and an allowance had been made to the administrator of a specified amount for its services as administrator, appellant and his counsel joined in a written waiver of any right to appeal from the order approving the account and allowing fees and in a stipulation that the order might become immediately final.

It appears, therefore, that appellant's attack presented in the form of objections to the special account of the new administrators is in reality not an attack upon any account rendered either by the present administrators nor by the former administrator, and that it is not an attack upon the order allowing fees to the former administrator. It is an attack upon the agreement whereby the former administrator assigned its fees to the attorneys who represent the present administrators of the estate. It may be that appellant is entitled to attack this assignment on the grounds specified by him in some appropriate action. As to this we here express no opinion. That it may not properly be done in the manner which is here attempted we think is obvious.

The order from which this appeal has been taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

1 Cal.App.2d 43

LIMA v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 5179.

District Court of Appeal, Third District, California.

Sept. 24, 1934.

1. Master and servant ⇐417(7)

Reviewing court is bound by Industrial Accident Commission's findings, supported by substantial evidence (St. 1917, p. 831, as amended).

2. Insurance ⇐665(2)

Evidence *held* to support Industrial Accident Commission's finding in workman's compensation proceeding that antedating of employer's liability policy was obtained by broker's fraud, and hence was not binding on insurer (St. 1917, p. 831, as amended).

3. Insurance ⇐665(2)

Testimony as to order, alleged to have been given employer's liability insurer by broker before employee's injury, to issue policy, *held* insufficient to overthrow award made by Industrial Accident Commission in insurer's favor on ground that antedating of policy, issued after injury, was obtained by broker's fraud, in absence of evidence that person given order had authority to bind insurer (St. 1917, p. 831, as amended).

Proceedings for compensation under the Workmen's Compensation Act by John Luteran and others, employees, opposed by Sam Lima, employer, and the Commercial Casualty Insurance Company, insurer. On the employer's application to review an award of the Industrial Accident Commission in favor of named employee and insurer.

Award affirmed.

Ralph H. Lewis, of Sacramento, and Glenn West, of Lodi, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the application of the above-named petitioner to review an award made by the Industrial Accident Commission in favor of the respondents John Luteran and Commercial Casualty Insurance Company, a corporation.

The record shows that the petitioner was engaged in the viticultural business in San Joaquin county; that he was engaged in such business during all the times mentioned herein; that on or about the 5th day of October, 1933, the petitioner, being about to begin the harvest of grapes, wrote to Anthony M. Lanza, a real estate and insurance broker in San Francisco, requesting Lanza to procure from the Commercial Casualty Insurance Company an insurance policy pursuant to the provisions of the Workmen's Compensation, Insurance and Safety Act of the state of California (St. 1917, p. 831, as amended). This letter was received by Lanza on the 7th day of October, 1933; on the same day the petitioner called at the office of Lanza in San Francisco with reference to the procurement of a liability insurance policy, and according to the record was informed by Lanza that he would attend to the procurement thereof.

Work was begun by the petitioner in the gathering of grapes, and in pursuance there-

of he employed the individual respondents herein. In so doing the petitioner furnished conveyance to the individual respondents in going from the residence of the petitioner to the place where the workmen were engaged in the gathering of grapes. It appears that some time between 5 and 6 o'clock of the afternoon of October 10, 1933, while riding in an automobile furnished by the petitioner in conveying his employees to and from their work, the automobile was upset and the respondent John Luteran severely injured.

The record further shows that later in the evening of October 10, 1933, a six-minute communication by telephone was had between the residence and telephone number of the petitioner herein and the telephone number of Anthony M. Lanza, in San Francisco. Likewise, the record shows a telephone communication was had between the telephone number of the petitioner and the telephone number of Lanza, on October 11, 1933, and likewise on October 13, 1933, the telephone call on October 13th being listed as a person to person call as from Lima to Lanza. These telephone calls were denied by both the petitioner and Lanza.

Lanza testified that on Saturday, October 7, 1933, he telephoned to the office of the Commercial Casualty Insurance Company and had a conversation with some one whose voice he did not recognize, and ordered a liability policy to be made out insuring the petitioner. This conversation the witness testified was first had with a girl and then with some man. The transcript before us does not show that any record was made by the respondent Commercial Casualty Insurance Company of this telephone order for the writing of a policy. No policy appears to have been issued in pursuance of the telephone order testified to have been given by the witness Lanza.

On October 11, 1933, Lanza called up the respondent Commercial Casualty Insurance Company and had a conversation with one of the agents of the Commercial Casualty Insurance Company by the name of Mitchell, and ordered a liability policy made out in favor of the petitioner in this proceeding. This witness testified as follows:

"Q. Will you state to the best of your recollection what conversation took place at the time Mr. Lanza telephoned you on October 11th? A. He phoned and asked that I write a policy for Sam Lima; gave me a classification to use the address, and then mentioned that if there was any further information that I needed I could get it off the old daily as we had the insurance before.

"Q. Did he make any reference about having previously ordered the policy? A. Not to me."

In pursuance of this order for a policy in favor of the petitioner, the respondent Commercial Casualty Insurance Company wrote the liability policy dated as of October 13, 1933, but made effective as and from the 11th day of October, 1933, the date of the order just referred to. This policy was delivered to Lanza on the morning of October 14th. Shortly after the receipt of the policy by Lanza on October 14th, Lanza called up the office of the Commercial Casualty Insurance Company and had a conversation with one of the officers thereof in relation to the effective date of the policy, and thereafter called at the office of the company and informed an agent of the company named Crawford that he had ordered the policy on the 7th day of October, 1933, and desired a correction made therein so that the effective date of the policy would read as of October 7, 1933. Accepting the word of Lanza that the policy had been ordered as of October 7, 1933, Crawford wrote a rider to be placed upon the policy changing the effective date so as to make it read as and from October 7, 1933, and attached this rider to the policy.

Lanza testified that he had not learned of the accident to Lima's employee named John Luteran, which as we have stated occurred on the evening of October 10, 1933, at the time of the occurrences herein referred to. Likewise the agents of the company testified that they had not learned that any injury had befallen any of the employees of the petitioner.

The record does not disclose the subject-matter of the conversations had between the Lima telephone and the Lanza telephone on October 10, 1933, after the accident, nor does it disclose the subject-matter of the telephone conversations had between the two telephones on either October 11 or October 13, 1933. It simply discloses that one of the telephone calls was a person to person call as from Lima to Lanza. Following the introduction of testimony, an award was made in favor of John Luteran, and likewise holding that the antedating of the policy issued by the Commercial Casualty Insurance Company was obtained by fraud, and therefore was not binding upon the company.

Some question was raised before the commission as to whether Lima came within the terms and provisions of the Workmen's Compensation, Insurance and Safety Act, by reason of the amount of his pay roll for the previous year (see St. 1927, p. 1681, § 1, as amend-

ed by St. 1931, p. 1962). However, by reason of that not having been made the subject for rehearing before the commission, it is not a matter of subject to be reviewed herein. Likewise, the argument presented by counsel that, if a rehearing is had, the telephone conversations had between Lima and Lanza might be so proven as to show that Lanza had no knowledge of the accident to John Luteran on October 10, 1933, and that the petitioner was acting under the impression that the insurance policy had been ordered on October 7, 1933, and issued in accordance with such order. These questions, however, are subject-matters not within the jurisdiction of this court. Upon this hearing we are confined to the record.

[1, 2] Irrespective of the inferences which might be drawn by the court from the testimony referred to herein, if there is any substantial evidence to support the findings of the commission, this court is bound thereby. The rule is thus stated in 27 California Jurisprudence, p. 578: "Findings of the commission on questions of fact may not be reviewed when there exists substantial evidence to support them, even though that evidence be hearsay. And if the specific findings of the commission have the support in the evidence, and if such findings, with the aid of fair inferences, sustain the findings of ultimate facts, the action of the commission will not be overthrown. Likewise, the courts have nothing to do with the conflict of testimony or the credibility of the witnesses appearing before the commission." If the testimony which we have recited, and which appears in the record, supports a fair inference that Lanza did not order a liability insurance policy from the respondent Commercial Casualty Insurance Company on October 7, 1933, but did give such an order on October 11, 1933, and thereafter secured the antedating of the policy in order to cover up or conceal his neglect, or in an attempt to conceal any act of negligence on his part, then and in that case the award of the commission must be affirmed. With the witnesses before them, and their opportunity to judge the credibility of Lanza, we think there is sufficient in the record to support the conclusion of the commission, and that a fair inference is deducible from the testimony that Lanza neglected to give the order for the insurance policy on October 7, 1933, and that his subsequent acts were taken in an attempt to relieve himself from such neglect.

[3] Again, the testimony as to the order alleged to have been given by Lanza on October 7, 1933, is insufficient upon which to overthrow the award of the commission.

In the case of Kugler v. Industrial Accident Commission, 63 Cal. App. 308, 218 P. 472, the subject of oral orders given to an insurance company, in order to render the company liable as and from the date of the order, is considered at length, and it is there held that any one relying upon such an oral order has the burden of proving that the person to whom the oral order is given has authority to bind the insurance company. Nothing of that kind appears in the record in this case. That such oral orders, when properly proved, given to an authorized agent of an insurance company, bind the company, appears to be well supported by the cases cited in Ferrar v. Western Assurance Co., 30 Cal. App. 489, 159 P. 609, 611. However, from the failure of the testimony to establish such facts in this case, those authorities are not pertinent here.

Irrespective of the views which we may hold upon the testimony presented by the record in this case, it clearly appears that there is sufficient to support the findings of the commission.

It follows, therefore, that the award must be, and the same is hereby, affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

Ex parte JOHNSTON et al. *

Cr. No. 2541.

District Court of Appeal, Second District, Division 2, California.

Sept. 18, 1934.

Hearing Granted by Supreme Court Oct. 18, 1934.

1. Habeas corpus ⇨44

District Court of Appeal *held* to have jurisdiction of habeas corpus petition for discharge from custody under judgments of conviction, though appeals from the conviction to such court were pending.

2. Criminal law ⇨878(3)

That, in some counts of indictment under Corporate Securities Act, naming certain defendants as corporation's officers, one de-

*For subsequent opinion see 44 P.2d 1052.

fendant was referred to not as officer, *held* not to result in acts charged therein being different from overt acts alleged in conspiracy count, as respects question whether acquittal on substantive counts worked acquittal on conspiracy count (St. 1917, p. 673, as amended).

3. Criminal law ⇐878(3)

In conspiracy count, allegation that, as "an" overt act, defendants did issue "and" sell, and caused to be issued "and" sold, securities in violation of statute, *held* to charge but one overt act, and each similar allegation in conspiracy count likewise charged only single overt act, as respects question whether acquittal on counts charging the same acts as substantive offenses constituted finding that none of overt acts alleged in conspiracy count were committed (St. 1917, p. 673, as amended).

[Ed. Note.—For other definitions of "An" and "And," see Words & Phrases.]

4. Criminal law ⇐878(3)

Where defendants were acquitted on counts charging certain violations of Corporate Securities Act, conviction on conspiracy count alleging as overt acts only the acts charged as substantive offenses in the other counts *held* void, notwithstanding Code provision that acquittal on one or more counts shall not be deemed acquittal on any other (Pen. Code, § 954, as amended by St. 1927, p. 1042; St. 1917, p. 673, as amended).

5. Constitutional law ⇐56

Where it results from verdict alone, or from verdict and other matters of record, that defendant has been acquitted in given case, adjudication of such fact is judicial function with which Legislature may not interfere (Pen. Code, § 954, as amended by St. 1927, p. 1042).

6. Criminal law ⇐882

In criminal cases, court, in exercise of implied and inherent power, must apply principle that special finding of jury overcomes general verdict.

7. Constitutional law ⇐48, 56

Code provision that acquittal on one or more counts shall not be deemed acquittal on any other *held* proper exercise of legislative power only if Legislature intended provision to be declaratory and meant to end any doubt as to effect of other Code provisions, and it was to be presumed that provision was enacted with such intent (Pen. Code, § 954, as amended by St. 1927, p. 1042).

8. Constitutional law ⇐48

In construing statute, court must assume that Legislature realized constitutional limitations on its authority and did not mean to invade province of another independent department of government.

9. Criminal law ⇐878(3)

Code provision that acquittal on one count shall not be deemed acquittal on any other, construed as declaratory enactment, *held* to mean merely that acquittal on one count should not preclude proper judicial consideration of entire record before court and of all elements, including verdict of acquittal, appropriate for exercise of judicial function (Pen. Code, § 954, as amended by St. 1927, p. 1042).

10. Habeas corpus ⇐29

Where conspiracy count charged as overt acts only the same acts alleged as substantive offenses in other counts, and defendants were acquitted on substantive counts, judgment of conviction and sentence on conspiracy count *held* void and beyond court's jurisdiction, so that habeas corpus was appropriate remedy.

STEPHENS, P. J., dissenting.

Proceedings on the petition of Charles H. Johnston and E. E. Pratt for a writ of habeas corpus.

Petitioners discharged from custody.

McGee & Robnett, Robert L. Collins, Erwin P. Werner, and Paul Friedman, all of Los Angeles, for petitioners.

Buron Fitts, Tracy Chatfield Becker, and A. H. Van Cott, all of Los Angeles, for respondent.

CRAIG, Justice.

Application for writ of habeas corpus after acquittal of acts charged in all counts of an information except the acts alleged in the first count, charging conspiracy.

By an amended indictment filed in the superior court of Los Angeles county, petitioners were charged in several counts with having committed certain specified acts, to wit, selling certain corporate stock in nonconformity with the Corporate Securities Act (St. 1917, p. 673, as amended) of this state. By another count it was alleged that they combined, confederated, and conspired to violate the same provisions of said act, and that in furtherance of such conspiracy certain overt acts therein enumerated were committed, which overt acts were identical with, and mere repetition of, the crimes charged in the preceding counts. On a trial before a jury verdict was returned finding petitioners guilty

of the charge last mentioned and not guilty of the offenses alleged in all other counts. From the judgments entered upon the verdict of conviction they appealed. A petition for a writ of habeas corpus was thereafter filed and is now before this court, praying that petitioners be discharged from custody, for the reason, among others, that said acquittals constitute a finding that none of the overt acts alleged in the count of the information charging conspiracy were committed, and hence in legal effect result in an acquittal of the crime charged in that count.

[1] Respondent asserts that, because petitioners have appealed from the judgment entered upon their respective convictions, this court is without jurisdiction to consider the habeas corpus petition. The authorities cited in support of this contention are not in point. So far as the principles enunciated in them go, such decisions lead to the conclusion that jurisdiction exists in this court and perhaps in no other. Without discussing each of the cases cited in this behalf individually, it will suffice to say that none of them involves a writ of habeas corpus in a court to which the petitioner's case had been appealed. In several instances it was declared that a trial court may not entertain a writ of habeas corpus where the petitioner's case had been removed from its jurisdiction to a higher court. It is obvious that these rulings do not uphold respondent's claim. Such a case is France v. Superior Court, 201 Cal. 122, 255 P. 815, 818, 52 A. L. R. 869, principally relied upon by respondent. In one case cited, In re Doyle, 26 Colo. 52, 55 P. 1080, the Supreme Court of that state held that, an appeal having been taken to the district court from the trial court, habeas corpus would not be given consideration by the Supreme Court. This was based upon the proposition, as quoted in the opinion of our Supreme Court in France v. Superior Court, supra: "Pursuant to a general rule of wide application, and upon which there is no conflict of authorities, it has been held that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated." In the instant proceeding the appeal has been taken to the District Court of Appeal. Jurisdiction is now here. We have no doubt of our authority and jurisdiction to pass upon this petition and to grant any relief to which petitioners may be entitled.

[2] Respondent argues that, since in certain counts naming certain defendants as officers of the corporation in question one defendant is referred to not as an officer, this in some way which is not explained results in the overt acts charged in said counts being different from the overt acts alleged in the conspiracy count. The Corporate Securities Act makes no distinction of this character, and we think the argument is untenable.

This court has had occasion to pass upon the question which is decisive of this proceeding. In Oliver v. Superior Court, 92 Cal. App. 94, 267 P. 764, 765, we held, in a prosecution based on numerous counts of an indictment in which petitioners were charged with different acts of larceny and embezzlement, and where in a final count it was alleged that, in furtherance of a conspiracy, the defendants committed certain overt acts delineated as the same offenses whose commission was charged in the preceding counts, and the defendants were acquitted of the crimes charged in such preceding counts, that this constitutes a finding that none of the overt acts alleged in the conspiracy count were committed. Further, that the result of said acquittals was an acquittal on the charge of conspiracy. It is there said: "But here the conclusion cannot be escaped that since each crime, considered and described collectively as a single entity, is alleged to be an overt act, and as the jury fully acquitted these petitioners of each overt act thus alleged, the portion of the count charging conspiracy remaining unadjudicated is insufficient to constitute criminal conspiracy." Contrary to the contention of respondent here, this authority has not been overruled or modified by any decision in this jurisdiction. In People v. MacMullen, 218 Cal. 655, 24 P.(2d) 793, as the opinion indicates, the legal problem presented is the reverse of that in Oliver v. Superior Court. These cases are thus clearly distinguished in the MacMullen decision, and, if any inference is to be drawn from the language used therein concerning the Oliver v. Superior Court ruling, it would be one of approval rather than disapproval or qualification.

[3] In all particulars here involved, the form of this indictment is identical with that in the Oliver Case. In both indictments one count contains a general charge of conspiracy

to commit a crime. In the Oliver Case that offense was "conspiracy to obtain the money and property exceeding in value $200, alleged to have been the subject of the offenses set forth in the preceding counts." In this case it was "conspiracy to * * * issue and sell, and cause to be issued and sold, shares * * * for a consideration other than the consideration mentioned in the provisions of" the permit of the corporation commissioner. In the Oliver Case it is charged in the conspiracy count that the defendants, in furtherance of the conspiracy, "committed certain overt acts which are delineated as the same offenses whose commission is charged in the first 33 counts of the indictment." In this case it is charged in precisely the same manner that the defendants, in furtherance of the conspiracy, committed certain overt acts. In reference to each act named it is alleged to be "an overt act" by which the defendants "did issue and sell and cause to be issued and sold" shares of capital stock for a consideration other than that mentioned in the permit issued by the corporation commissioner. Each overt act thus charged is identical with the crime charged in one of the other counts of the indictment.

It is to be noted that in the conspiracy count, in setting forth each of these overt acts, it is referred to as "*an* overt act"; also that the acts charged to have been done in committing "an overt act" are connected by the word "and"; the language being, "issue *and* sell, cause to be issued *and* sold," etc. (Italics ours.) This is consistent with the statement that all of that transaction is "an overt act" alleged as above quoted. In the corresponding count of the indictment dealing with the same transaction as a separate offense, the same wording is again employed and the transaction is again, as an entity, charged as such separate offense. All of the language used in each of the counts other than the conspiracy count, which is indicative of the character of the charge as setting up a single entity or a number of overt acts, precludes the latter and establishes the former. In addition to the preceding analysis, again referring to the conspiracy count, the word "an," used before "overt act," in the sentence "That said defendants, * * * as an overt act and in furtherance of their said conspiracy," cannot possibly be construed to mean a series of acts. The pleader charges that the act named "an overt act," committed to carry out the conspiracy, is that the defendants "did * * * issue and sell, and cause to be issued and sold," etc. These actions conjunctively constitute the overt act denominated "an overt act." It is doubtful if this indictment could be worded otherwise, because the offense here described by this statute is a single act, to wit, selling shares for a consideration other than as allowed by the permit. Selling the shares involves their issuance.

The case of People v. McClennegen, 195 Cal. 445, 234 P. 91, charging criminal syndicalism and conspiracy, illustrates a statute and a prosecution where acquittal of all counts other than the conspiracy might not amount to an acquittal of the charge of conspiracy, for the obvious reason that any of the other counts might be set up, not as describing "an" overt act, but rather as doing a number of the series of acts enumerated by the statute in each of several of the subdivisions of the Criminal Syndicalism Act (St. 1919, p. 281), the commission of any one of which is sufficient to complete the offense under its respective subdivision. For example, section 1 reads: "The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching *or* aiding *or* abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), *or* unlawful acts of force and violence *or* unlawful methods of terrorism as a means of accomplishing a change in industrial ownership *or* control, *or* effecting any political change." (Italics ours.) The most cursory notice of the grammatical construction of this enactment as compared with the one involved in the instant proceeding suffices to convey the obvious contrasts and to show by example that the charges contained in counts of the information before us, other than the conspiracy count, are only of segregated overt acts, each one an entity in itself.

[4, 5] But it is said that in writing the opinion in the case of Oliver v. Superior Court, an enactment of the Legislature must have been overlooked; that this amendment to our Penal Code contains a mandate contrary to that decision. If so, the same conclusion must be reached concerning the case of People v. Koehn, 207 Cal. 605, 279 P. 646, 649. We believe that both cases were properly decided without regard to the provision in question. Our attention is called to the last provision of section 954 of the Penal Code, enacted in 1927 (St. 1927, p. 1042) and prior to the decision of Oliver v. Superior Court, supra. Undoubtedly, the reason that deci-

sion made no reference to this Code section is that it is not applicable. Probably for the same cause this enactment has not been discussed in certain other cases decided by our Supreme Court, where the provision mentioned would have been decisive if it would be in either the present matter or the Oliver Case. In People v. Koehn, supra, the opinion being rendered in 1929, it was held that, where two counts were inconsistent, not as a matter of pleading but as one of evidence adduced at the trial, the defendant must be held to be acquitted on one of the two counts of the indictment. We quote from the opinion: "Returning to the question whether a conviction on both counts of the information may be sustained, we are of the view that the two conclusions are inconsistent with each other and cannot be reconciled by the application of any rule by which the purposes of a rational mind may be determined. * * * The act seems to be devoid of rationality, whatever may have been the end attempted to be attained. From the nature of the case we are unable to perceive upon any theory how the defendant could have intended to commit both of the offenses charged in the information." Here the same is true. The two conclusions are wholly inconsistent. They cannot be reconciled by any rule of rational reasoning. While the provision of section 954 above adverted to has been passed over in certain cases subsequently decided, it may be well to express our view as to why it is not applicable here. If the enactment were to be construed as intended to govern such a case as this, it would not be binding on the courts. As was said in McClure v. Nye, 22 Cal. App. 248, 133 P. 1145, 1147: "Nor is this a case where we are bound by the legislative declaration that these appropriations are for 'the usual and current expenses of the state.' If it appeared that this determination of the Legislature might be a lawful and rational conclusion from facts submitted for the consideration of the legislators, then we would be bound to draw the same inference. But we are not dealing with a question involving a possible conflict of evidence, or one permitting a different rational solution. The facts appear upon the face of the enactment, and the only reasonable conclusion is that such an appropriation is not for the 'usual current expenses of the state.' The said legislative declaration has no greater effect, and is no more binding upon the court, than if the Legislature had declared that a certain measure is or is not constitutional. In such contingency that question would still remain for the courts to determine." In People v. McMurchy, 249 Mich. 147, 228 N. W. 723, 727, it is held that the Legislature may not divest the court of their judicial powers, and that "a statute that takes away a power of the court to direct a verdict is unconstitutional. It is an unwarranted interference with the judicial power by the Legislature. In a criminal case a judge has the power to direct a verdict." The determination that an acquittal is to be deemed an acquittal is a judicial function, not a legislative one. If in a given case, it results from the verdict rendered alone or from that and other matters of record taken together that a defendant has been acquitted, as was the situation in People v. Koehn, supra, the courts and the courts alone may decide and adjudicate that fact and that legal consequence.

There can be no doubt but that the power of determining such questions as the setting aside of a verdict, the directing of a verdict, and the effect of one verdict upon another rendered on several counts of the same indictment, both at common law and in practice in California down to the present time, has been exercised by the courts. In the leading case of Thoe v. Chicago, M. & St. P. R. Co., 181 Wis. 456, 195 N. W. 407, 409, 29 A. L. R. 1280, it was held that, where the Constitution confers judicial power upon the courts any statute forbidding the court to direct a verdict is violative of the Constitution and void. The opinion quotes from Finkelston v. Chicago, etc., Co., 94 Wis. 270, 68 N. W. 1005, as follows: "Then, the motion for a nonsuit or the direction of a verdict requires that disposition of the case, as a matter of right, which implies a judicial duty to grant it. Such disposition by no means trenches on the province of the jury, but is the exercise of a judicial function, essential to the due administration of justice." Continuing, it is declared: "It is clearly evident that the exercise by the court of the authority to make such a determination when properly called upon to do so is of the very essence of judicial power; that is, the power to determine under the law the rights of parties properly before it. Further exposition cannot make it plainer." And further: "If the power to determine the legal sufficiency of the evidence is a judicial power, then the Legislature has exercised that power by determining in every case the legal sufficiency of the evidence to go to the jury. If this does not constitute a clear exercise of judicial power it is difficult to im-

agine a case where the judicial power can be invaded. At the close of the evidence, the statute steps in and performs a function that has been the function of common-law courts from time immemorial. * * * Neither has the Legislature power to declare in advance that the evidence is legally sufficient in every case. It may or it may not be. Whether it is or not is for the court to determine in the exercise of the powers conferred upon it by the Constitution. A motion to direct a verdict calls for the exercise of legal judgment by applying the law to the facts of each case. It cannot be done wholesale by legislative fiat."

In deciding the case of State ex rel. Cartmel v. Ætna Casualty & Surety Co., 84 Fla. 123, 92 So. 871, 873, 24 A. L. R. 1262, the court discussed the scope of judicial power in a similar situation, holding that a verdict rendered may be set aside if in the judgment of the trial court it is contrary to law or the manifest weight of the evidence and the principles of right and justice, and that power of the court is inherent and an implied prerogative. It is said: "What weight a trial court, or an appellate court of general jurisdiction shall give to the verdict of a jury is a judicial matter that cannot be controlled by legislative enactment."

The books contain many instances where laws enacted in attempts to exercise police powers have been held not capable of being sustained on that ground and have been held to constitute infringements of personal or property rights. In all of these, at least by implication, the Legislature had determined that the business attempted to be regulated was so "clothed with a public interest" as to justify the lawmaking department of the government regulating it. In the leading case of People v. Weller, 237 N. Y. 316, 143 N. E. 205, 207, 38 A. L. R. 613, the statute itself expressly so declared. However, as to this issue the court's decision reads: "The declaration of the Legislature that the price or charge for admission is a matter affected with the public interest is not conclusive upon the courts; for the courts must in each case decide whether in fact the public interest justifies an attempted restriction by the state upon the liberty of its citizens. Not the assertion of the Legislature, but only the actual existence of conditions which would justify the exercise of legislative control, must be the basis of a valid exercise of the police power." Not the assertion by the Legislature, regardless of the language used, that an acquittal is not an acquittal, but only the fact itself as shown in each case, can be regarded by the courts. Not the legislative fiat, determining wholesale that in all cases where an indictment or information contains more than one count a verdict of acquittal shall not be deemed or held to be an acquittal of the charge contained in any of the others, but the facts and the record presented to the trial or appellate courts, tested and measured by legal principles interpreted and administered by the judiciary, must in each instance provide the answer. In the instant case, all of the evidence on all of the counts was submitted to the jury. It solemnly returned its verdicts on all except the conspiracy count, giving as its final conclusion that as to the charge contained in each such count defendants were innocent thereof. The offense alleged in each of these counts, stated as an entity, is identical with the allegation of corresponding overt acts related in the conspiracy count; and, when each of said offenses was subtracted from the conspiracy count, it left no overt act to support a verdict of guilty on that count. Legislative enactments cannot make that which is constant, inconstant. They cannot transform a vacuum into substance, nor can they take from the courts their jurisdiction to determine whether in a given case a jury's verdict of acquittal on one count spells acquittal on another count, or subtracts from the structure of that other count a pillar without which it cannot stand. The judicial power "is the power to hear and determine those matters which affect the life, liberty, or property of the citizens of the state." City of Sapulpa v. Land, 101 Okl. 22, 223 P. 640, 644, 35 A. L. R. 872. "The grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant, covering the whole power, subject only to the limitations which the constitutions impose, and to the incidental exceptions before referred to." Cooley's Constitutional Limitations, vol. 1, p. 174. The incidental exceptions mentioned have no application here.

No limitation of the legislative department within its own proper sphere or restraint from passing beyond the border into that of the judicial has ever been declared by the courts except as the exercise of a duty imposed by constitutional sanction and behest, and the preservation of that system of checks and balances within our government which has up until now provided the greatest measure of protection for the lives, property, and liberty of its citizens of any government, pres-

ent or past. The judiciary cannot and must not shirk its responsibility. Respect for law and the law's administrators, the courts, is essential to the security of our American institutions. What underpinning can there be for such respect if the courts declare themselves powerless to set aside verdicts so inconsistent that, as was said by our Supreme Court in the Koehn Case, they "cannot be reconciled by the application of any rule by which the purposes of a rational mind may be determined"? What basis for confidence can there be in a system or a judiciary charged with the protection of the liberty and life of the individual which would fail to act to relieve a citizen of a verdict of guilty of an offense, where the same jury which rendered the verdict upon the same evidence has answered, by another verdict, that he did not commit one or more of the acts legally necessary to render him guilty of the crime of which he has been convicted? Such was the case in People v. Andursky, supra, in Oliver v. Superior Court and in the instant case. Respect for the law cannot be maintained, nor can confidence in courts exist, if the latter, while admitting in cases tried by them that verdicts returned result in gross injustice, are inconsistent to the point of irrationality and in fact demonstrate the innocence of the accused and convicted, refuse relief, and sentence men to incarceration on the pretext that the Legislature has tied their hands in the performance of their judicial functions and their constitutional obligations.

[6] An interesting incongruity occurs in the Legislature's apparent appraisal of the right to property as balanced against those affecting liberty and life. Section 625 of the Code of Civil Procedure safeguards the loss of the former through inconsistent verdicts of a jury with care, precision, and completeness. In addition to a general verdict, special verdicts are provided for to be rendered upon any question of fact allowed by the court. If the general verdict and the special finding are inconsistent, the special finding is made to control. In a personal injury case, where a special finding has been asked on the issue of contributory negligence, a finding that the plaintiff was guilty of such contributory negligence would, of course, overcome a general verdict for the plaintiff. The Legislature has not made this provision in criminal cases, but it is the duty of the court in the exercise of its implied and inherent powers to apply the same principle. By the same theory and the application of the same principles appellate courts unhesitatingly reverse judgments where the findings are hopelessly inconsistent and affect the substantial rights of the appellant. No authority less than the Constitution can take from the judicial department its judicial powers. This has been done in a few instances where by constitutional provision juries are given the decision of law as well as fact in trials for criminal libel and in personal injury suits.

The history of section 954 of the Penal Code reveals that its various changes have principally had to do with making provision for permitting the prosecution to set forth the same offense in different forms under different counts, and the resultant problem of need for an election by the prosecution. Prior to 1872 (St. 1851, p. 238, § 241), the statute allowed the same offense to be charged in different forms in separate counts. The enactment of 1872 (Penal Code 1872, § 954), provided that the indictment could charge but one offense in one count. However, in 1873 (Amendments to the Codes 1873–74, p. 437) the provision again permitted the allegation of the means to be charged in the alternative. In 1905 (St. 1905, p. 772) the Code allowed the statement of the same offense in different counts, and in 1915 (St. 1915, p. 744) an amendment provided that an indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crime or offenses, under separate counts. Also, except for the case of People v. Ranney, 123 Cal. App. 403, 11 P.(2d) 405, in which the court's statement is based on the last sentence of section 954, Penal Code, added in 1927, and to which decision reference will be made, post, during the entire period from 1851 to this time the decisions of our appellate courts have consistently held that the verdict on one count will, if the facts and record warrant it, be regarded as bearing on the guilt or innocence of the accused under other counts of the same information or indictment; that such interdependence exists, having reference to the nature of the charges in the several counts and whether or not they are related, is a matter for judicial determination; nor has the judicial character of such decision ever been questioned in California or elsewhere, as far as our inquiry shows. It has been held that, where two counts of an information charge offenses growing out of and relating to the same transaction, and the jury by an acquittal on one count necessarily must logically find that the defendant

did not commit an act which is an essential element in the offense charged in the other count, a verdict of guilty on the last-named count will be set aside as a nullity. This is the holding in People v. Powell, 50 Cal. App. 436, 195 P. 456, decided in 1920, and citing People v. Piner, 11 Cal. App. 542, 105 P. 780, decided in 1909, and People v. Warriner, 37 Cal. App. 107, 173 P. 489, decided in 1918, and in People v. Andursky, 75 Cal. App. 16, 241 P. 591, rendered in 1925, both of the last two decisions after the amendment of 1915. Also to the same effect is Oliver v. Superior Court, decided in 1928, and People v. Koehn, supra, in 1929, the last two after the amendment of 1927. These authorities and others have continued down to the present time, the only one from whose language an inference that the matter is one for legislative determination may be drawn being People v. Ranney, 123 Cal. App. 403, 11 P.(2d) 405, 406, where it was held without other comment that, since the addition of the last sentence to section 954, "a verdict of either conviction or acquittal" upon the charge in one count "has no effect or bearing upon other separate counts" contained in the indictment or information. However, in so far as the determination of that case was concerned, the decision against the claim of inconsistent verdicts could not have been escaped, regardless of the Code amendment, for there, as stated in the opinion, just as in People v. Edwards, 72 Cal. App. 102, 236 P. 944, and People v. Warriner, supra, the allegations in the separate counts were of separate and distinct offenses not connected with each other. Under such circumstances, all judicial decisions hold, independently of the provisions of section 954 of the Penal Code in question, or other statute, that "each count must stand upon its own merit." As above indicated, under the same circumstances the same ruling was made in People v. Edwards and People v. Warriner, both before the amendment quoted in the Ranney Case.

In reviewing decisions in this jurisdiction, mention should be made that, after the amendment of 1915, which, as above stated, provided that an indictment or information may charge two or more offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, it was observed in People v. Howard, 31 Cal. App. 369, 160 P. 697, 702, that "both in theory and in fact, it is only that particular offense, if any at all, which the evidence discloses that the accused has committed upon which he is to be tried or, in the last analysis, is tried; for, very clearly, he can, in contemplation of law, neither be tried upon, nor convicted under, all the counts." The court was discussing an information in three counts charging three different offenses of the same class. This case is worthy of note as an additional instance indicating the continued judicial treatment of the matter as one within its prerogative, notwithstanding the statutory provision then existing, which declared: "But the defendant may be convicted of any number of the offenses charged."

It is unquestionably the function and the duty of the courts to prevent, by such appropriate action as the case may require, one tried for crime from being convicted and punished twice for the same offense, or from being punished for an alleged offense as to some essential element of which a jury has declared him to be innocent. In People v. Powell, People v. Andursky, Oliver v. Superior Court, and People v. Koehn, supra, the courts acted judicially and without drawing on any statutory authority in declaring that in the respective cases convictions could not be maintained where the inherent rights of defendants would be invaded and violated thereby. Courts may not forget that, while society is endangered by the escape of criminals from the penalties prescribed by the law for those who commit public offenses, and is protected by their punishment, the ill consequences of the innocent being unjustly convicted and branded as felons has always been recognized by states advanced in civilization as entailing so much more disastrous results against the solidarity and security of government itself that evidence of guilt by proof greater than a preponderance of evidence has been almost universally required; and under the common law the degree of such proof demanded has been fixed as a degree beyond reasonable doubt. Our decisions have repeatedly declared it to be the duty of the trial judge to set aside a verdict of guilty if he entertains a reasonable doubt of the defendant's guilt. People v. Lepkojes, 48 Cal. App. 654, 192 P. 160; People v. Knutte, 111 Cal. 453, 44 P. 166. Zeal in prosecuting crime sometimes leads those charged with that duty to press beyond that impartial fairness which the law and the public interest require of all public servants in seeking convictions, and so to use, as weapons in their battle against crime, laws not intended to be applied as they may then be. Our Legislature has seen fit, and without doubt wise-

ly, to make conspiracy a felony in itself, using care to keep its definition consistent with general criminal law principles by making necessary an overt act to complete the offense. But surely it was never intended to be employed as a dragnet to accumulate a mass of flotsam and jetsam of suspicion which may incubate guesses from whose infinity and confusion the mind of the jury might conclude some inculpatory fact exists, whether the one charged or some other, on the theory, perhaps, of the adage that, where there is much smoke, there must be some fire. However, the verdicts in Oliver v. Superior Court and the instant case can be explained only on this hypothesis, or that the jury failed through misunderstanding to follow the law which it must be presumed was properly given it by the court. The acquittal of these petitioners on all twelve counts, charging in each instance a single offense as an entity, which, taken together, includes every overt act charged in the conspiracy count, leaves the verdict of guilty of conspiracy one which could not have been arrived at through any process of rationalization.

[7, 8] It seems probable that the provision of section 954 here under consideration was intended to be declaratory in its nature. If so, and if the Legislature only meant thereby to put an end to any doubt that might exist as to the effect of certain other provisions of that section of the Code, it is efficacious to that extent and a proper exercise of legislative power. It is to be presumed that it was enacted with such intent that it can be sustained and applied; we must assume that the Legislature realized the constitutional limitations upon its authority and did not mean to invade the province of another and independent department of government. As a declaratory statute whose purpose is to state the common law as already recognized by court decisions, in which class a large proportion of our Code sections are, it is most useful and appropriate. People v. Edwards, supra, was a case where a conviction was sustained on one count, although on two other counts of the same indictment the jury had acquitted. The prosecution proceeded under that provision of section 954 which says: "An indictment * * * may charge * * * two or more different offenses of the same class of crimes or offenses under separate counts." This decision was rendered before the amendment adding the last sentence. In effect it held exactly what that sentence states to be the law. The prosecution in People v. Ranney was under the same provision of section 954, Penal Code, as People v. Edwards. We quote from the opinion in the Ranney Case: "Each count contained in the indictment was based upon allegations of separate and distinct appropriations of funds." It cited the last sentence of section 954. It might with equal finality have cited People v. Edwards and cases there cited, all of which in the exercise of the judicial power ruled in the same way. Other California cases might be mentioned upholding the conviction of defendants under informations or indictments charging "two or more different offenses connected together in their commission" and "different statements of the same offense," where a conviction was had on one count and an acquittal on one or more counts.

[9] Viewed as a declaratory enactment, the Legislature's statement of the law to be that "a verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count" means no more than that an acquittal on one count shall in no case preclude a proper and judicial consideration by the courts of the entire record before them and of all elements, including the verdict of acquittal, appropriate for the exercise of their constitutional judicial function of "applying the law to the facts" and "protecting the rights of the citizen to life and liberty"; and this interpretation is quite consistent with the other provision of section 954, supra, that "the defendant may be convicted of any number of the offenses charged."

[10] The point is made by respondent that in no event is habeas corpus an appropriate remedy for these petitioners. When the verdicts of the jury are all considered, the result reached is an acquittal of defendants on all counts, including the one charging conspiracy. Oliver v. Superior Court, supra. The judgment and sentence is therefore as clearly void as though a sentence had been pronounced by the court on the verdict of not guilty rendered on any one of the other twelve counts. Such a judgment would, of course, be a nullity; and so, also, is this judgment void and beyond the jurisdiction of the court.

Petitioners are discharged from custody.

DESMOND, Justice.

I concur. As stated in People v. Johnson, 22 Cal. App. 362, at page 365, 134 P. 339, 341:

"To sustain a conviction of criminal conspiracy, it was necessary *to allege and prove* not only the making of the conspiracy, but *the commission of some act* to effect the object

thereof." (Italics mine.) This information, in the last thirteen of the fourteen counts, sets up thirteen separate acts, charging each of them as a separate criminal offense; namely, violation of the Corporate Securities Act. The defendants were each found not guilty on all thirteen counts. In other words, the jury found that neither of them committed any of the acts. These are the very acts alleged as overt acts in count I, charging conspiracy, and identified as the same by comparison of dates and persons named; also by the phrase in each of the last thirteen counts, "being a different offense from but connected in its commission with the charge set forth in Count I hereof." We can only conclude from the foregoing that, when the jury found these petitioners guilty of conspiracy, they based their finding not upon proof of any of the overt acts alleged (for of those acts they were specifically found not guilty), and a conviction of conspiracy cannot be had without proof of at least one of the overt acts charged. "It has already been noted that the prosecution was required to allege and prove the overt act or acts, and the jury were not to be permitted * * * to cull from the evidence proof of some act other than those charged, and conclude therefrom that the crime was properly made out." People v. Johnson, supra.

STEPHENS, Presiding Justice.

I dissent. My views of this case are so different from those of my associates and the principles involved are of such importance that I deem it appropriate to express my views in the form of an opinion.

Petitioners were convicted of the offense of conspiracy to violate certain provisions of the Corporate Securities Act and acquitted of thirteen alleged violations of that act. In order to understand the issues of the case, it will be necessary to explain and partially quote the grand jury indictment. Count 1 charged that the petitioners, with others, did "feloniously and knowingly combine, conspire and agree together that they would knowingly *issue* and *sell* and cause to be issued and sold, shares of the capital stock of Master Holding Corporation * * * for a consideration other than the consideration mentioned in the provisions of and in nonconformity with, and with intent to violate the terms of 'a legally issued permit of the Commissioner of Corporations.'" Then follows as an allegation of overt acts language to the effect that such persons, including petitioners, did "issue and sell and cause to be issued and sold, shares of the capital stock of Master Holding Corporation" to certain named persons in violation of the referred to permit. In like manner there is alleged in the indictment thirteen instances of the same sort of overt acts. The other counts of the indictment charge violation of the Corporate Securities Act, and merely copy each instance of the alleged overt acts as set out in count 1. The indictment of each of these counts opens with the following language: "For a further and separate cause of action, being a different offense from, but connected in its commission with, the charge set forth in count 1 hereof," etc. In other words, the conspiracy charge sets out thirteen different times that petitioners did issue, sell, cause to be issued and caused to be sold, shares contrary to the terms of the permit. Then the allegations of what happened at these thirteen separate transactions are separated and each separate transaction is alleged as a count in violation of the Corporate Securities Act.

The jury acquitted petitioners of every count in violation of the Corporate Securities Act and convicted them of the one count of conspiracy to violate that act. It is claimed by petitioners that under the terms of the indictment they could not be convicted of conspiracy when they were not guilty of violation of the Corporate Securities Act.

The petition should be denied. In the first place, no authority need be cited to the proposition that jurisdiction alone is put in issue by habeas corpus. Even though it be herein admitted that the verdict of acquittal in the counts alleging violation of the Corporate Securities Act and the conviction on the count alleging conspiracy are inconsistent (and it is not so admitted), it does not seem to me that the jurisdiction of the jury or the court is affected. Even on direct appeal, which throws every possible legal question open, the weight of authority in California and the United States courts is that inconsistent verdicts returned by the same jury simultaneously are not therefore invalid. As concisely stated under point 5 in the opinion in People v. Smith, 117 Cal. App. 530, 4 P.(2d) 268, 269: "The record before us so clearly establishes the guilt of appellants on all the charges of which the jury found them guilty, that we are not disposed to grant them relief because the jury failed to convict them of the commission of the other crimes which the evidence as clearly established. They had the benefit of the jury's compassion, rather than suffering a burden because of its pas-

sion, as they claim. If error was committed, it was in appellants' favor and of this they cannot complain." Non constat but that this very situation would appear upon a direct appeal of the instant case. People v. Day, 199 Cal. 78, at pages 83 et seq. under points 2 to 6, inclusive, 248 P. 250; People v. Ranney, 123 Cal. App. 403, point 1, 11 P.(2d) 405; People v. Edwards, 72 Cal. App. 102, point 18, 236 P. 944; People v. McCollum, 116 Cal. App. 55, point 1, 2 P.(2d) 432; Dunn v. United States, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356, 80 A. L. R. 161.

But in my opinion the verdicts are not inconsistent. The finding of the jury that the offense of violation of the Corporate Securities Act was not committed is not a finding that no element of such an offense was present in the proof. In Oliver v. Superior Court, 92 Cal. App. 94, 267 P. 764, 765, upon which petitioners heavily lean, this exact point is alluded to as follows: "It is important to note the fact * * * that the only overt acts alleged in count 34 [conspiracy] are the specific crimes charged in the other counts; the sole overt acts averred were 'larceny and embezzlement.' The situation is clearly different from that which would have been presented had the conspiracy charge contained allegations of a number of overt acts which, taken together, would constitute grand larceny or embezzlement. Had the indictment been so drafted, it could not be said that an acquittal of grand larceny or embezzlement would necessarily have been a determination that no criminal conspiracy pertaining to the same transactions had occurred. But here the conclusion cannot be escaped that since each crime, considered and described collectively as a *single entity*, is alleged to be an overt act, and as the jury fully acquitted these petitioners of each overt act thus alleged, the portion of the count charging conspiracy remaining unadjudicated is insufficient to constitute criminal conspiracy." In the instant case violation of the Corporate Securities Act, the crime other than conspiracy alleged, is not set up as a "single entity," but instead it is alleged by setting up "a number of overt acts" which, taken together, would constitute a violation of the Corporate Securities Act. It is alleged that petitioners did *issue* and did *sell* shares of stock. The crime of violation of the Corporate Securities Act requires both of these facts, but conspiracy requires but one. It is also alleged that petitioners did cause to be issued and did cause to be sold shares of stock, and the conclusion follows that is immediately above pointed out. No clearer authority could be written than the Oliver Case, supra, to sustain the premise here taken.

The converse of the Oliver Case, but based upon the same principle, is the case of People v. MacMullen, 218 Cal. 655, 24 P.(2d) 793. In that case three persons were indicted for the crime of conspiring to steal $500, and it is therein alleged, as the overt act in the conspiracy, that the money was actually stolen. After the jury had been impaneled to try the case, the charge was dismissed without the consent of one of the defendants. Subsequently thereto this person was indicted for grand theft in taking the identical $500, and she pleaded not guilty, once in jeopardy and former acquittal. She was found guilty, and the verdict was against her on the special pleas. It was contended on appeal that the dismissal of the conspiracy charge in the circumstances operated as an acquittal of the overt act, and that the overt act was the act alleged to constitute the grand theft charge. But the Supreme Court was not in agreement with this theory, and cited many cases to the contrary. The basis of the reason of these cases is the very basis for one of the reasons why the writ should be discharged in the instant proceeding, viz., it may well be that the defendant MacMullen stole the money but was not guilty of conspiracy because she did not conspire with others to do it. In the instant proceeding it may well be that the jury, in considering the violation of the Corporate Securities Act, found that the facts proved fell short of establishing an accomplished violation, but that they did establish a conspiracy to so violate the act but got no further, for example, than the issuance of the certificates of stock that were to be sold contrary to the permit to sell stock. Here there is no inconsistency in the verdicts. Here are facts plainly sufficient to constitute overt acts in conspiring to violate the Corporate Securities Act. The quotation from the Oliver Case plainly shows that the premise of the decision as expressed in the opinion is that the alleged overt act and the substantive crime alleged were the same inseparable act, "a single entity."

It is interesting to note that section 954 of the Penal Code as amended May 12, 1927 (St. 1927, p. 1042), was effective when the opinion in the Oliver Case was written, but that it is not referred to therein. The amendment reads: "A verdict of acquittal of one or more counts shall not be deemed or held

to be an acquittal of any other count." This amendment is effective in the instant proceeding, and its constitutionality can hardly be questioned after the use of the language under point 1 in the opinion in People v. Ranney, supra.

Petitioners also claim that they should be dismissed from custody because (a) they were not brought to trial within 60 days after the disagreement of the jury, causing a mistrial prior to the trial in which conviction was had, citing section 1382 of the Penal Code; (b) that the trial was not set within 30 days from the indictment, according to section 1050 of the Penal Code; and (c) that they were not given a speedy trial as guaranteed by section 13 of article 1, of the Constitution. I shall consider these questions in the order of their statement.

(a) Under the doctrine expressed in In re Alpine, 203 Cal. 731, 265 P. 947, 58 A. L. R. 1500, habeas corpus is not available in the instant case. That case holds that, inasmuch as section 1382 of the Penal Code provides a speedy remedy at law for its own effectiveness, to wit, a direct motion for the dismissal of the cause where the defendant has not been brought to trial within 60 days from the date of the indictment or the filing of the information, the writ of habeas corpus may not be used to effect a dismissal. Should the motion be denied, the use of the writ of mandate is available.

(b) Section 1050 of the Penal Code has been held to be directory and does not provide for dismissal for noncompliance with its provisions. Ray v. Superior Court, 208 Cal. 357, 281 P. 391. There was a mistrial in the instant case, and thereafter several continuances were had before the case went to trial again, and, except for a continuance of five days before the second attempted trial, each continuance was specifically consented to by petitioners, or by their silence they are conclusively presumed to have given their assent thereto. Ray v. Superior Court, supra, and cited cases. The point that failure to object to a continuance amounts to consent thereto may well be considered, should petitioners consider the use of the motion and the writ of mandate.

(c) The circumstances set out under (b) conclusively negative the claim that petitioners have not been accorded a speedy trial under the guarantee of the Constitution.

The writ should be discharged and the petitioners remanded.

1 Cal.App.2d 151

POZZOBON v. O'DONNELL et al.

Civ. 8715.

District Court of Appeal, First District, Division 1, California.

Sept. 28, 1934.

1. Appeal and error ⇐882(12)

Where defendants had not affirmatively pleaded contributory negligence of plaintiff as defense, but alleged in cross-complaint that collision was result of plaintiff's negligence, and one of defendants affirmatively alleged it as special defense in answer, instruction on contributory negligence *held* not ground for complaint by defendants.

2. Damages ⇐131(1)

$1,500 award, where plaintiff had suffered slight concussion, fracture of second rib, bruises about shoulder, and had lost 75 days' work at $8 per day, *held* not excessive.

3. Automobiles ⇐242(6), 244(26)

Deduction of agency or permissive use which jury may make in absence of evidence to contrary from proof of ownership of automobile by one person and its use by another is an "inference" and not a "presumption," and jury may draw such inference, but it is not bound to do so.

[Ed. Note.—For other definitions of "Inference" and "Presumption," see Words & Phrases.]

4. New trial ⇐39

Use of words "presumption" and "presume" instead of "inference" and "infer" in instruction that law presumes person operating automobile is doing so as agent of owner, and that such presumption amounts to evidence of that fact, *held* to authorize new trial, where jury, contrary to evidence that deliveryman was using automobile causing injuries for personal pleasure, found owner liable (Civ. Code, § 1714¼).

5. Appeal and error ⇐978(1)

Where trial court grants new trial on ground that erroneous instruction has operated prejudicially, its conclusion will not be disturbed, unless it appears that it has abused its discretion.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by Celeste Pozzobon against John O'Donnell and Walter G. Bray, doing business under the name and style of the Walter G. Bray Company. Judgment for plaintiff, and, from an order granting defendants a new trial, plaintiff appeals.

Order granting new trial as to Walter G. Bray, doing business under the name and style of the Walter G. Bray Company, affirmed, and as to John O'Donnell, reversed.

Henri Burkard, of San Francisco, Edmund Scott, of Redwood City, and Albert Picard, of San Francisco, for appellant.

Gus L. Baraty, of San Francisco, for respondents.

KNIGHT, Justice.

Plaintiff was awarded $1500 damages by a jury, and judgment was entered accordingly. Subsequently the trial court granted a new trial on the ground of errors of law. From the order made in that behalf plaintiff appeals. The action arose out of an automobile collision which occurred on Christmas Day at an intersection of two streets in San Mateo, between a Ford passenger automobile owned, driven, and occupied by plaintiff, and a Chevrolet delivery wagon owned by the defendant Bray, driven by his employee, the defendant O'Donnell, and occupied by O'Donnell and his wife. Both automobiles were more or less wrecked, and their occupants sustained personal injuries.

The defendants answered separately, and each filed a cross-complaint for damages, alleging that the collision was proximately caused by plaintiff's negligence. O'Donnell's answer set up a special defense to the same effect. Bray alleged by way of special defense that on the day of the accident O'Donnell was driving and operating said delivery wagon without his knowledge, permission, or consent, not in furtherance of his business nor for or on his behalf. The evidence adduced in support of Bray's special defense shows that he was engaged in a mercantile business in San Francisco and O'Donnell was in his employ as sales and delivery man. Both lived in San Francisco. O'Donnell carried on his employment with the aid of said delivery wagon. When not in use, it was kept in a garage belonging to Bray in a section of the city other than that in which he lived. O'Donnell had access to the garage and carried the keys to the delivery wagon. Christmas, being a holiday, was O'Donnell's day off. Nevertheless, without obtaining permission from Bray, he took the delivery wagon from the garage, drove it to his home to get his wife, and they then proceeded to drive to San Mateo, intending to eat their Christmas dinner there; but before reaching their destination the accident happened.

On this appeal defendants join in one set of briefs, and, in support of the order granting the new trial, contend, first, that the trial court erred in giving certain instructions (a) on the presumption of agency, (b) on contributory negligence, (c) on imputable negligence as declared in section 1714¼ of the Civil Code, (d) on questions of fact; second, that a nonsuit should have been granted as to Bray; third, that there was no evidence of agency connecting Bray with the operation of the delivery automobile at the time of the collision; and, fourth, that the amount of damages awarded was excessive.

[1] We are of the opinion that the trial court was justified in granting a new trial as to Bray, but not as to O'Donnell. As will be noted, only two of the foregoing assignments of error affect O'Donnell, namely, that the trial court erroneously instructed the jury on the subject of contributory negligence, and that the amount of damages awarded is excessive. As to the first, no complaint whatever is made as to the correctness of the statement of the legal principles embodied in said instructions, but it is contended that, inasmuch as neither defendant affirmatively pleaded *contributory* negligence as a defense, it was error to give any instructions upon that subject. As already stated, however, it was affirmatively alleged by O'Donnell as a special defense in his answer and by both defendants in their cross-complaints that plaintiff was negligent in the operation of his automobile, and that such negligence was the proximate cause of the collision. Therefore, inasmuch as defendants themselves brought the issue of plaintiff's negligence into the case, the court was fully warranted in giving to the jury the legal principles to be applied by it in determining the merits of the case in the event it found that plaintiff's negligence was established by the evidence. Moreover, it would appear that defendants are not in a position to complain of the giving of such instructions because, even conceding they were improperly given, the detrimental effect thereof operated against plaintiff, rather than against defendants.

[2] As to the question of damages, the evidence shows that plaintiff was a cement worker and earned $8 a day; that as a result of the accident he suffered a slight concussion of the brain, his left second rib was fractured, and he was bruised about the left shoulder. He was confined 2 days in the hospital and lost 75 days' work; his total special damage for loss of earnings, cost of medical treatment, hospitalization, and damage to his automobile amounted to approximately $816; and at the time of trial, which took place

about 16 months after the accident, he had not completely recovered from the effects of the injuries he received. Taking into consideration also the element of pain suffered by him as a result of said injuries, it cannot be fairly said that the award of $1,500 was so disproportionate as to justify the conclusion that the verdict was given under the influence of passion or prejudice.

Therefore, since no error in the trial of the action against O'Donnell has been shown, the order granting a new trial as to him cannot be sustained.

[3-5] Aside from the questions of negligence and damages, however, the case against Bray, as owner of the delivery wagon and as O'Donnell's employer, stands on a different footing, and must be governed by different legal principles. In this regard section 1714¼ of the Civil Code provides that every owner of a motor vehicle shall be liable and responsible for injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, provided that the liability of an owner for imputed negligence imposed by said section and not arising through the relationship of principal and agent or master and servant shall be limited to the amount of damages specified in said Code section. Among the other instructions given by the court in the present case was the following: "I instruct you that the answer of the defendant Walter G. Bray doing business under the firm name and style of Walter G. Bray Co., alleges that on December 25, 1930, the date of the accident here in question, said Walter G. Bray was the owner of the Chevrolet delivery automobile which was involved in the accident of the plaintiff in this case. I further instruct you that the law *presumes* that the person operating an automobile is doing so as the agent of the owner, and that this *presumption* amounts to evidence of that fact. I therefore instruct you that unless evidence has been introduced in this case which convinces you that the defendant John O'Donnell was not operating the automobile at the time of the accident as the agent of the defendant Walter G. Bray, the *presumption* that he was so operating said automobile as the agent of said defendant Bray stands as evidence of that fact, until the contrary is shown." (Italics ours.)

Such an instruction is erroneous. Fahey v. Madden, 56 Cal. App. 593, 206 P. 128; Kruse v. White Brothers, 81 Cal. App. 86, 253 P. 178. As pointed out in the above cases and in those cited therein, the deduction of agency or permissive use which a jury may make in the absence of evidence to the contrary from proof of ownership of an automobile by one person and its use by another is an inference and not a presumption. See, also, memorandum opinions of Supreme Court in denying hearing in Maupin v. Solomon, 41 Cal. App. 323, 326, 183 P. 198, and McWhirter v. Fuller, 35 Cal. App. 288, 292, 170 P. 417. As further pointed out, the jury under such circumstances may draw such an inference, but it is not bound to do so; that therefore an instruction embodying the words "presumption" and "presume" instead of the words "inference" and "infer" is erroneous. (Kruse v. White Brothers, supra; Albert v. McKay & Co., 53 Cal. App. 325, 200 P. 83); and, if the effect thereof be prejudicial, the giving of such an instruction serves as grounds for new trial (Fahey v. Madden, supra) or reversal (Albert v. McKay & Co., supra; Kruse v. White Brothers, supra). Furthermore, it is well settled that, in determining whether the giving of an erroneous instruction has operated prejudicially, much is committed to the discretion of the trial court, and that, where the trial court grants a new trial on that ground, its conclusion will not be disturbed, unless it appears that its discretion has been abused. Sheets v. Southern Pacific Co., 212 Cal. 509, 299 P. 71; Pope v. Wenisch, 109 Cal. App. 608, 293 P. 622; Montgomery v. Globe Grain & Mill. Co., 109 Cal. App. 695, 293 P. 856; Thompson v. California Construction Co., 148 Cal. 35, 82 P. 367; Associated Fruit Co. v. Marone, 68 Cal. App. 358, 229 P. 868. In the present case, both O'Donnell and Bray testified that on the day of the accident the delivery wagon was not being used in furtherance of Bray's business, nor in his interests, but that O'Donnell was using the same for his own personal pleasure and without the permission or knowledge of Bray. There was no testimony given to the contrary. Nevertheless, the jury found that Bray also was liable for the damage resulting from the collision. In that state of the record we are not prepared to hold that the trial court abused its discretion in determining that the giving of the erroneous instruction operated prejudicially against Bray.

The giving of the other two instructions about which respondent complains was, in our opinion, not error; and the conclusion we have reached that the trial court was justified in granting Bray a new trial on account of having given the erroneous instruction

above discussed renders the remaining points urged by respondent in support of the trial court's order unimportant.

For the reasons stated, the order granting a new trial as to Bray is affirmed, and as to O'Donnell, it is reversed.

We concur: TYLER, P. J.; CASHIN, J.

1 Cal.App.2d 58

PEOPLE v. FLORES.
Cr. 266.

District Court of Appeal, Fourth District, California.

Sept. 24, 1934.

1. **Criminal law** ⇐1144(17)
In absence of proof to contrary, it must be assumed that defendant was legally committed.

2. **Statutes** ⇐105(1)
Constitutional provision relating to titles of acts should be liberally construed (Const. art. 4, § 24).

3. **Statutes** ⇐109
Title of an act need not set forth all details of the act nor serve as a complete catalogue of its contents (Const. art. 4, § 24).

4. **Statutes** ⇐124(4)
Statute increasing number of justices *held* not invalid for failure of title to express contents, where title purported to amend specified section and to repeal another section of Political Code relating to salaries, fees, and expenses of officers in counties of the fourth class (Pol. Code, § 4233, as amended by St. 1931, p. 1007; Const. art. 4, § 24).

5. **Homicide** ⇐253(1)
Evidence sustained conviction for first-degree murder, as against claim offense was manslaughter only.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Guadalupe M. Flores was convicted of murder in the first degree, and he appeals.

Affirmed.

Davies & Wallace, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with having murdered one Julio Contreras in the city of Oceanside, on December 16, 1933. On the evening of that day the defendant met a friend with whom he had several drinks of beer and whisky. Some time after 11 o'clock that night the two entered a pool hall where the defendant purchased a glass of beer for himself and one for his companion. An argument of some kind took place in the pool hall between the defendant and Julio Contreras, during which the latter accused the defendant of being "cheap" because he did not offer to treat him and his party. About 12 o'clock the pool hall closed and the deceased and his party left, followed almost immediately by the defendant and his companion. Shortly thereafter the defendant stabbed Contreras with a knife, inflicting a wound which later caused his death. A jury found him guilty of murder in the first degree, recommending life imprisonment. From the judgment and from an order denying a motion for a new trial, this appeal is taken.

The first point raised is that the court erred in denying a motion to set aside the information. This is based upon the contention that the justice's court in which the preliminary examination of the appellant was held had no legal existence. In support thereof it is stated that this justice's court was created in 1931, and it is then argued that chapter 458 of the Statutes of 1931, purporting to amend section 4233 of the Political Code, and providing, among other things, for an increase in the number of justices of the peace in the township of which the city of San Diego is a part, is unconstitutional and void since it contains matter which is not expressed in its title, in violation of section 24 of article 4 of the state Constitution. The title of the amendatory act referred to reads as follows: "An act to amend section 4233 and to repeal section 4233a of the Political Code, relating to the salaries, fees and expenses of officers in counties of the fourth class." St. 1931, p. 1007. It is argued that since this title makes no mention of increasing the number of justices' courts in this township, that portion of the amendment is void and, consequently, no preliminary examination of this appellant was had.

[1] It may first be observed that nothing appears in the record to show who was the

committing magistrate or in what justice court the preliminary examination was held, and it may not be assumed that the appellant was illegally committed in the absence of any proof. People v. Williams, 84 Cal. 616, 24 P. 145; People v. Ramirez (Cal. App.) 33 P.(2d) 848.

[2-4] Considering the matter on its merits, we think section 4233 of the Political Code, as amended in 1931, is not open to the objection here made. It is well settled that the constitutional requirement referred to should be liberally construed and that the title of an act need neither set forth all details of the act nor serve as a complete catalog of its contents. In the case of In re Bear, 216 Cal. 536, 15 P.(2d) 489, 491, 83 A. L. R. 1402, the court said: "We have had occasion to point out in an increasing number of decisions that a liberal rule should prevail in the interpretation of the constitutional requirement of a descriptive title, and that nothing more is required than a reasonably intelligent reference to the subject of the legislation. '* * * The title of an act need not embrace an abstract or catalogue of its contents, but need only contain a reasonable intimation of the matters under legislative consideration. * * * The general subject need not appear in the title, if it is clearly disclosed or readily inferred from the details expressed.' Heron v. Riley, 209 Cal. 507, 510, 511, 289 P. 160, 161. * * *"

It has frequently been held that the title of an amendatory act is sufficient when it sets forth the fact that the same is an act to amend a particular section of one of the codes. People v. Parvin, 74 Cal. 549, 16 P. 490; Beach v. Von Detten, 139 Cal. 462, 73 P. 187; People v. Oates, 142 Cal. 12, 75 P. 337; Estate of Elliott, 165 Cal. 339, 132 P. 439; People v. Rambaud, 78 Cal. App. 685, 248 P. 954. The appellant concedes this general rule but insists that the act here in question cannot come within this rule because, after naming the code section to be amended, the title thereof adds the following: "relating to the salaries, fees and expenses of officers in counties of the fourth class." In Estate of Elliott, 165 Cal. 339, 132 P. 439, 441, the court said: "The addition of further descriptive words cannot vitiate this sufficient title, unless such further words indicate a subject not really related to the matters covered by the body of the bill."

Section 4233 of the Political Code, as adopted in 1907 (Stats. 1907, p. 354), is a part of an act entitled as follows: "An act to repeal Title II of Part IV of the Political Code, and to add a new Title II of Part IV of said code in place thereof, relating to the establishment of a uniform system of county and township governments." As a part of an act thus properly entitled, section 4233 was legally adopted. Aside from the general title of the act of which section 4233 was a part, this particular section was given in that act certain subtitles referring to salaries and fees of officers in counties of the fourth class. While these subtitles referred to salaries and fees, this was a matter apart from and in addition to the general title of the act of which the section was a part, the subtitles apparently being added for convenience. And section 4233, as then adopted, like many other sections of the same act applying to counties of other classes, contained many things besides the matters of fixing salaries and fees. For example, it fixed the number of deputies in the various county offices and also, among other things, fixed the number of justices of the peace in different sized townships in counties of the fourth class.

Not only do we think the general rules laid down by the authorities above quoted require a holding that the title to the amendment here in question is sufficient, but the very definite reference in the title of the amendatory act to the precise section to be amended leads inevitably to the same conclusion. The title to the 1931 amendment not only refers to the specific section of the Political Code but goes on to refer to the subtitle which was used in the original act as an additional title for that particular section. The further descriptive words "relating to the salaries, fees and expenses," etc., not only relate to the matter in that portion of the body of the bill, but they are particularly germane and applicable to the section to be amended since they refer, in almost identical language, to the subtitle used in that section as originally adopted and as placed in the Code. It is difficult to see how a Code section could be more completely referred to and described than by referring to it by its designated Code section number, and by adding the subtitle given to it in that Code. Any one interested was thus definitely told exactly what Code section was sought to be amended, and a reading of that section and of the act of which it was a part, with the title thereof, would plainly disclose that this particular section plainly covered other matters besides "fees and expenses," in the strict sense of those words. We think these further descriptive words do not indicate a subject not really related to the matters covered by the body of the bill and, further, that they do very definitely indicate and refer to the exact contents of the section which was

being amended. It follows that the first point raised is without merit.

[5] The only other point requiring consideration is that the evidence is insufficient to sustain the verdict of the jury. It is argued that the evidence fails to show that the killing was willful, deliberate, and premeditated and that it must be held, as a matter of law, that the evidence establishes merely the crime of manslaughter. In support of this contention the appellant relies upon the testimony of two witnesses, Miguel Gomez and Alexander De Larosas, who testified that immediately after they left the pool hall Contreras struck the appellant on the back of the neck and on the shoulders; that he pushed the appellant backwards for some 40 feet; that the appellant continued to retreat and Contreras continued to try to hit him with his fist; that suddenly Contreras stopped; that when the witnesses came up the appellant, who was standing 8 or 10 feet away with a knife in his hand, said to them, "If you fellows want anything too, I have got enough for you here"; that they observed that Contreras was bleeding and caught him to keep him from falling; and that the defendant immediately left the scene.

An officer testified that he was standing about 275 feet away and saw these men come out from the pool hall. He testified: "I saw them come out and push one another and kind of spar around, and then they would quit and talk and walk together, and finally I saw one of the taller ones strike at the other taller one, I saw his body droop and saw the other two catch hold of him." He further testified that while he saw some pushing and scuffling around he did not see any blows struck prior to the one which killed the deceased; that the man who struck the deceased ran up the street; that he immediately went to the spot where the striking occurred; and that at that time Gomez and De Larosas told him that they found Contreras wounded there when they came out of the pool hall. When the appellant was found at his home he told the officers that he had been in bed since 9 o'clock, that he had not been in the pool hall that night, and that he had not been in a fight with anyone.

In a dying statement, which was admitted in evidence, the deceased fully described his assailant, although he did not know his name, and stated that this man quarreled with him in the pool room over who would pay for some drinks; that shortly after they came out of the pool room this man came up to him and said, "You fellows from the Santa Margarita Ranch feel you are too good to drink with other people, so you take that"; and that after saying this he stabbed him.

The evidence relied upon by the appellant creates a conflict, at best, and the jury may well have refused to accept it as true. It cannot be said, as a matter of law, that the entire evidence establishes the crime of manslaughter only. The question presented was one of fact for the jury and the evidence is sufficient to sustain its finding. People v. Peete, 54 Cal. App. 333, 202 P. 51.

For the reasons given the judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.App.2d 100

KINGSBURY v. WHITACRE et al.

Civ. 8021.

District Court of Appeal, Second District, Division 1, California.

Sept. 26, 1934.

Hearing Denied by Supreme Court Nov. 22, 1934.

1. Appeal and error ⇐173(12)

On appeal from judgment upon note against indorser, defense of release which was not pleaded and which was not presented, nor considered by trial court, would not be considered by reviewing court, since points made for first time on appeal will not be reviewed.

2. Bills and notes ⇐289

Holder of note who, over her signature on back of note, wrote that for value received holder granted and assigned note together with rights accrued or to accrue under deed of trust securing note, and waived presentment, demand, notice, protest, and notice of protest, *held* liable upon note as indorser to assignee's indorsee even if holder's assignment amounted to special indorsement, where assignee's indorsee derived title to note and trust deed through indorsement of holder's assignee (Civ. Code, §§ 3114, 3115, 3119, 3121, 3144, 3147).

Appeal from Superior Court, City and County of Los Angeles; Frank C. Collier, Judge.

Action by Helen Kingsbury against James E. Whitacre and others. From a judgment for plaintiff, Kate Saathoff appeals.

Affirmed.

Wheeler & Wackerbarth, of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

HAHN, Justice pro tem.

Kate Saathoff, one of the defendants in the above-entitled action, which was upon a promissory note bearing her indorsement, alone appeals from a judgment rendered against her and her codefendants, who were the makers of the note.

From the record it appears that on or about January 25, 1927, James E. Whitacre, one of the defendants, executed his promissory note in the sum of $5,200, payable to Harry Jenkins and wife, secured by a trust deed on certain real property. In due course thereafter, the note was indorsed to appellant, who in turn assigned and indorsed the note to one Marjorie E. Wehrly by a writing on the back of the note, which reads as follows:

"Los Angeles, Cal., Dec. 1, 1927.

"For value received, I hereby grant and assign to Marjorie E. Wehrly the within note together with all rights accrued or to accrue under the deed of trust securing the same, so far as the same relate to this note, and waive presentment, demand, notice, protest and notice of protest.

"Kate Saathoff."

Marjorie E. Wehrly later indorsed the note and delivered it with the trust deed to respondent. The property covered by the trust deed was subject to the lien of a prior trust deed, which as a senior lien was foreclosed and the property bid in for the amount of the first lien indebtedness. Whereupon respondent filed suit on the $5,200 note against the original makers and the several subsequent indorsers, alleging in her complaint that the security had been sold to satisfy a senior lien, thus rendering it valueless as a security for the payment of the note sued upon. When the case was called for trial, counsel for appellant made the following statement to the court: "There are only two questions open in this case which we desire to submit to the court, the one is upon the question as to payments made upon said note, concerning which we have no evidence to offer. The other question is as to the effect of the form of endorsement which the defendant Kate Saathoff executed as same appears upon the back of said promissory note. We contend that under that form of endorsement the defendant Kate Saathoff would not be responsible upon said note to the plaintiff."

The question of the payments on the notes was by the court determined in favor of plaintiffs. No point is made on this appeal as to the correctness of the court's ruling on that question. The only other point presented to the trial court for determination was as to the legal effect of the indorsement made by defendant Saathoff.

In her brief upon this appeal, appellant sets forth three contentions as grounds for reversal of the judgment:

"1. Defendant, Saathoff, was not liable to the plaintiff;

"2. The release of the general indorsers, Harry D. Jenkins and Myrtle Pidgeon Jenkins, released the defendant, Saathoff.

"3. By permitting the property securing the payment of said promissory note to be lost, plaintiff discharged the defendant, Saathoff, from liability."

[1] Respondent in reply concedes that the first contention presented by appellant is now properly before this court, but maintains that with no allegations in the pleadings to furnish a foundation for the last two questions submitted by appellant, and the fact that they were not raised before the trial court, these questions cannot be raised for the first time upon appeal. Respondent's contentions as to the second and third points must be sustained. The defense of release, as raised in the last two points stated, is not set up in said defendant's answer, nor does she deny the assertion in respondent's brief that these matters were neither presented to nor considered by the trial court. The rule has long been established in this state that appellate courts will not consider or review points in a case made for the first time on appeal. Richey v. Haley, 138 Cal. 441, 71 P. 499; Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 P. 293, 5 A. L. R. 1193; Sullivan v. Vera, 125 Cal. App. 303, 13 P.(2d) 770.

This leaves for consideration the question involved in point 1, under which appellant makes the contention that her assignment of the note "can only be considered as a special indorsement," and "that the only person who could sue the defendant Saathoff as assignor under an assignment showing an intention to be bound, would be the person to whom she assigned said promissory note by said assignment or special indorsement."

The following sections of our Civil Code dealing with indorsers and indorsements are pertinent to the inquiry here involved:

"§ 3114. *Kinds of indorsement.* An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

"§ 3115. *Special indorsement.* A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."

"§ 3121. *Payable to bearer.* Where an instrument, payable to bearer, is indorsed specially it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

"§ 3144. *Person deemed indorser.* A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

Appellant in her brief does not deny that the language used in her assignment written on the back of the note obligates her as an indorser, but argues that her liability is limited to Marjorie E. Wehrly, to whom she assigned the note. In support of this contention, she cites the sections of the Civil Code hereinbefore quoted. We cannot give assent to the interpretation which appellant places upon these code sections. Section 3115, which defines a "special indorsement," does not place any limitation upon the liability of such indorsement. It does declare that the indorsement of the "special indorsee" is necessary to make the note negotiable, and further provides that a note indorsed in blank may be negotiated by delivery. Section 3121 provides that where an instrument made payable to bearer is specially indorsed, it may still be negotiated by delivery, but only those holders who derive their title through the indorsement of the special indorsee may hold him liable. The note here involved was made payable to Harry D. Jenkins et ux. There is no provision of our Code limiting the liability of a "special indorsement" on an instrument made payable to a third party.

Section 3147 of the Civil Code reads as follows:

"*Liability of general indorser.* Every indorser who indorses without qualification, warrants to all subsequent holders in due course—

"(1) The matters and things mentioned in subdivision one, two and three of the next preceding section; and

"(2) That the instrument is at the time of his indorsement valid and subsisting.

"And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

Section 3119 defines a "qualified indorsement" as follows: "Qualified indorsement. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument."

[2] The language of the assignment executed by appellant does not bring it within the definition of a qualified indorsement. If, then, the assignment does not constitute a qualified indorsement, there would seem to be no escape from the conclusion that appellant would be liable as an indorser under the provisions of section 3147, Civil Code. If, on the other hand, the contention of appellant that section 3121, Civil Code, is applicable, then appellant would still be liable, for it is undisputed that respondent derived her title to the note and trust deed through the indorsement of appellant's indorsee.

Research by counsel has not disclosed any case where the precise question here raised has been considered or decided. In support of her contention appellant quotes a statement from Daniels on Negotiable Instruments as follows: "If the paper be indorsed specially to a particular person, none but such person or his representative can sue." Upon an examination of the cases cited by the author in support of this declaration, it appears that in each case the question of the ownership of the note sued upon was involved and that the most that these cases hold is that where the special indorser is still the owner, or presumed owner of the note, no other person may enforce its payment. Ruling Case Law, in volume 3, p. 1152, declares the rule in conformity with section 3121 of the Civil Code as follows: "But the person indorsing specially is liable

as indorser to only such holders as take title through his indorsement."

Taking into account the various considerations which bear upon the question, we are of the opinion that the weight of authority, as well as the better reasoning, gives support to our conclusion that under the undisputed facts in this case appellant is liable to respondent as an indorser of the note sued upon.

Judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

1 Cal.App.2d 204

TREACY v. SUNRISE LAUNDRY CO. et al.

Civ. 9075.

District Court of Appeal, First District, Division 1, California.

Oct. 1, 1934.

Hearing Denied by Supreme Court Nov. 26, 1934.

1. Automobiles ⊂=244(58)

Evidence sustained finding that pedestrian's injuries were proximately caused by concurrent negligence of pedestrian and of defendant driving automobile (Code Civ. Proc. § 1847).

2. Appeal and error ⊂=843(3)

Whether court erred in admitting testimony to contradict certified copy of certificate stating names of persons doing business under fictitious name will not be determined on appeal, where finding that plaintiff was guilty of contributory negligence was sustained by the evidence (Civ. Code, § 2466).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Thomas Treacy against the Sunrise Laundry Company and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

D. W. Brobst, of Oakland, for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondents.

PER CURIAM.

An action to recover damages for personal injuries alleged to have been caused by defendants' negligence.

Defendants alleged that plaintiff's negligence proximately contributed to his injury, and the trial court found that any injury suffered was the proximate result of the concurrent negligence of plaintiff and defendant Lim Jack. Judgment was entered accordingly, and plaintiff has appealed therefrom.

He contends that the evidence is insufficient to support the above finding, and that the trial court committed prejudicial error by the admission of certain evidence.

Plaintiff was struck by an automobile while crossing Eighth street at its intersection with Campbell street in Oakland. According to the testimony of himself and his witnesses, he was exercising due care, and his injuries were solely due to the negligence of the driver of the automobile. But, according to an eyewitness, the plaintiff and two companions, walking arm in arm, the three being intoxicated and staggering, started to cross Eighth street in a northerly direction; plaintiff's companions were assisting him, and, when about three paces from the southerly curb, they stopped. While in this position, plaintiff was struck by the automobile, which was proceeding east on Eighth street. The witness mentioned, who was walking north along the east side of Campbell street a few feet south of the intersection, testified that he heard the automobile horn and saw the reflection of its lights shortly before the plaintiff was struck, and that the car stopped about twelve feet east of the point of collision. Whether plaintiff looked in the direction from which the automobile was coming before attempting to cross is not clear; there was some testimony that he did, but from the eyewitness' testimony the contrary might be inferred.

[1] Immediately after the accident, plaintiff was taken to a hospital, and the physician who examined him upon his arrival testified that he was then under the influence of liquor. The credibility of witnesses and the weight to be given their testimony were questions for the trial court. Code Civ. Proc. § 1847; 10 Cal. Jur., Evidence, § 375, p. 1159. There was ample evidence to support the conclusion that plaintiff's injury was the proximate result of his own want of ordinary care.

[2] Plaintiff offered in evidence a certified copy of a certificate filed pursuant to section 2466 of the Civil Code, stating the names of the persons doing business under the name of Sunset Laundry Company. Testimony that the persons named were not in partnership notwithstanding the certificate so stated

was admitted over objection. Plaintiff contends that this was error; but, in view of our conclusion that the evidence sustains the finding that he was guilty of contributory negligence, it will be unnecessary to consider this question.

The judgment is affirmed.

1 Cal.App.2d 7

DE BRINCAT v. MOGAN, Superior Judge, et al.

Civ. 9547.

District Court of Appeal, First District, Division 2, California.

Sept. 21, 1934.

1. Process ⇐68

Jurisdiction acquired by court through service of summons and complaint in action relates back to filing of complaint (Code. Civ. Proc. § 416).

2. Courts ⇐475(1)

Where both parties to collision instituted actions for damages in superior court but in different counties, each court had jurisdiction of controversy upon service of process in each action prior to making of motion by opponent to stay proceedings in such action (Code Civ. Proc. §§ 395, 416).

3. Courts ⇐475(1)

Where both parties to collision instituted actions for damages, court in which process was first served had jurisdiction over whole litigation, although complaint had not been first filed in that court (Code Civ. Proc. §§ 395, 416).

4. Mandamus ⇐7

Writ of mandamus is ordinarily one of discretion, and does not issue as matter of absolute right when not necessary to prevent injustice to parties.

5. Mandamus ⇐31

Where both parties to collision instituted actions for damages, writ of mandamus to stay proceedings in one court on ground that jurisdiction had first been acquired by second court which had concurrent jurisdiction, by service of process first in action brought in that court, was refused where controversy could be determined in first court without prejudice to either side (Code Civ. Proc. §§ 395, 416).

6. Courts ⇐476

Where both parties to collision instituted actions for damages, until court in which process was first served assumed full jurisdiction, court of concurrent jurisdiction in which second action was brought had jurisdiction to proceed with trial (Code Civ. Proc. §§ 395, 416).

Original proceeding in mandamus by Joseph De Brincat against E. P. Mogan, Judge of the Superior Court of the City and County of San Francisco, and another.

Petition denied, and alternative writ discharged.

John J. Taheny, R. O. Purvis, and Varnum Paul, all of San Francisco, for petitioner.

Hugh K. McKevitt, of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an original proceeding in mandamus. The petitioner and one Whitfield, both residents of the city and county of San Francisco, were involved in a collision in San Mateo county from which both claimed damages. On February 9, 1934, a complaint was filed by Whitfield in the superior court in San Francisco seeking damages from petitioner. On February 13, 1934, petitioner filed a complaint in the superior court in San Mateo county seeking damages from Whitfield. Summons was served in the latter case on the same day. In the former case summons was served on February 17th. Thereafter petitioner applied to the superior court in San Francisco for an order staying proceedings in the Whitfield case on the ground that exclusive jurisdiction rested with the superior court in San Mateo county, since service of process had first been made in the proceeding commenced in that county. This motion was denied, and the petitioner seeks a writ of mandate to stay such proceedings.

After denial of the motion here involved, Whitfield applied to the superior court in San Mateo county for a similar order staying the proceedings pending in that court. This motion was granted, and this is the subject of the second proceeding, against the San Mateo court, and hereafter determined. De Brincat v. Swart, 36 P.(2d) 247.

The concurrent jurisdiction of the two courts in the first instance is conceded. Section 395, Code Civ. Proc. The single question urged by petitioner is whether, as between two courts having concurrent jurisdiction of

the subject-matter of a cause of action in personam, exclusive jurisdiction of the cause attaches to the court in which the service of process was first made or to the court in which the complaint was first filed.

The interest in the question has been roused by the recent decision in Todhunter v. Smith (Cal. Sup.) 28 P.(2d) 916, holding that a collision of this character is a "transaction" within the meaning of section 439 of the Code of Civil Procedure providing that, if a defendant omits to set up a counterclaim upon a cause arising out of the transaction pleaded in the complaint, he cannot afterwards maintain an action against the plaintiff therefor.

The question is one of first impression in this state. Proceedings under the Probate Code are not helpful, because it is there provided that the court in which a petition for letters has first been filed shall have exclusive jurisdiction of the administration of the estate. Section 301, subd. 3. Actions in rem involving specific property or objects are controlled by the rule that exclusive jurisdiction attaches to the court where jurisdiction over the res was first acquired. 15 C. J. p. 1161. But we have found no authority in this state holding which of two courts having concurrent jurisdiction of actions in personam acquires exclusive jurisdiction of the litigation.

[1, 2] By the terms of section 416 of the Code of Civil Procedure, a court is deemed to have acquired jurisdiction of the parties from the time of the service of the summons and a copy of the complaint, and thereafter has "control of all the subsequent proceedings." The jurisdiction thus acquired relates back to the filing of the complaint. Gardiner v. Royer, 167 Cal. 238, 244, 139 P. 75. Process having been served in the action commenced in the San Francisco court before the motion to suspend was made, that court had jurisdiction of the parties at that time; but the court sitting in San Mateo county also had jurisdiction of the same controversy.

[3] Throughout the decisions we find the expression that "the court which first acquires jurisdiction * * * retains its jurisdiction and may dispose of the whole controversy." 15 C. J. p. 1134, and cases cited in note 58; 7 R. C. L. p. 1067. In United States v. Lee (D. C.) 84 F. 626, Judge Wellborn has made an exhaustive review of the authorities involving actions in personam, and concludes that "the unbroken current of authorities is to the effect that priority of jurisdiction is determined by the date of the service of process." See page 631 of 84 F., and cases cited.

Our conclusion is therefore that in actions of this character the court in which process is first served has jurisdiction over the whole litigation and has full power to require the parties to come into that court for a complete adjudication of the controversy.

[4-6] But it does not follow from this that the writ of mandate should issue. This writ is ordinarily one of discretion, and does not issue as a matter of absolute right when not necessary to prevent an injustice to the parties. Gay v. Torrance, 145 Cal. 144, 147, 78 P. 540; Fawkes v. City of Burbank, 188 Cal. 399, 402, 205 P. 675; Williams v. City of Stockton, 195 Cal. 743, 749, 235 P. 986. Here the showing is that both parties reside in San Francisco; that but four days elapsed between the service of process in both cases, and no proceedings detrimental to the petitioner have been taken in either case; and that the entire controversy may be determined in the San Francisco court without prejudice to either side. Hence, though the court in San Mateo county had full power to assume jurisdiction over the whole controversy, we cannot say that, under the circumstances here shown, it abused its discretion in refusing to do so. Conversely, until full jurisdiction was assumed by the San Mateo court, the San Francisco court had jurisdiction to proceed with the trial.

The petition is denied, and the alternative writ is discharged.

We concur: STURTEVANT, J.; SPENCE, J.

1 Cal.App.2d 756

Joseph DE BRINCAT, Petitioner, v. Franklin SWART, Judge of the Superior Court of the State of California, in and for the County of San Mateo, and Albert Whitfield, Respondents.

Civ. 9563.

District Court of Appeal, First District, Division 2, California.

Sept. 21, 1934.

John J. Taheny, R. O. Purvis, and Varnum Paul, all of San Francisco, for petitioner.

Hugh K. McKevitt, of San Francisco, for respondents.

PER CURIAM.

For the reasons given in De Brincat v. Mogan, Judge of Superior Court (Cal. App.) 36 P.(2d) 245, the petition herein is denied and the alternative writ is discharged.

3 Cal.App.2d Supp. 757

C. I. T. CORPORATION, etc., v. BILTMORE GARAGE, etc., et al.

Civ. A.-2534.

Appellate Department, Superior Court, Los Angeles County, California.

Sept. 28, 1934.

1. Automobiles ⇐381

Garage keeper, surrendering possession of automobile daily to purchaser thereof under conditional sale contract, lost by each surrender lien for storage charges previously incurred, and such lien was not revived by purchaser's daily return of automobile to garage (Civ. Code, § 3051).

2. Constitutional law ⇐70(3)

Inconvenience resulting from construction of statute according to its clear meaning cannot justify court in ignoring it, but relief therefrom should be sought from Legislature.

3. Automobiles ⇐378

Garage keeper's lien for automobile repair and storage charges depends on keeper's possession of automobile (Civ. Code, § 3051).

4. Automobiles ⇐378

Mere constructive possession of automobile by garage keeper is insufficient to give lien, dependent on possession of automobile, for repair and storage charges (Civ. Code, § 3051).

5. Automobiles ⇐378

Garage keeper did not have even constructive possession of automobile, on which it claimed lien for storage charges, while in hands of conditional purchaser, to whom keeper daily surrendered possession thereof, as purchaser's agreement that such lien should not be extinguished by voluntary restoration of car to purchaser did not make keeper owner of car nor purchaser keeper's agent to hold it for keeper (Civ. Code, § 3051).

Term "constructive possession" is used to designate relation between property and its owner when not in latter's actual possession.

[Ed. Note.—For other definitions of "Constructive Possession," see Words & Phrases.]

6. Automobiles ⇐378

Statute providing that voluntary restoration of personal property to its owner or holder of lien thereon dependent on possession extinguishes lien, unless parties otherwise agree, and that such agreement is ineffective as to owner's creditors and subsequent bona fide purchasers and incumbrancers, *held* inapplicable to garage keeper's lien for storage charges on automobile surrendered daily to conditional purchaser agreeing that lien should not be extinguished by voluntary restoration of car to him (Civ. Code, §§ 2913, 3051).

7. Statutes ⇐212

Where statute contains express exception, it will be presumed that no further exceptions were intended.

Appeal from Municipal Court of Los Angeles; Hugh J. Crawford, Judge.

Action by the C. I. T. Corporation, etc., against the Biltmore Garage, etc., and another, to recover possession of an automobile. Judgment for defendants, and plaintiff appeals.

Reversed and remanded, with directions.

D. M. Potter and George S. Hupp, both of Los Angeles, for appellant.

Call & Murphey and Walter Bennett, all of Los Angeles, for respondents.

SHAW, Presiding Judge.

This is an action to recover possession of an automobile. Plaintiff is the successor in interest of a seller who made a conditional sale of the automobile to one Ansted. The seller delivered possession of the automo-

bile to Ansted, but retained title until the price was paid and also the right to retake possession in case of default by Ansted. Ansted used the automobile in his business and stored it with defendant, a garage keeper, taking it from defendant's garage every morning and bringing it back every night. Defendant stored the automobile, performed services on it, supplied it with gasoline, and furnished and affixed to it certain accessories. Ansted owned successively three automobiles which he kept in defendant's garage, the one here in dispute being the third. While he had the first, he made a written contract for storing it with defendant, in which was an express agreement that defendant's lien on the automobile should not be extinguished by its voluntary restoration to Ansted. By its terms this contract referred only to the first automobile, which was described in it. No such agreement was made regarding the automobile here in question. On August 21, 1933, Ansted ceased to take the automobile in question from the garage and it remained there continuously from that date until taken by mesne process in this case. On September 15, 1933, a part of the price of the automobile was due and unpaid, and plaintiff demanded possession of it from defendant, at the same time offering to pay defendant all its charges accrued since August 21, 1933. Defendant refused the offer, demanding payment also of its charges on the automobile which had accrued prior to August 21.

[1, 2] The question for solution is whether, under the circumstances, defendant retained a lien on the automobile for its charges accrued prior to August 21, in spite of the fact that it daily surrendered possession of the automobile to Ansted, who daily returned it to defendant. We are of the opinion that by each such surrender of possession defendant lost its lien for all charges previously incurred, and that this lien was not revived by the subsequent act of Ansted in returning the automobile to defendant's garage. The inconvenience resulting to garage keepers from such a conclusion is strongly urged against it; but where the law is clear, as we think it is here, such inconvenience cannot justify a court in ignoring it. If relief from such a rule is needed, it should be sought from the legislature.

[3] The garage keeper's lien is provided for in section 3051, Civ. Code, in the following language: "keepers of garages for automobiles shall have a lien, dependent on possession for their compensation in caring for and safekeeping, and for making repairs and performing any labor upon or furnishing supplies or materials for such automobiles." The same section contains provisions for several classes of liens, all of them using the words "dependent on possession," or equivalent language. As the Supreme Court said regarding this section in First National Bank v. Silva, 200 Cal. 494, 497, 254 P. 262: "There seems to be no difference in the legal meaning of the language used in reference to the different liens there provided for, although there is some difference in the actual language used. * * * While the language differs, the meaning is the same, that is, the lien is dependent upon the possession of the article upon which the lien is claimed by the one asserting the lien, and may be maintained until the lien is discharged by payment."

Section 3051 also gives a lien "dependent on possession" to one who repairs an article of personal property. In several cases relating to a repair man's lien it has been held that a surrender of possession of the subject of the lien by the lien claimant ends the lien and that such lien is not revived by his subsequent regaining of such possession. Davis v. Young, 75 Cal. App. 359, 242 P. 743; Covington v. Grant, 82 Cal. App. 749, 256 P. 213; Goodman v. Anglo-California Trust Co., 62 Cal. App. 702, 217 P. 1078; Lundblade v. Pierce, 95 Cal. App. 192, 272 P. 329. The section itself suggests no distinction in this respect between a lien for repairs and one for storage, and the Supreme Court has said in First National Bank v. Silva, supra, that there is none.

[4, 5] Neither do we find anything in the section from which to conclude that mere constructive possession is sufficient to satisfy its requirements. In fact, we cannot see that defendant had even constructive possession of the automobile while it was in the hands of Ansted. The term "constructive possession" is used to designate "the relation between the owner of the property and the property when the owner is not in actual possession thereof." 12 Corpus Juris, 1305; Hayes v. Moffatt, 83 Mont. 185, 271 P. 452. Neither defendant nor Ansted was the owner of the car, but Ansted was more nearly in that class, for he had the general right of possession, subject to the conditional sale contract. His agreement with the defendant, even if it had by subsequent dealings been made applicable to this automobile, which does not clearly appear from the stipulation, did not make the defendant the owner of the car, nor did it make Ansted its agent

to hold the car for it—if that could legally be done. He would no doubt have been greatly surprised, and justly so, if told that while he was using the car defendant had any sort of possession of it.

[6] Section 2913, Civ. Code, provides that the voluntary restoration of personal property "to its owner" by the holder of a lien thereon "dependent upon possession" extinguishes the lien unless the parties otherwise agree, and that such agreement is not effective as to creditors of the owner and subsequent bona fide purchasers and incumbrancers. No doubt the contract between defendant and Ansted was made with this section in mind. But this section does not apply to such a situation as we have here, because the car was not returned to its owner, the plaintiff, and the agreement was not with it, but with Ansted. Hence the contract cannot continue defendant's lien after its surrender of possession, or afford it any defense against plaintiff. Goodman v. Anglo-California Trust Co., supra; Davis v. Young, supra.

While section 2913 does not apply to this particular case, it seems to us to cut the foundation from under the argument that the Legislature must have meant, by section 3051, to continue the lien, without any agreement, in cases of automobile storage where the car is daily or regularly taken from storage and used by the person who stores it and then returned. Where that person is the owner, section 2913 applies directly to the case and ends the lien as soon as the car is voluntarily restored to him, regardless of the length of time it has been in storage or the use that is being made of it. It does not appear that any such statutory provision was involved in the decisions from other states holding that the lien continues in cases such as we have here. No reason appears for making a different rule, or one more favorable to the garage keeper, in cases where the party storing the car is not the owner, and nothing in section 3051 requires or suggests such a different rule.

[7] To hold that the lien continues after surrender of possession in such cases as we have here would be in effect to write an exception into section 3051. That section contains an express exception applicable to automobiles, in the proviso that where the lien claimant loses his possession by reason of fraud, trick, or device, his subsequent repossession of the automobile shall revive his lien. According to a well-established rule of statutory construction, it will be presumed that no further exceptions were intended. Belloc v. Rogers, 9 Cal. 123, 128; Merchants' Nat. Bank v. Continental Nat. Bank, 98 Cal. App. 523, 532, 277 P. 354; Rothschild v. Superior Court, 109 Cal. App. 345, 348, 293 P. 106.

Another reason for holding that defendant has no lien is suggested to us by the authorities. In Lowe v. Woods, 100 Cal. 408, 34 P. 959, 38 Am. St. Rep. 301, it was held that no lien is created in favor of a livery stable keeper for feeding a horse left with him by one having possession thereof under a contract of conditional sale by the terms of which title is retained by the seller until the price is paid, and that such a lien could be created only by the owner or by some one authorized to act for him. This decision was made upon a consideration of the provision of section 3051 regarding livery stable keepers' liens, which is, in its operative words, identical with the provision as to garage keepers' liens. Both of these provisions differ from that regarding a repair man's lien, which extends to work done at the request of the legal possessor of the property, and on this ground the decision in Lowe v. Woods has been distinguished and it has been held that the repair man has a lien for work done at the request of a conditional vendee. Davenport v. Grundy, etc., Co., 28 Cal. App. 409, 152 P. 932; Goodman v. Anglo-California Trust Co., supra. But as far as its application to the present case is concerned, Lowe v. Woods has never been overruled or distinguished, and it was cited and the principle on which it is based was adopted and followed in McTigue v. Arctic, etc., Co., 20 Cal. App. 708, 718, 130 P. 165. However, since Lowe v. Woods was decided, section 3051a has been added to the Civil Code, and it seems to assume that liens may arise under section 3051 for automobile storage at the request of persons other than the legal owner. If such a provision were written into section 3051, it would of course reverse the rule of Lowe v. Woods; but since section 3051a does not purport to create any liens, there may be some question as to its effect in this respect. This matter has not been argued and we do not base our decision upon it, but suggest the point now for further consideration whenever necessary, and as a matter to which the attention of the Legislature may well be turned.

We are aware that a decision contrary to our holding was made by the San Francisco Appellate Department in Pacific States Finance Corp. v. Freitas, 113 Cal. App. 757,

295 P. 804. We have carefully considered that decision in order to avoid a conflict if possible, but find ourselves unable to agree to the conclusion there reached.

The judgment is reversed, and the case is remanded to the municipal court, with directions to render judgment for plaintiff; appellant to recover its costs of appeal.

I concur: FOX, J.

1 Cal.2d 648

PEOPLE v. LAMSON.

Cr. 3730.

Supreme Court of California.

Oct. 13, 1934.

Homicide ⇐253(1)

Evidence *held* insufficient to sustain conviction for first degree murder in uxoricide prosecution based on circumstantial evidence.

In Bank.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

David Lamson was convicted of first degree murder, and he appeals.

Reversed, and cause remanded.

Rea, Free & Jacka, Maurice J. Rankin, and E. M. Rea, all of San Jose, and Edwin V. McKenzie and Walter H. Linforth, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Fred L. Thomas, Dist. Atty., John P. Fitzgerald, Chief Deputy Dist. Atty., and Allan P. Lindsay and Herbert S. Bridges, Asst. Dist. Attys., all of San Jose, for the People.

PRESTON, Justice.

The defendant, David Lamson, stands convicted of murder in the first degree, upon which conviction a judgment imposing the death sentence has been entered. He prosecutes this appeal both from the judgment and from order denying a new trial.

The case is purely one of circumstantial evidence. The charge is the murder of his wife Allene, alleged to have occurred in their home on the Stanford University campus at Palo Alto, Santa Clara county, Cal., on the morning of May 30, 1933. This young couple had been married about four years, and there had been born to them a daughter, then some two or three years of age. This small daughter was absent on the day in question; being away on a visit with the mother of defendant. The defendant had also residing in the vicinity, besides his mother, two sisters, one of whom, Dr. Margaret Lamson, is a practicing physician.

Defendant and his wife were both connected with the activities upon the university campus, she as secretary of the Y. W. C. A. and he as manager of the Stanford University Press, which published mainly scientific books. He also had some slight experience as an amateur actor. The couple moved in the best social circles, and were well known to a great many people prominent in the university campus life. Numerous friends, intimately acquainted with both of them, came forward to testify to the cordial and apparently affectionate relationship between them, emphasizing especially defendant's uniform kindness toward, and consideration of, his wife.

She was found dead by the defendant himself about 10 a. m. of said day; her body being in the bathroom. The exact location of the body when death occurred is unknown except to the defendant, for admittedly, after discovery, it was disturbed by him on at least two occasions between the announcement of her death by him and the viewing of it by others. This circumstance, among others, makes it difficult indeed to solve the mystery surrounding the death. We must therefore detail the defendant's statement of events in order to bring to the surface the question of law we must determine.

Defendant stated that he and his wife returned from a social visit with Dr. and Mrs. Wright in Palo Alto about 11 o'clock of the evening of May 29th; that his wife had eaten some lemon pie and orange juice, and, as a result thereof, was suffering the distress of indigestion; that she retired, however, about 11:40 p. m.; that at the home of the Wrights he had previously announced his intention of spending a part of the coming holiday working in the yard; that, owing to the indisposition of his wife and the absence of their child, he elected, as he had sometimes done before, to sleep in the back bedroom and not in the room with his wife; that he removed his working clothes from their usual place in the hall closet, and put them in the living room where he would have access to them early in the morning without disturbing his wife, who was what is known as a "light sleeper"; that he also procured at the same place his bathrobe, pajamas, and slippers; that he read awhile before retiring, waiting to see that the light in his wife's room was extinguished by her; that he then went to the bathroom and undressed therein for bed, hanging his clothes upon a hook on the inside of the bathroom door. The position of these clothes will be hereafter referred to.

He stated that about 3:30 a. m. his wife called to him and he attended her at that time, rubbing her back for several minutes and procuring some lemon juice and water for her, which was followed by a bowl of soup

and sandwich, both held over from a previous meal; that his wife's condition settled, and in about three-quarters of an hour he returned to bed; that rather early in the morning he arose and dressed for work, leaving his bathrobe, pajamas, and slippers in the living room; that he prepared his own breakfast, and, after leisurely moving around for a while, went to work in the back yard about 7 a. m. He detailed in a plausible manner the kind of work which he was doing about the yard. He stated that, among other things, about 8 a. m., he built a fire to burn accumulated rubbish; that he saw and talked to several neighbors during this period; that about 9 a. m. he returned to the kitchen, prepared a few things for his wife's breakfast, drank another cup of coffee himself, and then drew water for a bath for his wife; that he then went to her room and assisted her in getting up; that she went to the mirror and braided her hair in two braids, and that he thereafter accompanied her to the bathroom and gave her his hand to assist her in stepping into the tub; that he then returned to his work, leaving the water boiling for his wife to make a Postum drink following her bath; that he then set the sprinkler in the front yard and went to the back yard and pursued the work he had theretofore begun; that around 9:50 a. m. Mrs. Place, a real estate broker, appeared at the front door with prospective lessees for the Lamson home by the name of Mr. and Mrs. Raas; that, failing to get admittance at the front door and seeing the sprinkler and hearing voices in the back yard, Mrs. Place came upon defendant there talking to a neighbor, Miss Vincent; that, on learning the mission of Mrs. Place, he told her to return to the front door; that he would go in the back door, pick up some things, and admit her and her clients at the front door; that at this time he was stripped to his waist and wore gauntlets; that he immediately put on one of the two shirts he had hung on the lattice fence, removed his working boots and put on tennis shoes; that, carrying his gauntlets, he then entered the house, gathered up the bathrobe, pajamas, and slippers and perhaps some other clothing, and proceeded toward the hall closet near his wife's bedroom; that in so doing it was necessary for him to pass, and he did pass, the bathroom door, and there saw evidences of blood which immediately led to the discovery of his wife's body.

At this point the further testimony, other than that of defendant, was without dispute that it was from three to five minutes after Mrs. Place left defendant in the back yard before he reappeared at the front door; that prior to his appearance at the front door she heard cries of grief and a little later defendant opened the front door, appearing with blood on his shirt, face, and hands, and exclaimed: "My God, my wife has been murdered"; that a few minutes later he said: "Get the police to find the murderer," and a little later: "Who could have done it? No one had anything against her."

Mrs. Place immediately began calling doctors, officers, and an undertaker, by telephone. Mrs. Raas summoned neighbors. Several responded, among them Miss Vincent and Mrs. Brown. Later the undertaker arrived, and a little later Dr. Saier; about 10:10 Chief of Police Zink of Palo Alto and Officer Gilkey, and still later Officer Lawrence, who some time during the forenoon took pictures of the then condition of the bathroom and objects in it. The sheriff and his deputies arrived about 10:50 a. m.

Before any officer arrived, defendant was known to have handled the body of his wife at least twice, taking it into his arms and purporting to exhibit genuine grief. Before Mrs. Place was admitted, it is evident that defendant had handled the body of his wife and the blood on his clothing resulted therefrom. After Mrs. Place was admitted, he returned to the bathroom and again had the body in his arms. All this occurred before the arrival of any of the officers. When Mrs. Brown arrived, defendant was still in the bathroom, with the body in his arms, calling upon his wife to speak to him and showing further outward evidences of deep-seated and demonstrative grief. Mrs. Brown led him out of the bathroom into the maid's room, where he collapsed, and later, having recovered composure, he was induced to change his clothing again, as what he had on was then quite wet and bloody.

The injuries received by Mrs. Lamson may be described as four lacerations on the back of the head, covering the occipital protuberance and surrounding area. Three of said lacerations were somewhat horizontal in direction; two, however, being somewhat curved. The upper was 4½ to 5 inches long, the middle 2½ inches and the lower 1½. The fourth was an irregular perpendicular, 3½ inches long, extending from about one-half inch above the upper laceration and across it, forming the end of the second and also the end of the third, meeting the latter at an angle of about 30 or 45 degrees, and extending across it. There was, as a part of said lacerations, one depressed fracture of the skull as well as an undepressed stellate fracture

thereof. There was brain injury under the depressed fracture as well as contra coup injuries to the frontal brain; also a slight hemorrhage over the entire surface thereof. To this should be added the presence of three small hemorrhage areas between the layers of tissue composing the scalp. Lastly, no other abrasions of the skin were found, but there were three bruises, which may be material, and which are described as two spots over the anterior portion of the hip bones at the two prominent points, the left being slightly larger than the right and the areas approximately 1¼ inches in diameter. There was on the left leg, about two-thirds of the distance from the knee and one-third from the ankle, on the outer surface, a similar area showing bruise, the skin not being broken, approximately 1 to 1¼ inches in diameter.

Knowledge of the cause or causes which produced these injuries would furnish the solution of the problem before us, to wit: Did the decedent meet her death by a criminal agency or was her death produced by accidental means?

Resting its case upon circumstantial evidence, the prosecution must not only show a set of circumstances consistent with guilt, but must show a set of circumstances inconsistent with any reasonable theory of innocence. This test the prosecution asserts it has met. But the defendant asserts that the evidence in the record is not only consistent with death by accidental means but preponderates in favor of that conclusion. Consideration of these contentions requires a further elucidation of facts:

To our mind, the conclusion is unescapable that the decedent met her death in the bathroom; that she met her death after she had stripped to enter the tub; moreover, that death occurred after she had gotten into the tub and with the bathroom door practically closed. We should first state that at 10:10 a. m. both the water in the tub and the body of the deceased were still warm. Rigor mortis was not then discernible, as the physician was able to manipulate the head in ascertaining that life was extinct. This strongly corroborates the defendant as to the period of time within which the deceased must have died and has a distinct tendency to overthrow the state's theory that she died prior to 8:45 a. m. We are pointed to no other evidence indicating the probable hour of death.

The conditions in the bathroom now require consideration: The position of the body at the time of death is unknown, as already noted, except to the defendant, who testified that he found the body draped over the bathtub at the hips, facing downward, about half in and half out of the tub, he thought near the center of the tub but was not positive, and could not say whether or not the head touched the floor. So all we have are the other surrounding physical circumstances. Said statement, however, accounts for the bruises on the hip bones.

The bathroom is a diminutive one, being but 7 feet 10 inches long, the ceiling 8 feet 4 inches high. The door, entering from the hall, is at the north end, 30 inches wide. The entire length of the west side of the room is occupied first by a linen closet to the north near the door into the hall, and the remainder by the bathtub. The longest side is against the west wall. The remainder of the room, after taking out the space for the closet and bathtub, is but 48 inches wide, partly occupied by a washbasin stand and toilet. The tub itself is 30 inches wide and 18 inches high. From tub to basin is 29⅛ inches; from basin to hall door 35 inches. The rim of the basin is 29½ inches above the floor. The basin is opposite the tub, north of its center, at about the quarter-length point. The rim of the tub is 11¾ inches lower than the top of the basin. The linen closet also has a door about 30 inches wide, and both this door and the bathroom door swing inside the bathroom. A metal clothes hamper 23½ inches high stood at the east wall between the basin and the door. There was a metal waste basket immediately under the washbasin. There was also a two-step ladder at the south end of the bathroom.

The deceased was 5 feet 6 inches tall and weighed 115 pounds. Defendant, as already noted, had disturbed the body several times, but stated he left it in somewhat the same way in which he found it, although its location on the side of the tub was uncertain. Decedent's hair had been braided, but, when seen, the right braid was down. Many people were in and out of the bathroom during the day, and before any pictures were taken, but the condition as disclosed when the pictures were made at about 11 a. m., was as follows:

A bath towel and bath mat were lying crumpled on the floor, saturated with blood. The nightgown was hanging immediately over the north end of the bathtub; its bottom being within a foot of the edge of the tub. Near the bottom of the garment were 14 arterial blood spots and some other stains, indicating splotches of blood and water mixed, called in the record hemolyzed blood. The

two-step ladder at the south end of the tub was without blood stains. There were blood stains upon the bowl of the toilet. A woman's sheep or fleece lined slippers were placed in an orderly manner along the east wall south of the basin and near the toilet. The right slipper had blood without and many small spots within it. There were eight small spots on the inside over the arch of the slipper. Fresh arterial blood was also found inside the left slipper. A lady's watch was on the shelf over the washbasin. The metal waste basket under the basin had many arterial spots of blood on its surface facing the tub and also some inside facing the tub. On the inside of the bathroom door a coat, vest, soft white shirt, and pair of white flannel trousers were hanging; the latter being so hung that the waist line and belt were at the same level as the lower part of the legs. Both the trousers and shirt showed arterial blood spots as did also the coat. The coat even had spots inside one sleeve for a distance of almost six inches. The metal hamper had a ventilator open and also a lid partly open. Arterial blood was found upon the clothes within it, and there were also arterial blood spots on the outside above the ventilator. The bathtub was partly filled with water, still warm at 10:10 a. m., as already noted; on the side of the tub were streaks of blood and water where the body was then located, and the same to the south thereof.

It has already been noted that the lacerations, fractures, and contusions existed on the back of the head of the deceased at the occipital protuberance. We have also noted elsewhere the three bruises, one on each hip bone anterior and one on the left leg, halfway between ankle and knee. Further blood conditions remained to be described: Arterial blood, coagulated, was in great quantities on the floor at the north end of the room. Hemolyzed blood was also found on the floor. Arterial blood to a great extent was on the east wall north of the washbasin and on the inside of the bathroom door; also on the closet door to the left; also underneath the washbasin and at various other places.

Now, compare these conditions with the story related by the defendant, and where can be found facts consistent with guilt and inconsistent with every other hypothesis? Without waiting to examine the question of whether or not the corpus delicti has been proved as a matter of law, let us examine a few of the state's contentions in connection with this matter.

First, it is contended by it that, if it be assumed that the deceased fell while standing in the bathtub and hit her head against the rim of the washbasin, then, instead of falling partly in and partly out of the tub, her entire body would have been found on the floor. Defendant offered to demonstrate, for practical purposes, that this contention is unsound, but was denied that privilege upon the ground that it was a question of common knowledge and not one of expert testimony; moreover, that the demonstration could not be made successfully unless the experimentee died in the process. We are thus left to our own common judgment. Who can say with any assurance that, when the feet slip out from a woman 5 feet 6 inches tall, standing in a bathtub, and she falls against a solid substance, producing unconsciousness, the body thus becoming the hypotenuse of a right triangle, with base about 40 inches and altitude 29½ inches, that the center of gravity would not be below the rim of the tub 18 inches high and some 30 inches from the point of impact? The state does not reckon with the factor that a foot or more might be available in the tub for the feet to slip, thus bringing the center of the body clearly within the rim of the tub. It could more plausibly be argued that the entire body might go into the tub instead of only the lower extremities.

In this connection respondent further contends that bruises should be found on the face of the deceased because the face must have struck the tiled floor of the bathroom. This argument seems no sounder than the first and may be answered the same way.

It is next contended that the body was washed by some one. This contention is founded upon the assumption that there was no blood clot upon the wounds in the head and that the upper extremities of the deceased were practically free from blood. Upon this is built the argument that the deceased was transported into the tub from some other place for the purpose of washing the body. What motive would have prompted such conduct is not stated. Moreover, the contention does not appear to have a sound basis. No one, in view of the physical condition of the bathroom, would hesitate to declare that the decedent met her death therein and not elsewhere. It should be again remembered that the defendant handled the body, after discovery, a number of times. Besides this, there were clots of blood in the bathtub which could not have come from any other source than the wounded head. Defendant testified that in handling the body it slipped from his arms and was practically submerged in the water in the tub. Later he had the body in his arms again, and many

times was in and out of the bathroom after the discovery. Besides, fresh blood was found in the ear, splotches on the arms, in the hair, and perhaps elsewhere. Said theory of the state is simply too conjectural, standing alone, to be a solid link in a chain of circumstantial evidence.

It is next asserted that there was an attempt by some one to clean the bathroom. From what has already been here set forth, it is evident that this would have been a herculean task. The contention has no substantial basis. It rests solely upon the conjecture that the bath mat was used as a mop. The point need be but mentioned to show that it cannot be made a link in the chain of circumstantial evidence.

Entitled to no more consideration is the contention that an attempt was made to clean up the hallway. There were splotches of blood outside the door and on the walls of the hallway and one spot on the trapdoor in the ceiling. When they were made no one knows. With blood on the floor and on the clothing of the defendant found in the hall, and placed there after discovery of the body, with people tracking in and out of the bathroom, and the spreading of papers and sheets on the floor, it is no wonder that spots of washed blood were found in various isolated places. This is a sufficient reply to the argument that some one attempted to wash off blood spots from defendant's pajamas and bathrobe. Some of these garments, he says, were thrown on the floor near the bathroom when he discovered the body, and blood could hardly have failed to reach and make spots on them. As for the nightgown of the deceased, a splash of the bloody water from the tub could account for all the washed blood spots on it and the arterial blood spots show that it was hanging at the point stated at the time the deceased was bleeding.

Much is made by the state of alleged contradictory statements of the defendant. They consist chiefly of this: That the chief of police and one or two other officers said defendant claimed he was returning from depositing his bathrobe and pajamas when he discovered the body, whereas, on the trial he stated he was going to put them away when he made the discovery. The fact is that the latter statement must be true, if either is, for the clothes were first on the floor and then taken to the bedroom; indeed, the gauntlets and one of defendant's slippers were actually in the bathroom itself. Again, Officer Davis corroborated the story of the defendant as to when he discovered the body.

It is next asserted that defendant killed his wife with an iron pipe less than 10 inches in length and ¾ of an inch in diameter. One witness testified that within the rusty threads of this little pipe, which was found in the ashes of the bonfire in the back yard, was evidence of the presence of blood. He does not state that it was human blood, nor could he. Another expert produced by defendant, who worked with the other one, would not confirm this fact. In all probability the contention is pure conjecture. In the first place, the iron pipe was in the fire for hours and little, if anything, could be told about the kind of blood, if any, on it; furthermore, it was in the fire before 8:45, when the witness smelled some peculiar odor coming therefrom. It is entirely reasonable to suppose that Mrs. Lamson was still alive at that time. Rigor mortis had not set in at 10:10 a. m. Nothing of value developed out of the odor detected by the witness, which may have been only paint. The contention that such pipe could have produced the injuries from which Mrs. Lamson died is extremely doubtful, and brings to the surface the last major contention of the state, to wit: That the wounds on the head of Mrs. Lamson were such that they could only have been caused by four or more blows of this or a similar pipe, and could not have been produced by accidental means.

The injuries may be more particularly described as follows: Draw a line across the back of the head from a point just below the top of the ear to a corresponding point on the other ear; exclude from either extremity of this line about 1½ inches, and you have a laceration somewhat curved upward, 4½ to 5 inches long. This is the upper laceration on the head of the deceased, and may be designated by the letter A. From a point about one inch to the right of the center of said line A, an irregular perpendicular laceration is encountered, which may be designated as D. Laceration D is 3½ inches long, starting from a point ½ inch above A and extending downward, forming the ends of or extremities of two other horizontal lacerations, designated B and C, which are to the right of it, and further extending slightly below C. Laceration B is 2½ inches long; C is 1½ inches long. In the area along D, and for some 2 inches along the central part of A, and all the greater part of the lengths of B and C, was a contused or macerated area. A depressed fracture lay under the junction of lacerations B and D to a depth of one-sixteenth of an inch, consisting of loose or detached skull. In other words, A was contused in the center and not

on the ends. B was badly contused throughout and along practically its whole length. C was somewhat less contused. D was badly contused in the region of B.

The deceased also had, in addition to the above, a compound comminuted fracture of the occipital region of the skull, a contusion of the left cerebellum, under the depressed fracture; a hemorrhage in the right cerebellum; a hemorrhage in the left frontal region of the brain; and a contusion in the right temporal region. The other bruises over the anterior hip bones have already been described above.

Can these injuries be explained upon any reasonable hypothesis of accident? We have shown that every other claim made by the state is easily explained on a theory consistent with the innocence of the defendant. We approach this last question with admissions of the prosecution. First, it is admitted that it would take four or more blows from the iron pipe to produce such injuries. This means that three or more horizontal strokes of almost equal force and a perpendicular one, of equal or greater force than the rest, would be required. It is certainly next to impossible to appreciate that any such amount of force could have been so uniformly applied or that a perpendicular stroke could have been the exact extremity for two other horizontal strokes. If either would produce unconsciousness and death, in what way could the body have been held to have repeated the uniform blows? And in what position could the body have been to receive with even greater force a blow struck in perpendicular fashion? The very contemplation of this most unusual situation causes the mind to halt and falter.

Again, the experts for the prosecution all admitted that the brain injuries could have been wrought by a single blow. Defendant asserts with plausibility that the frontal contra coup brain injuries could have been caused only by a single blow and that a blow caused by the head striking some nonresistible object and not by a swinging blow. To this contention respondent offers no reply. The prosecution also admits that a single blow could have produced the compound comminuted fractures of the skull. As we understand this admission, if all the lacerations were absent except one, the fractures and brain injuries could have been produced. If this be true, what effect would subsequent blows have produced? If the brain injuries and fractures could have been produced by one blow, and that a fall, does this not suggest that one blow may have caused them all, fractures and lacerations included.

The prosecution, we understand, further concedes that a fall or one blow could have produced the four lacerations and attending results if the force was applied at the four places at the same time. Much testimony was received, and considerable excluded, all having for its purpose showing that a blow upon the washbasin, or even a flat surface, could have produced all these injuries as found on the head of the deceased. This testimony accords with our mind to the extent that such an explanation is not so unreasonable as to be rejected altogether. In fact, ascribing these injuries to the wielding of the pipe produced, seems much more improbable to us than that they occurred as the result of a fall. The macerated areas of these lacerations form a distinct pattern. Each in reality may be considered a part of the other. This area of some 2 to 2½ inches embraces the occipital protuberance, the median line, and some well-defined ridges on the skull. The lacerations are really flaps around the vertical one as a stem. How could an iron be wielded with such precision as to force, as to length of contact, and as to location? Which is the first stroke, the second, and the third and fourth? And in what position was the victim when they were dealt? What was the effect of each? If the first produced the brain injuries and the undepressed fractures, what was the effect of the others? The mind can easily conclude that they were, as defendant's experts determined, the result of one blow producing what is called an "explosion" fracture.

The three small areas of hemorrhage at the roots of the hair should be mentioned. Only one expert found them. One was connected with the lacerations direct and the other two were near or under the hair braids, and apparently not immediately connected with the wounds. Whether they resulted from the fall or from being caught as the body fell after the blow or whether some one pulled the hair can never be determined. At full worth, they represent no more than a suspicion or conjecture, and cannot alone rise to the dignity of establishing death by criminal means.

The prosecution dwells but little upon the question of motive, which consisted of an alleged tryst with a Sacramento woman and of a statement to a friend, overheard by an officer, to the effect: "Why did I ever marry her?" This was all plausibly explained consistent with innocence, and, moreover, is of

no value where the corpus delicti is not proved.

Finally, the position of the main pool of blood in the bathroom is explained consistently with the story of defendant when the dip or unevenness of the floor is considered.

Contemplating this case as a whole, the mind is not satisfied that the rule controlling in circumstantial evidence cases has been met as a matter of law. This rule is elementary and is aptly restated in the case of People v. Staples, 149 Cal. 405, 425, 426, 86 P. 886, 894, as follows: "It will be perceived that the evidence in the case relied on to establish the guilt of the defendant is practically circumstantial, and it is elementary law that where the evidence is of such a character it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. The deduction to be drawn from these circumstances is, ordinarily, one for the jury, but where, in a case such as this, every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. The prosecution has the burden of proof. The defendant is presumed innocent until the proof satisfies the jury beyond a reasonable doubt of his guilt. The right of a jury to return a verdict of guilty is not an arbitrary right. The sufficiency of their verdict must be tested by determining whether the evidence upon which that verdict is framed was of such a character that they could say from it that in their judgment no reasonable doubt of the defendant's guilt existed."

Where in the case before us is there evidence of a preparation for commission of a crime? Where is the plan by which the death was to become known? Where is the effort to prevent detection or for concealment? Where are the bloody or missing clothes? Where is evidence of a seizure in order to inflict the blows? Every statement of the defendant, capable of verification, tends to support his claims. It is true that he may be guilty, but the evidence thereof is no stronger than mere suspicion. It is better that a guilty man escape than to condemn to death one who may be innocent. These views render it inadvisable to prolong this discussion by consideration of the various other assignments of error.

The judgment and order denying a new trial are, and each is, reversed, and the cause remanded for a new trial.

We concur: STURTEVANT, Justice pro tem.

SHENK, Justice.

I concur in the reversal of the judgment, but not for the reasons stated in the foregoing opinion. From the evidence received in the case I am satisfied that there was sufficient upon which to base the conclusion that the deceased did not come to her death by accident and that the corpus delicti was established. However, the defendant desired fully to rebut this showing. I am convinced that the trial court unduly restricted the defendant in his offer of proof of an experiment by which he proposed to show that, when a woman of the size of the deceased was placed with her head upon the washbasin and her feet in the bathtub in said bathroom, and was allowed to slip from that position, she would always slip back into the bathtub. While ordinarily the trial court may in its discretion admit or reject testimony concerning experiments, I am satisfied that the refusal to admit such testimony constituted an abuse of discretion under the circumstances presented by the evidence in this case.

I think the trial court also erred prejudicially in unduly restricting the defendant as to the tendered expert testimony on the question whether the fatal injuries could have occurred by coming in contact with the washbasin.

Furthermore, the question of the position or positions of the body of the deceased at the time that the blood spurted therefrom and onto the walls was of utmost importance. The defendant offered expert testimony to prove, from the location and shape of the spots of blood, that said blood spurted from the wounds while the body was in a position consistent with the defendant's claim of accidental death by a fall against the washbasin. I believe the trial court also committed prejudicial error in excluding such testimony.

There are other assignments of error, including the claim that the defendant was prevented from having a fair and impartial trial by reason of the fact that a deputy sheriff of the county served as a member of the trial jury. As to certain of said assignments, it does not appear that there is any substantial merit therein. As to the remaining assignments, including the alleged disqualification of the juror, I believe it unnecessary to discuss the same, as there is no likelihood that the questions involved will arise on a retrial of the cause.

We concur: WASTE, C. J.; SPENCE, Justice pro tem.

SEAWELL, Justice (concurring).

Whether or not the deceased met her death by accident or whether it was the result of a criminal agency presents a very close question of law. The jury, by its verdict, found that the evidence proved the defendant guilty beyond a reasonable doubt and to a moral certainty, and that there was no reasonable theory or hypothesis, upon which he could be innocent. The evidence is largely circumstantial and conflicting to the extent on the one hand that the cranial injuries which caused death could have been produced by an accidental fall, the back of the head striking against the rim of the washbasin, and on the other, to the effect that the cranial injuries could not have been inflicted by one impact, but that they were the probable result of several blows. There is no satisfactory evidence of motive on the part of defendant and but slight, if any, incriminatory evidence which tends to support a wicked design to take life. Upon the nature and character of the wounds the inference of guilty or not guilty must flow. I am not prepared to say, as a matter of law, in the face of two opposing conflicting theories, neither of which is demonstrable to the degree of certainty, which the law requires, that the judgment of death should be executed. I am also partially brought to this view by reason of the fact that a member of the sheriff's official family served as a juror in the case. I impute no corrupt motive to said juror, as it is most unlikely that he was conscious of the effect of the relation which he bore to the sheriff of the county. It is true that he was called a courtesy deputy, which means that he received no salary, and has, perhaps, no fixed duties to perform, but, nevertheless, he was a deputy sheriff, and may have felt that he owed some fealty to his principal. Had he been interrogated as to his relationship to the sheriff, he doubtless would have frankly revealed it, and the defense, very likely, would have exercised its right of challenge. The sheriff was very active, as he should have been, in his duty to establish the cause of death which had occurred under unusual circumstances, and in so doing he became convinced that there was probable cause to believe the defendant had committed a homicide. In fact, he swore to the complaint accusing defendant of murder. While no one can be said to be censurable for a seeming fortuitous event, nevertheless the defendant was deprived of the right of having his case presented to twelve qualified jurors in a case in which the crime is punishable with death, and no valid judgment can be pronounced in capital cases upon a verdict unless said jury is constituted of twelve legally qualified jurors. The power to execute judgments in criminal cases has its sole origin in a verdict of a jury composed of twelve jurors formed in the manner provided by law. The reasoning upon which I am impelled to hold said juror disqualified is set forth in People v. Le Doux, 155 Cal. 535. I am not of the view that the trial court committed prejudicial error in its rulings excluding or limiting proffered evidence of an experimental character, or that the defendant suffered prejudice by the court's ruling on the admission of evidence upon any other question presented or that the instructions were erroneous as to any substantial proposition of law.

For the reasons above assigned, I join in the order of reversal.

LANGDON, Justice.

I concur in the judgment of reversal, on the same ground stated in my dissent in People v. Tedesco (Cal. Sup.) 34 P.(2d) 467, filed July 2, 1934. The two cases present the same question on appeal; namely, the sufficiency of the circumstantial evidence introduced therein to sustain the judgment of conviction. In the instant case, in my opinion, the record does not conclusively establish either the guilt or the innocence of the defendant; but the law requires that the defendant's guilt be proved beyond a reasonable doubt, and the state has failed to meet the burden thus placed upon it, notwithstanding the fact that the record shows there was no lack of painstaking and intelligent effort put forth by both the sheriff and the district attorney to do so.

I am unable to agree with the conclusion reached in the concurring opinion, that reversible error was committed in the trial of the case. In my opinion, the alleged errors in admission and rejection of evidence, and the other claimed irregularities, did not, taken separately or together, so prejudice the defendant as to amount to reversible error.

1 Cal.2d 630

In re SAN FRANCISCO CHRONICLE et al.

Cr. 3834.

Supreme Court of California.

Oct. 11, 1934.

1. Contempt ⇐9

Publication of false or grossly inaccurate report of court proceedings may be summarily punished by court as constructive contempt, and motive or intent of publisher is immaterial, except in mitigation (Pen. Code, § 166, subd. 7).

2. Contempt ⇐9

Newspaper publishers *held* guilty of contempt of Supreme Court in publishing false report as to disposition of case before case had in fact been disposed of, and in falsely representing that report was obtained from confidential and authoritative sources (Pen. Code, § 166, subd. 7; Code Civ. Proc. § 1209, subd. 9).

3. Contempt ⇐9

Publication of article, whether true or false, concerning pending cause which tends to impede orderly administration of justice, therein constitutes contempt, though publisher believed article to be true, and though article did not in fact influence court (Code Civ. Proc. § 1209, subd. 9).

IRA F. THOMPSON, J., dissenting in part.

In Bank.

Contempt proceedings against the San Francisco Chronicle and others.

Judgment finding defendants guilty of contempt.

Sullivan, Roche, Johnson & Barry, Theodore J. Roche, and Percy E. Towne, all of San Francisco, for respondents.

WASTE, Chief Justice.

This proceeding in contempt against respondents was instituted by the filing of affidavits by William H. Waste, Chief Justice of the Supreme Court of California, and B. Grant Taylor, clerk of said court. Based on these affidavits, the court ordered respondents to show cause why they should not be punished for contempt. The respondents filed answers in the form of affidavits, and have agreed that the case may be determined upon the affidavits on file herein.

The affidavit of B. Grant Taylor, so far as pertinent here, recites that on September 10, 1934, and prior thereto, there was pending in the Supreme Court an appeal entitled "People of the State of California, Plaintiff and Respondent, v. David Lamson, Defendant and Appellant," which appeal on said date and prior thereto was undetermined by the Supreme Court; that on September 10, 1934, respondents caused to be published in the San Francisco Chronicle an article referring to the Lamson Case. The article is set forth in full in the affidavit. The article states that the Supreme Court has voted to reverse the decision of the trial court in the Lamson Case. The following statements appearing in the article are particularly referred to as being false and untrue:

1. "Lamson Wins New Trial!"

2. "Supreme Court acts to Nullify Death Sentence."

3. "Lawyers' Appeal Charging Prejudice in San Jose Trial Gains Point for Stanford Executive in Shadow of Gallows."

4. "David Lamson has won a new trial."

5. "The Supreme Court of California has voted to reverse the trial court and jury which 12 months ago found the young Stanford Press Executive guilty of the 1933 Memorial Day murder of his wife Allene and condemned him to death."

6. "This was learned by The Chronicle last night from confidential and authoritative sources."

7. "The Supreme Court justices are reported to have based their reversal on three points:

"1. That George P. Peterson, foreman of the trial jury, was a Santa Clara county deputy sheriff at the time he voted to send Lamson to the gallows.

"2. That Lenora Ghetti, matron of the Jury, indulged in prejudicial activities detrimental to Lamson's cause.

"3. That Superior Judge Robert R. Syer, who presided over Lamson's trial, erred in ruling out certain testimony of E. O. Heinrich, noted criminologist and ace technical witness for the defense."

8. "The decision granting Lamson a new trial was written by Justice William H. Langdon. * * *"

9. "Justice W. H. Langdon writes decision."

10. "David Lamson Given another Day in Court."

The affidavit alleges that each of the above statements was false, in that on September 10, 1934, and prior thereto, the Lamson Case was then pending in the Supreme Court, and had not been reversed or otherwise decided by the

court: that no opinion had on that date been prepared by any member of the court, and that the court on or prior to that date had not voted to reverse or in any other way to decide the Lamson Case; that the article constituted the publication of a false report of the proceedings of the Supreme Court; that the article naturally tended to and actually did:

(1) Interfere with the orderly and due administration of justice in the Lamson Case; (2) bring into disrepute the Supreme Court and expose the court to public disfavor, distrust, and suspicion; (3) untruthfully indicate to the readers of the San Francisco Chronicle that that newspaper had an authoritative source of information close to the Supreme Court not open to other newspapers or to the public generally; (4) unlawfully interfere with the proceedings of the Supreme Court; and (5) impede, embarrass, and obstruct the court in the discharge of its duties.

The affidavit of the Chief Justice realleges the facts set forth in the Taylor affidavit, and, in addition, alleges that, in affiant's capacity as Chief Justice, it is his duty to assign the various causes pending in the Supreme Court to the particular justice who is to prepare the opinion in the cause; that on September 10, 1934, and prior thereto, he had not yet assigned the Lamson Case to any justice of the Supreme Court; that on that date, and prior thereto, said cause was pending before the court, and had not been decided by the court; that on that date, and prior thereto, the court had not voted to reverse or in any other way to decide said cause; and that on that date, and prior thereto, no opinion had been prepared in said cause.

The answers of respondents, so far as substance is concerned, are almost identical. It is therein set forth that the respondents admit the publication of the article in question, but allege that the publication was made in good faith upon information received by respondents which seemed to them "trustworthy." The answers all expressly admit that respondents have no authoritative source of information close to the Supreme Court not open to other newspapers or to the public generally. It is also alleged and admitted that respondents did not receive any portion of the information from any member of the Supreme Court, or from any officer or attaché thereof. By failing to deny, it is admitted that the information contained in the article was false and untrue. It is also alleged that the San Francisco Chronicle, one of the named respondents, is not a legal entity, but is the name of a newspaper printed and published by the corporate respondent, Chronicle Publishing Company.

On this showing, respondents argue that they are not guilty of a contempt. It is seriously urged that under the provisions of section 1209, subd. 13, of the Code of Civil Procedure, the publication of any article (whatever its contents) not in the physical presence of the court does not constitute a contempt. So far as pertinent here, subdivision 13 reads as follows: "But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

The foregoing contention requires but brief consideration. That portion of section 1209 above quoted has many times been held unconstitutional on the ground that the courts have inherent power to punish for contempts, whether of a direct or constructive nature, and that the Legislature cannot constitutionally infringe on that power. In re Shuler, 210 Cal. 377, 397, 292 P. 481; McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L. R. A. 691; Lamberson v. Superior Court, 151 Cal. 458, 91 P. 100, 11 L. R. A. (N. S.) 619; In re Lindsley, 75 Cal. App. 122, 241 P. 934; Lindsley v. Superior Court, 76 Cal. App. 419, 245 P. 212; see, also, In re Arnold, 204 Cal. 175, 267 P. 316; Blodgett v. Superior Court, 210 Cal. 1, 290 P. 293, 72 A. L. R. 482; In re Shortridge, 99 Cal. 526, 34 P. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78. What was said by this court in Briggs v. Superior Court, 211 Cal. 619, 297 P. 3, in no way affects the rule above enunciated. It was therein held that the Legislature may, in the case of a constructive contempt, provide for the procedure by which such contempt shall be tried and punished, but that case did not hold that the Legislature can determine what shall constitute a constructive contempt, or declare that certain acts shall not constitute a constructive contempt. There is obviously a fundamental difference between a statute merely regulating procedure, as was involved in the Briggs Case, and one such as section 1209, supra, purporting to affect the power of the courts to punish for contempt.

The main charge is that the Chronicle knowingly published a grossly inaccurate and untrue report of a judicial proceeding, the case of People v. Lamson (Cal. Sup.) 36 P.(2d) 361. The charge is not denied by respondents. The story is concededly false. Respondents admit that they received no information from this court or any of its officers or attachés, and

that the source of the information upon which they acted was unnamed individuals having no official connection with the court. They made no attempt to verify this purported information by inquiry of the court or any of its staff, and offer no explanation for their failure to do so, save that such inquiry might have given competing newspapers an inkling of the story, and thus have spoiled their "scoop."

The position of respondents is that their mere statement, under oath, that they acted in good faith, purges them of the alleged contempt. Similar is their contention that the proceeding is quasi criminal in character, and that the essential element of criminal intent is negatived by their sworn denial. It would indeed be a remarkable rule that in criminal prosecutions the sworn conclusion of the defendant that he meant no wrong would conclusively establish his innocence, in spite of his frank admission that he knowingly did the act complained of. There is no such rule in criminal prosecutions, and in proceedings for contempt this view has been repudiated by the great majority of American jurisdictions. The majority rule above referred to is especially applicable when, as here, the publication is not susceptible of two interpretations. Ex parte Bankhead, 200 Ala. 102, 75 So. 478; Globe Newspaper Co. v. Commonwealth, 188 Mass. 449, 74 N. E. 682, 3 Ann. Cas. 761; O'Flynn v. State, 89 Miss. 850, 43 So. 82, 9 L. R. A. (N. S.) 1119, 119 Am. St. Rep. 727, 11 Ann. Cas. 530; Carson v. Ennis, 146 Ga. 726, 92 S. E. 221, L. R. A. 1917E, 650; United States v. Shipp, 203 U. S. 563, 27 S. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265; In re Providence Journal Co., 28 R. I. 489, 68 A. 428, 17 L. R. A. (N. S.) 582, 125 Am. St. Rep. 755.

[1, 2] The publication of a false or grossly inaccurate report of the proceedings of any court constitutes a constructive contempt; the motive or intent of the publisher being immaterial, except in mitigation. Section 166 of the Penal Code provides in part:

"Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor: * * *

"7. The publication of a false or grossly inaccurate report of the proceedings of any court."

Under this section, the act prohibited is both a contempt and a misdemeanor. The mere fact that the Legislature has seen fit to declare such a contempt also a misdemeanor in no way deprives the court of the power to punish such an act as a constructive contempt in a summary proceeding such as this. See In re Morris, 194 Cal. 63, 227 P. 914.

The publication of the article in question also constituted a contempt, in that it tended to create in the public mind distrust and suspicion of the court. The only possible inference from the statement appearing at the beginning of the article that news of the supposed reversal "was learned by The Chronicle last night from confidential and authoritative sources" is such that information had been secured from some member of the court or some officer or attaché of the court. It matters little whether the reader infers that the Chronicle came by its special knowledge honestly, as a result of the court's deliberately favoring it with the first report on the case, or dishonestly, as a result of a justice or officer of the court disclosing the information deliberately or inadvertently. In either event, the reader would conclude from the article that the confidential proceedings of the court may be reached by a privileged newspaper; that the method of decision prescribed by law and followed by the court is not a barrier to an enterprising and powerful organization such as the Chronicle. That this tends to bring the court into wide disrepute, and is, therefore contempt of court, cannot be doubted.

[3] The publication of the article involved herein also constituted a contempt, in that it tended to interfere unlawfully with the proceedings of the Supreme Court in the Lamson Case. See section 1209, subd. 9, Code Civ. Proc.

The publication of any article, whether true or false concerning a pending cause, that tends to impede the orderly administration of justice in that cause, constitutes a contempt, and the fact that the publisher believed it to be true is immaterial, except in mitigation of the punishment. In re Providence Journal Co., supra. It is also entirely immaterial that the article did not in fact influence the court, so long as the publication tended to obstruct justice. In re Shuler, supra; In re Lindsley, supra; United States v. Toledo Newspaper Co. (D. C.) 220 F. 458, affirmed 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186; Ray v. State, 186 Ind. 396, 114 N. E. 866. The article necessarily tended to arouse a state of mind in the general public, and to influence public opinion, in such a way as to embarrass the court in the determination of the cause. In this respect, it has the same effect as one which directly attempts to arouse sympathy in favor of one side of the case. Of this latter type of publication it was said in People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528, 533:

"A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.

"Regard it in whatever light we may, we cannot but consider the article in question as calculated to embarrass the administration of justice, whether it has in fact done so or not, and, therefore, as falling directly within the definition of punishable contempts."

The showing in mitigation made by respondents falls far short of the desired result. It fails completely to establish their good faith. Respondents admit that the substance of the article was false, and that the information did not come to them from any person connected with the court. All that is alleged is that some unknown persons gave respondents the information, that they believed it was true, and that the persons who furnished it were believed by them to be trustworthy. From this showing, respondents conclude that they acted in good faith. Such a showing in no way demonstrates their good faith. As previously stated, no attempt was made to check the information by communicating with any member of the court. The statement of respondents that they acted in good faith is simply a legal conclusion. Respondents have not seen fit to disclose to the court the facts and circumstances surrounding the securing of such information, nor have they seen fit to disclose the source of such information. The bare legal conclusion that they acted in good faith, without disclosing to the court all of the facts and circumstances, is not sufficient to mitigate the offense.

It therefore appearing that, the order to show cause having issued and due return and appearance having been made by Chronicle Publishing Company, Chester H. Rowell, editor of the Chronicle, and W. D. Chandler, managing editor of the Chronicle, and no good cause having been shown why they and each of them should not be found in contempt and punished therefor, it is adjudged by the court that the Chronicle Publishing Company, Chester H. Rowell, and W. D. Chandler are, and each of them is, guilty of contempt of this court, as specified in the order to show cause and the accompanying affidavits, and that as punishment therefor the Chronicle Publishing Company shall pay a fine of $500, for which amount let execution issue, and Chester H. Rowell and W. D. Chandler shall each pay a fine of $250, and that, in default thereof, the individual respondents so defaulting shall stand committed to the sheriff of the city and county of San Francisco, and, until such fine is paid, shall be imprisoned in the county jail of such city and county at the rate of one day's imprisonment for every $2 of such fine.

Execution and commitment are, and each is, stayed for five days.

We concur: SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

IRA F. THOMPSON, Justice.

I concur and dissent. I concur in the decision in so far as it determines that respondents are guilty of contempt, but I feel compelled to dissent from that portion which fixes the punishment. I am persuaded that the article was mistakenly published and published without due consideration of its effect upon the administration of justice, but I am also convinced that it was without animus of any kind, and without malice; that in fact it is contemptuous because of its falsity, and not because of an effort to impede, obstruct, or hinder the administration of justice. I think, in view of these facts, and the further fact that, so far as I can discover, no similar case has occurred previously in California, the ends of justice will be fully served by the finding that respondents are guilty, which, in effect, constitutes a public reprimand. I think we may safely depend upon these respondents and others engaged in like enterprises being advised hereby, not to offend hereafter, but rather to assist within their proper sphere in the proper and due administration of justice.

1 Cal.2d 542

SOUR et al. v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

L. A. 14720.

Supreme Court of California.

Oct. 1, 1934.

1. Justices of the peace ⇐140

New statute dealing with procedure only, such as extent of order Superior Court may make on appeal from justice court, applies to both pending and future actions (Code Civ. Proc. § 980).

2. Justices of the peace ⇐187

Superior Court's power to make order on appeal from justice court *held* defined by statute authorizing it to review all orders affecting judgment appealed from, set aside, confirm, or modify subsequent proceedings, and order new trial (Code Civ. Proc. §§ 974, 980, 982a, 988h).

3. Justices of the peace ⇐187

Superior Court *held* to have exceeded its jurisdiction in ordering judgment to be entered in Superior Court upon reversal of judgment of justice court (Code Civ. Proc. § 980).

4. Justices of the peace ⇐187

Judgment of Superior Court reversing judgment of justice court and ordering judgment to be entered in Superior Court *held* required to be annulled in its entirety, since Superior Court was without jurisdiction (Code Civ. Proc. §§ 980, 1075).

In Bank.

Proceeding by George Sour and another for certiorari to review a judgment of the Superior Court of the State of California, in and for the County of San Diego, Charles C. Haines, and Clarence Harden, Judges, reversing a judgment recovered by petitioners against the Western States Grocery Company in a justice's court and entering judgment for the grocery company.

Judgment of the Superior Court annulled.

For prior opinion, see 29 P.(2d) 329.

J. L. Hofflund, of San Diego, for petitioners.

Liggett & Liggett, of San Diego, for respondents.

SHENK, Justice.

The following opinion of the District Court of Appeal, Fourth Appellate District, prepared by Mr. Justice Marks, is adopted as the opinion of the court, to wit:

Petitioners, George and Peter Sour, recovered judgment in the justices' court of San Diego township, county of San Diego, against Western States Grocery Company, Inc., which appealed to the Superior Court of San Diego county on questions of law alone. Judgment in the justices' court was rendered April 3, 1933, and on October 31, 1933, the following judgment was rendered by the Superior Court: "It is ordered that the judgment of the trial court be reversed, and that judgment be entered herein in favor of the defendant Western States Grocery Company, Inc., a corporation. It is further ordered that said defendant recover costs in the trial court and upon the appeal."

San Diego township has a population in excess of 30,000. At the time the appeal from the justices' court was taken, section 982a of the Code of Civil Procedure provided that appeals from such justices' courts "shall be taken, heard and determined as provided in chapter four of this title relating to appeals from municipal courts." Section 988h of the Code of Civil Procedure provides that on appeal from a municipal court, the Superior Court "may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered."

Section 982a of the Code of Civil Procedure was repealed on August 21, 1933 (St. 1933, p. 1904, § 198). Effective the same day, the title of chapter 3, title 13, part 2 of the Code of Civil Procedure was amended to read "Appeals from Justices' Courts" (St. 1933, p. 1893, § 153), with the machinery of appeal and power of the appellate court set forth in that chapter.

Section 974 of the Code of Civil Procedure provides for appeals to the Superior Court on questions of law, or fact, or both. Section 980 of the same Code provides that "upon an appeal heard upon a statement of the case (an appeal on questions of law alone) the superior court may review all orders affecting the judgment appealed from and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial."

The principal question to be decided here is whether the powers of the Superior Court on appeal from the judgment were defined by section 980 or section 988h of the Code of Civil Procedure. There is no question but that the provisions of section 988h were applicable to appeals from the justices' court of San

Diego township at the time the case was tried, judgment given, and the appeal perfected in that court. During the pendency of the appeal, section 982a of the Code of Civil Procedure was repealed. This had the effect of removing section 988h from the Code provisions governing appeals from justices' courts. During the same time chapter 3, title 13, part 2 of the Code of Civil Procedure was made the law governing appeals from all justices' courts.

[1] The extent of the order which the Superior Court could make on appeal is a matter of remedy and procedure. "When a new statute deals with procedure only, it applies to all actions—those which are pending, and future actions." Heron v. Bray, 122 Cal. App. 79, 9 P.(2d) 513, 514. See, also, City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298.

[2] We conclude that the power of the Superior Court to make an order on appeal from a justices' court on October 31, 1933, was defined and limited by the provisions of section 980 of the Code of Civil Procedure. The powers given by this section to the Superior Courts on an appeal from a justices' court on questions of law alone were considered in the case of G. & H. Commercial Service v. Superior Court, 121 Cal. App. 191, 8 P.(2d) 549, 550, where it was said: "The appeal to the superior court was heard upon a settled statement of the case, which assigned the admission of hearsay evidence by the justice's court as error. The case was not tried de novo by the superior court. No evidence was adduced upon the hearing in that court. After argument by respective counsel, the superior court rendered and entered a judgment which reads in part: 'It appearing to the court that the said Justice's Court erred in law in the matters specified as such errors in said statement of the case, above referred to: It is therefore ordered and adjudged that the judgment of said Justice's Court of Marysville Township * * * be and it is hereby reversed and set aside, and that judgment be entered in favor of said defendant.'

"In an appeal upon questions of law alone, which is taken from a judgment rendered in a justice's court, the superior court is without jurisdiction to try the cause de novo, or to render a judgment on the merits.

"In the case of Lugo v. Superior Court, 55 Cal. App. 561, 203 P. 812, 813, it is said: '"We think it clear * * * that upon an appeal on questions of law alone * * * the superior court can merely pass upon the questions brought before it on the appeal, and has no jurisdiction to try and determine the whole cause as if it had been transferred to that court upon an appeal upon questions of both law and fact."'" Sherer v. Superior Court, 94 Cal. 354, 29 P. 716.

[3] From the foregoing it follows that the respondent court exceeded its jurisdiction in ordering judgment to be entered in the Superior Court upon a reversal of the judgment of the justices' court, and that the respondent court should have proceeded under the authority vested in it by section 980 of the Code of Civil Procedure.

[4] It is suggested by the petitioners that the valid and invalid portions of the judgment of the respondent court are severable; that the portion which reverses the judgment of the justices' court is valid and should be affirmed; and that the portion ordering judgment to be entered in the Superior Court in favor of the defendant grocery company is invalid and should be annulled. See section 1075, Code of Civ. Proc. But acting under section 980 of the Code of Civil Procedure, the respondent court, upon further proceedings on said appeal, may deem it necessary or proper to include therein an order for new trial in the justice's court in the event the judgment be reversed.

We think the judgment of the respondent court should be annulled in its entirety. It is so ordered.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

1 Cal.2d 587

BIERLICH v. UNGER et al.

L. A. 14665.

Supreme Court of California.

Oct. 2, 1934.

Principal and surety ⇐76

Bond reciting that, if principals constructed building according to specifications and should indemnify obligee and preserve priority of trust deed over mechanics' liens, obligation should be void, *held* to guarantee that building would be constructed and not merely to obligate surety to indemnify obligee against priority of mechanics' liens.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Action by Julius Bierlich against Walter L. Unger, the Seaboard Surety Corporation of America, and another. From a judgment for plaintiff, defendant last named appeals.

Affirmed.

Prior opinion, 28 P.(2d) 76.

Arthur T. Stollmack, of Los Angeles (Samuel H. Weissberg, of Los Angeles, of counsel), for appellant.

Wm. M. Morse, Jr., Edgar H. Craddock, and John L. Flynn, all of Los Angeles, and Frank L. Guerena, of San Francisco, for Walter L. Unger.

William Schreider, of Los Angeles, for respondent.

LANGDON, Justice.

This action is brought to recover on a surety bond executed by defendant Seaboard Surety Corporation.

Plaintiff, in response to an advertisement of a deed of trust for sale, agreed to lend money to General Finance Corporation. The corporation represented that it had several vacant lots upon which it intended to build. Plaintiff insisted upon a surety bond covering performance. Thereafter plaintiff paid into escrow the amount of his loan, $3,000, and received a note and deed of trust, together with a surety bond; the principals being General Finance Corporation and defendant Unger, the purported owner of the land. Unger was not in fact the owner, and the building was never constructed. Plaintiff was forced to sell the land under the deed of trust, and suffered a loss, for which he sued, and recovered judgment against all defendants. The defendant Seaboard Surety Company appealed.

The only point which requires discussion is the claim of the surety company that it bound itself simply to hold plaintiff harmless and indemnify him against priority of mechanics' liens, and that it did not guarantee that a building would be constructed. The terms of the bond are entirely clear on this issue. After reciting that the principals are about to construct a building, and plaintiff is about to purchase a trust deed, the funds to be available for construction provided a bond is furnished, it provides: "Now, therefore, if said Principals shall cause said buildings to be completed according to said plans and specifications, and shall fully indemnify the Obligee hereunder, and preserve the priority of said Trust Deed from and over any and all mechanics' liens * * * then this obligation shall be null and void; otherwise to remain in full force and effect." In explicit language, the bond makes one of the conditions the completion of the construction according to the plans and specifications. There was testimony to show that this was in accord with the intentions of the parties, and the trial court correctly held the surety liable under these circumstances.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

1 Cal.2d 565

PEOPLE v. GRANA.

Cr. 3769.

Supreme Court of California.

Oct. 2, 1934.

1. Criminal law ⇐260(11)

In trial of criminal case without jury, neither court's remarks during trial, nor opinion, can be resorted to on appeal as findings, conclusions of law, instructions, or remarks as though to a jury.

2. Criminal law ⇐260(7)

Appeal in criminal case where jury was waived is based upon the record, of which judge's opinion is no part though it may be looked to as aid to proper understanding of case.

3. Criminal law ⇐260(11)

In criminal case where jury was waived, reversal must be for errors of law alone.

4. Criminal law ⇐260(11)

In criminal case where jury was waived, conviction will be reversed for errors of law in admitting or rejecting evidence where they prevented fair trial, or if evidence does not support judgment.

5. Criminal law ⇐254

Mere use of quotation by court to illustrate duty of fiduciary during criminal trial for grand theft by fiduciary where jury was waived *held* not error, though doctrine announced in quotation was applicable only to civil case.

6. Larceny ⇐65

Negative, vague, and unreliable evidence of beneficiary, which showed deposits of bene-

ficiary's money in fiduciary's bank account, most of which was used for beneficiary, and civil action for accounting followed by beneficiary's release of fiduciary, *held* insufficient to sustain conviction of grand theft.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Giovannina Grana was convicted of grand theft, and she appeals.

Reversed.

For prior opinion, see 29 P.(2d) 461.

Ingle Carpenter, Harold A. Fendler, Nathan O. Freedman, Frank L. Kostlan, and Le Roy Anderson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., Frank W. Stafford, Deputy Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., all of Los Angeles, for the People.

PER CURIAM.

Upon defendant's appeal the District Court of Appeal, Second Appellate District, Division 2, reversed the judgment of conviction of grand theft entered against the appellant. The people, through the Attorney General, petitioned this court for a hearing, which was granted. Upon examination of the record and the authorities we are satisfied that the opinion prepared by Mr. Presiding Justice Stephens correctly disposes of the cause, and we therefore adopt that opinion as and for the decision of this court. It reads:

Mrs. Giovannina Grana was charged in eleven counts with the crime of grand theft by a grand jury indictment filed December 22, 1932. A jury was waived and convictions were had on six counts. The others have been dismissed. The dates of the thefts and the sums involved in the former counts are as follows: Count I, December 11, 1928, $260; count II, December 11, 1928, $700; count IV, March 16, 1929, $962.50; count V, April 25, 1929, $540; count VIII, April 5, 1929, $2,000; count X, September 20, 1929, $928. After the denial of a motion for new trial the court sentenced defendant to state's prison on each count upon which there had been a verdict of conviction, and provided that the sentences should run concurrently. The defendant appeals from the judgments.

Appellant, Mrs. Grana, and Mrs. Maria Vitagliano first met at their church in 1923. The latter was the owner of several valuable real estate properties. The foundation of the fortune was the profit from a small store in which Mrs. Vitagliano invested a small sum. Both she and her husband "kept store." Mrs. Vitagliano could neither read nor write. She knew the separate numerals, but did not, she testified, understand any combinations thereof. She knew that two $5 bills equaled $10, and could make change. She could write her name, but that was all. Some time prior to this first meeting the husband had disappeared and a daughter, Christine, had assumed the responsibility of handling the funds and properties. The acquaintance between the elder women grew into friendship, and eventually, after advising Mrs. Vitagliano that the daughter was not properly handling her affairs, appellant assumed this duty through the years 1926 to 1929, inclusive. In the course of time dissension between the friends broke the arrangement. During the latter part of 1929 the two had words, and Mrs. Vitagliano brought a civil suit for accounting against appellant. The suit was not tried, but on December 16, 1929, a document called "release" was signed by both parties which on its face purports to settle their financial troubles. A will dated January 24, 1929, was signed by Mrs. Vitagliano in which appellant is spoken of in warm terms of affection and appreciation. It mentions that appellant had loaned the maker money on various occasions. And although these documents speak of peace, there was, in fact, no peace between the erstwhile friends, and the difficulty reached a climax in the indictment by the grand jury already mentioned.

In the grand jury proceedings and later during the trial, Mrs. Vitagliano was the complaining witness and is referred to generally in all of the proceedings as the "prosecutrix." This term may not be accurate, but for brevity we shall adopt it herein.

The people's case rests upon the theory that appellant collected rentals and deposited them in prosecutrix' bank account; that in the course of this business appellant presented certain checks to prosecutrix for signature which were not drawn to cover any payment for or advance to the latter, but, unknown to prosecutrix, were drawn to appellant; and that they, or the money for which they were drawn, reached appellant's own bank account.

Appellant argues her appeal under three separate points, but says in her opening statement of facts that the primary point for consideration is that "there is no substantial evidence to support her conviction." We think the case must be disposed of by treatment of this subject alone.

From the evidence, and we have read the whole of the transcript, it would appear that the arrangement between prosecutrix and appellant whereby the latter should assume some part of the management of the properties was very loose. In practice it would appear that the money coming into the estate was collected by appellant and deposited in bank to prosecutrix' account, and that the bills received for operation of the estate were handled by appellant who would make out checks drawn upon prosecutrix' account for their payment which, after signature by the latter, would be dispatched. There is sharp conflict as to whether the signatures were generally affixed to blank checks or to checks with the payees' names and the sums written in. For this responsible service the compensation, if any was to be paid appellant, is one of the unexplained items of the case. There is an indirect mention of $150 per month, and there is the testimony of the prosecutrix that appellant said it was for the Lord's sake. There does not seem to have been any books of account, though appellant says and prosecutrix denies that the two would sit down and go over the bills and that prosecutrix always knew the condition of her account and of her affairs. A view of the whole case shows a confused condition of affairs and inconsistent actions on the part of prosecutrix. In the will hereinbefore referred to is written a statement of great affection from prosecutrix to appellant and a statement that appellant had loaned prosecutrix money. A civil suit for accounting was then pending, although there had been a document signed by both parties whereby the total sum of $2,122.50 had been paid to prosecutrix by appellant and each party released from all further financial liability each to the other. Prosecutrix testifies that she had no understanding of this document and did not know it purported to be a mutual release, and that she knew nothing of the contents of the will except that the names of her children were read to her from the document. Appellant was with prosecutrix at a bank when some conversation about a release was had, and the two went to an attorney's office where the document was prepared and signed. In the instances of both the will and the release there is positive testimony by responsible lawyers and other third parties that the documents were carefully read and explained to prosecutrix. She insists, however, that she does not remember this and that she did not suggest, approve or know that appellant was mentioned in the will, and that she did not know of or intend to sign a release or settlement of the financial troubles of the two. Mrs. Vitagliano was 67 years old, not well and was highly nervous at the time of the trial.

There was no attempt at an accounting in the trial, although ledger sheets of bank accounts of both prosecutrix and appellant are in evidence. The withdrawals from prosecutrix' bank and the ledger sheets of appellant show that the latter checked from prosecutrix' bank to her own in the sums mentioned in the six counts upon which conviction was had. It is true there were payments by appellant from her account covering very nearly if not all of such sums. In the matter of payment of taxes this is substantiated by canceled checks; and prosecutrix admits that she requested appellant to pay them, but explains that she merely asked that this be done in the regular course out of her own funds.

Prosecutrix' testimony shows numerous inconsistencies, contradictions and palpable misstatements. She does not accuse appellant of taking any specific sum or sums of money from her, and does not say that appellant converted any funds to her own use. In fact, a statement made by one of appellant's attorneys during the trial is almost literally true: "You can go through all of her [prosecutrix's] testimony and it is negative." All of the alleged embezzlements antedate the "release."

[1-6] The trial of criminal cases before a judge without a jury has given rise to novel theories, one of which is advanced herein by appellant. In civil nonjury cases the judgment is based upon findings of fact and conclusions of law, and in civil and criminal jury cases the jury considers the facts and applies the law as given it by the court. But where the judge alone decides a criminal case nothing of this nature intervenes between the evidence and the judgment. Appellant here scans the case for remarks of the court during trial and quotes from the court's written reasons for adjudging her guilty. Her counsel argue, in effect, that such remarks and such written reasons may be considered as though the judge had made them to the jury, since the judge is the trier of facts. It seems clear to us that neither the court's remarks during trial nor his concluding "opinion" can be resorted to on appeal in any way as findings, conclusions of law, instructions, or remarks as though to a jury. When a defendant in a criminal case waives a jury he agrees that the judge shall try both law and fact according to the legal machinery at hand therefor. Any appeal therefrom is based upon the record. The judge's opinion may be of use

to the appellate court as an aid to a proper understanding of the case, but it is not, strictly speaking, a part of the record. In the course of the trial the court may entertain an erroneous opinion as to the law and tentative but wrong opinion as to fact, and give expression thereto. None of these matters have any place upon appeal. In a criminal case tried by a judge alone an appellate tribunal will affirm or reverse the judgment of conviction upon errors of law alone. If errors of law in admitting or rejecting evidence have prevented a fair trial, or if the evidence does not support it, the judgment of conviction will be reversed. The court will not examine the trial court's remarks to discover whether or not it mentally applied the correct law as the case unfolded itself, or whether after completion of the evidence and argument it applied the correct law or reasoning in arriving at a judgment. The case of People v. Tapia, 131 Cal. 647, 63 P. 1001, is authority for the several points made in this paragraph. In the course of its opinion the trial court used the following language: "I begin by quoting the following statement made by Mr. Justice Cardozo in a New York case [Meinhard v. Salmon, 249 N. Y. 459, 164 N. E. 545, 546, 62 A. L. R. 1]: 'Many forms of conduct permissible in a work-a-day world for those acting at arm's length are forbidden to those bound by fiduciary ties. Not honesty alone, but the punctilio of an honor most sensitive is then the standard of conduct.'" It is clear, therefore, that notwithstanding the above was, as argued by appellant, a correct rule as to a civil procedure and not as to a criminal procedure, it in nowise affects the consideration of the appeal. We do not mean to intimate that the trial judge intended or did apply the principle of the Cardozo quotation to the decision of the instant case. He used the quotation merely as an illustration of the strict conduct required of a fiduciary.

The proven unreliability of prosecutrix' testimony, together with its negative nature, renders it practically of no value whatever. See People v. Tapia, supra. We think the evidence shows that there was some, we do not know how much, commingling of accounts; that appellant, in the instances mentioned, checked from prosecutrix' account to her own, and that while there is evidence that much of said money was for the repayment of advances theretofore made for the prosecutrix, there is no evidence that any thereof was ever converted to the use of appellant. "It is sometimes held in civil cases that the deposit by a trustee of trust funds to his personal account is sufficient cause for charging him with interest; but such fact alone is not sufficient evidence to convict a man of a felony." People v. Royce, 106 Cal. 173, 37 P. 630, 39 P. 524, 525.

In conclusion, we desire to refer to the fact that there is some evidence in the case that the title to one of prosecutrix' properties was transferred to appellant and later transferred back to prosecutrix. No details of or reasons for this are given, nor is the relevancy shown in any way. Certainly there is no evidence that there was anything improper in the transaction. There is much vague and unrelated evidence in the case, and this conclusively establishes the fact that the trial judge was not given the advantage of a full disclosure as to the actual relations between prosecutrix and appellant. It would seem very possible that the working arrangement between the two women friends was not as simple as the mere collection of rentals and the drawing of checks incident to upkeep of the properties. In justice to the district attorney we may assert our appreciation of the fact that the difficulties besetting the prosecution of this case are much more apparent in retrospection than before the trial.

The judgment as to each count upon which a conviction was obtained is reversed.

1 Cal.2d 611

PEOPLE v. McGEE.

Cr. 3686.

Supreme Court of California.

Oct. 8, 1934.

1. Criminal law ⇐105
Indictment and Information ⇐87(4)

Statute providing that indictment for any felony other than certain offenses must be found or information filed within three years of its commission *held* jurisdictional, and information for rape which showed on its face that prosecution was barred by limitations failed to state an offense, which question might be raised at any time before or after judgment (Pen. Code, §§ 800, 802).

2. Indictment and Information ⇐114

Statute providing additional sentence for previous felony conviction *held* not to authorize added punishment, where information, in violation of statutory provision regarding charging prior convictions, stated on its face

that such prior conviction was had more than a year after original offense charged (Pen. Code, §§ 969, 1168).

In Bank.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

John McGee was convicted of rape, and from an order denying motion to set aside judgment, he appeals.

Reversed.

For prior opinion, see 23 P.(2d) 1083.

W. C. Dorris, of Bakersfield (R. W. Henderson, of Bakersfield, of counsel), for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Ray Bailey, Dist. Atty., and Thomas Scott, Asst. Dist. Atty., both of Bakersfield, for the People.

LANGDON, Justice.

On November 3, 1930, an information was filed charging defendant with the crime of rape, and alleging the commission of the offense on or about March 30, 1926. A prior conviction of second-degree burglary was also charged. Defendant appeared without counsel, pleaded guilty, and was sentenced to imprisonment in the state prison. On March 18, 1933, defendant filed a motion to set aside the judgment, which was denied. This appeal is from the order denying the motion.

Section 800 of the Penal Code provides: "An indictment for any other felony than murder, the embezzlement of public money, or the falsification of public records, must be found, or an information filed, within three years after its commission." Section 802 of the same code provides: "If, when the offense is committed, the defendant is out of the state, indictment may be found or an information filed within the term herein limited after his coming within the state, and no time during which the defendant is not an inhabitant of, or usually resident within this state, is part of the limitation." On the face of the information herein it clearly appears that it was not filed within the period of the statute of limitations, and no allegations setting forth an exception to the running of the statute are made. If defendant had set up the bar of limitation, he would, so far as the record shows, have been entitled to a dismissal. But he failed to do so and raises the defense now for the first time after conviction and sentence. His contention is that the court lacked jurisdiction after the expiration of the three-year period, and that the judgment was therefore void.

Whether the statute of limitations in criminal cases is jurisdictional, or a matter of defense to be affirmatively pleaded by the defendant, is a question upon which there exists some diversity of opinion. In California the law is in a most confused state. This court, in Ex parte Blake, 155 Cal. 586, 102 P. 269, 18 Ann. Cas. 815, declared that the statute was a mere matter of defense, and not ground for discharge on habeas corpus. The District Court of Appeal, in Ex parte Vice, 5 Cal. App. 153, 89 P. 983, came to the opposite conclusion; and in People v. Hoffman, 132 Cal. App. 60, 22 P.(2d) 229, the court held that a motion to set aside a judgment would lie where the information showed on its face that the statute had run. A hearing in the Hoffman Case was denied by this court. The early case of People v. Miller, 12 Cal. 291, also lends support to this conclusion.

[1] It is necessary that this confusion be eliminated, and that the rule which shall govern prosecutions in this state be declared. In our view, the more desirable rule is that the statute is jurisdictional, and that an indictment or information which shows on its face that the prosecution is barred by limitations fails to state a public offense. The point may therefore be raised at any time, before or after judgment.

This is, of course, a rule essentially different from that governing civil actions, and it results from the different character of the statute in the two kinds of proceedings. In civil actions the statute is a privilege which may be waived by the party. In criminal cases, the state, through its Legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter. See People v. Hoffman, supra; State v. Bilboa, 38 Idaho, 92, 213 P. 1025, 222 P. 785. It follows that where the pleading of the state shows that the period of the statute of limitations has run, and nothing is alleged to take the case out of the statute, for example, that the defendant has been absent from the state, the power to proceed in the case is gone.

[2] Even if this issue were not determinative, the judgment would still be improper, for the alleged *prior conviction*, as charged in the information, took place on October 17, 1927, and hence *subsequent* to the offense for which defendant was prosecuted herein. Section 969 of the Penal Code provides that in charging a previous conviction, it is sufficient to state that "the defendant, *before* the commission of the offense charged in this indictment or information," was convicted of a

felony. The burglary conviction of defendant was not a "prior conviction" under this section. The Attorney General points to section 1168 of the Penal Code which, in subdivision (2), states that the minimum term of sentence and imprisonment for persons "previously convicted of a felony" shall be five years, "notwithstanding any other provisions of this code, or any provision of law specifying a lesser sentence." The difficulty with section 1168 is that it would appear to impose a punishment where there has been no pleading and proof to justify it. In other words, section 969 provides for charging a prior conviction, and an information such as the one involved herein does not fulfill the statutory requirement. Hence the defendant, though not validly charged with a prior conviction, is nevertheless subjected to an additional penalty by reason of a prior conviction. This nullifies the provisions of section 969, and we think that there is no justification for doing so.

The order appealed from is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; SHENK, J.; PRESTON, J.

1 Cal.2d 589

NICHOLS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 14688.

Supreme Court of California.

Oct. 3, 1934.

Rehearing Denied Nov. 1, 1934.

1. Divorce ⇐267

In wife's action for divorce, permanent maintenance, and division of community property, court had power to appoint receiver for community property to protect wife's rights where husband absented himself from state for purpose of fraudulently disposing of community property (Civ. Code, § 140; Code Civ. Proc. § 564).

2. Divorce ⇐267

In divorce action, court's power to direct payment of alimony pendente lite, attorneys' fees, and costs is not limited to direction to husband alone, but may run against receiver (Civ. Code, §§ 137, 140).

3. Divorce ⇐267

In wife's action for divorce, permanent maintenance, and division of community property, court had jurisdiction without notice to husband or service on or appearance by him, to appoint receiver to protect wife's rights, and to direct that receiver pay temporary alimony, attorneys' fees, and costs out of proceeds of such property, and that such charges be made lien thereon where husband absented himself from state for purpose of fraudulently disposing of community property (Civ. Code, § 140; Code Civ. Proc., § 564).

In Bank.

Application by Charles W. Nichols for writ of mandate to the Superior Court in and for Los Angeles County, Emmet H. Wilson, Judge.

Alternative writ discharged, and petition denied.

Prior opinion, 28 P.(2d) 714.

Schauer, Ryon & Goux, of Santa Barbara, and Paul J. Fritz, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, and Wilton W. Webster, of Pasadena, for respondents.

CURTIS, Justice.

On April 18, 1931, Ida Mae Nichols instituted an action in the Superior Court of the county of Los Angeles for divorce against Charles W. Nichols, the petitioner herein. For the sake of brevity, we will refer to the said Charles W. Nichols as the defendant. In that action she also asked, in addition to a divorce, for a division of the community property and permanent alimony, alimony pendente lite, attorneys' fees and costs, for a receiver to take charge of the community property of herself and husband, and for an injunction against certain persons made parties defendant in said action, restraining them from conveying, encumbering, disposing of, or transferring or delivering to defendant Charles W. Nichols, or to his agents, any part of said community property in their possession. After setting forth a cause of action upon which she based her prayer for a divorce, plaintiff set forth in her complaint in said action a description of the community property belonging to herself and husband; that it was of great value; that the annual income therefrom was in excess of $10,000; that ever since the separation of herself and husband on July 26, 1930, he "has absented himself from the state of California and is remaining outside of the jurisdiction of the state of California for the purpose of eventually causing the disposition, transfer and

liquidation of all of the community property of the parties, located within the state of California, and of obtaining the proceeds thereof, and taking the same beyond the jurisdiction of the courts of this state for the purpose of defrauding plaintiff and preventing her from realizing any part or portion of her community rights"; that the community property consisted of two candy stores situated in the city of Pasadena, of the estimated value of $22,500; of the home of said parties situated in the city of San Marino, near the city of Pasadena, which with its furniture and furnishings was worth not less than $20,000, and a note for $12,000 secured by mortgage upon real property in the city of Glendale, said note and mortgage having been executed by Volney Ayers Spalding and Effie G. Spalding; and of stocks, bonds, real estate, bills and notes, and other assets receivable, the exact nature, character, and extent of which were to the plaintiff unknown, but were of great value; and that the reasonable value of said community property was in excess of $100,000. It is further alleged in the complaint that, for the purpose of defrauding the plaintiff, the title to said home place had been taken in the name of First Trust & Savings Bank of Pasadena, and that the title to said real property still stood in the name of said bank; that Volney Ayers and Effie G. Spalding were about to pay off said $12,000 note; that said defendant Charles W. Nichols was attempting to sell said home place and the two candy stores and collect said $12,000 note and obtain the entire proceeds thereof for himself and defraud the plaintiff of her community interest and rights therein; and that unless restrained by the court, said Charles W. Nichols would collect the amount of said promissory note and cause said real property to be sold by said bank, and would remove the proceeds derived from the collection of said note and the sale of said real property from the state of California and thereby defraud plaintiff and prevent her from realizing any part or portion of her community interest therein. The complaint contains allegations to the effect that plaintiff had no means with which to support herself or to pay attorneys' fees or costs in said action. The prayer of the complaint was, as indicated above, for a divorce from defendant, a division of the community property, permanent alimony, and alimony pendente lite, attorneys' fees and costs of suit, for a receiver to take charge of defendant's property, and for an injunction restraining the bank from disposing of said home place, and also restraining the Spaldings from paying to defendant any part or portion of the community property funds or assets, as described in said complaint, until the further order of court. The bank and the Spaldings were, for the reason stated above, made parties defendant in said action. On the filing of said complaint, verified by plaintiff, the court made an order to show cause why an order should not be made requiring said Charles W. Nichols to pay to plaintiff alimony during the pendency of said action, attorneys' fees, and costs of suit, and also why a receiver should not be appointed to take charge of said community property, and an injunction should not issue as prayed for in said complaint. Said order to show cause was served on the defendants in said action, other than defendant Charles W. Nichols. Said matter came on for hearing on April 27, 1931, at which time it was shown that said order to show cause was not served on defendant Nichols for the reason that the whereabouts of said defendant were unknown. Said defendant Nichols was not present at said hearing either in person or by attorney. On said motion being heard, the court on May 2, 1931, made the following order: (1) for the payment to plaintiff of alimony pendente lite, attorneys' fees and costs, and that these amounts be made a charge and lien upon the community property, (2) that a receiver be appointed to take charge and possession of said community property and to pay out of the property in his possession said alimony, attorneys' fees and costs, and (3) an injunction as prayed for in plaintiff's complaint. The order for the payment of alimony, attorneys' fees and costs made no direction that these amounts should be paid by defendant personally, but directed only that they should be a lien against the community property and should be paid by the receiver.

Defendant Nichols was not personally served with summons in said action, nor did he appear in said action prior to the date when said order was made. An order for the publication of summons on said defendant was made on December 10, 1931, and thereafter said summons was published as provided by said order, said publication being completed on February 17, 1932. Thereafter, said defendant appeared in said action and on December 6, 1932, filed his answer and a cross-complaint for divorce against the plaintiff. On May 17, 1933, the defendant Nichols served and filed a notice of motion to vacate and set aside the order of May 2, 1931, allowing plaintiff alimony, attorneys' fees and costs, and granting an injunction and appointing a receiver to take charge of the community property of the parties hereto. Said motion was

predicated upon the ground that the order of May 2, 1931, was void for the reason that the court was without authority to allow alimony, attorneys' fees or costs in said action or to appoint a receiver to take charge of defendant's property, as no service of the summons or complaint in said action, or of said order to show cause had been made on defendant prior to the making of said order, nor had defendant at that time made any appearance in said action. This motion was denied by the court, whereupon the defendant Nichols instituted this proceeding before the District Court of Appeal for a writ of mandate or such other writ to which he might be entitled for the purpose of determining the validity of said order of court of May 2, 1931, and of the later order of said court refusing to vacate and set aside the order of May 2, 1931.

Petitioner makes practically the same contention here as he made before the trial court at the hearing of his motion to vacate and set aside said order of May 2, 1931. His contention then and now is that the trial court was without any jurisdiction to make an order for alimony pendente lite, attorneys' fees and costs, or for the appointment of a receiver to take charge of defendant's property for the reason that at the time said order was made defendant had not appeared in said action, nor had summons been served on him, nor had any notice been given him of said motion, at the hearing of which the court made its order of May 2, 1931, granting plaintiff alimony, attorneys' fees and costs, and appointing such receiver.

The facts as alleged in plaintiff's complaint presented a situation wherein the husband and wife, after accumulating a considerable amount of community property yielding an income sufficient in amount to comfortably maintain each of them, had domestic differences resulting in the disruption of the home, the separation of the parties, and the departure of the husband from the jurisdiction of the courts of the state, after the commission by him of several marital offenses, which would entitle the wife to a legal separation, permanent alimony, a division of the community property, and such incidental relief as the law gives to the wife in actions brought to dissolve the marriage relation and to establish her property rights. It appeared also from the allegations of the complaint that the husband's departure and continued absence from the state were for the purpose of enabling him the better to resist his wife's efforts to enforce her rights to a divorce, and to obtain a division of the community property, and furthermore from his position of vantage without the state, where he was immune from the process of the courts of this state, he was endeavoring by fraudulent means to dispose of, if not all, at least the greater part of the community property and thus defeat the right of the wife to her interest therein. These facts, together with the further showing that the wife was in indigent circumstances and was without the necessary funds either to provide for herself the necessaries of life, or to prosecute an action against her husband to protect her rights, were before the court at the time the court made the order of May 2, 1931, appointing a receiver to take charge of the community property of the parties and directing him to pay from the proceeds of said property, alimony during the pendency of said action, attorneys' fees and costs. Confronted with the situation indicated by the foregoing statement of facts, did the trial court have jurisdiction to make the order of May 2, 1931? Petitioner, the husband, upon the theory that the court had no jurisdiction to make any order whatever granting his wife temporary relief in said action without notice to him of the hearing at which said order was made, has brought this proceeding to determine the validity of said order of May 2, 1931, and the subsequent order of said court refusing to set aside the order of May 2, 1931.

Petitioner's principal reliance in support of his present petition is upon the cases of Baker v. Baker, 136 Cal. 302, 68 P. 971, 972, and Chaplin v. Superior Court, 81 Cal. App. 367, 253 P. 954. In the former of these two cases it was held, speaking of the order appealed from, that "the ex parte order was unauthorized and void, as the court had not acquired jurisdiction over the person of the defendant at the time it was made, as there had been no service of process in the action, or notice of the application for the order." That action was one for divorce and the order involved therein was for temporary alimony, attorneys' fees and costs, and the same was made by the trial court before any process had been served on defendant, and without notice of the application for said order. The facts in that case, however, differ from those in the present action in that the entire property of the defendant therein was his own separate property, it was limited in amount, and in value only slightly exceeded the amount of the alimony and counsel fees ordered by the court to be paid to plaintiff in said order. Furthermore, there was no showing that the defendant was absent from the state at the time said order was made, and could not have been served with notice of

said proceeding. In fact, the inference from the statement of facts set out in the opinion is to the contrary. Neither was there any claim that the defendant was acting in fraud of the wife's right to support and maintenance or that he was attempting unjustly or fraudulently to deprive his wife of any of her rights whatever. In fact, in that case, the plaintiff in an ordinary action for divorce, in which she asked for alimony pendente lite, counsel fees and costs, was granted an ex parte order allowing the same as a personal judgment against the defendant without any showing whatever as to the whereabouts of the defendant or that he was attempting in any way to conceal his property from the plaintiff or that he could not be personally served with notice. We are not inclined to hold that the principle of law enunciated in the opinion in that case covers cases like the instant one, where it is apparent that the defendant had purposely left the jurisdiction of the court and was endeavoring to defraud his wife out of her share of the community property, and the order for alimony, attorneys' fees and costs was simply made a lien on the community property of the parties situated in this state.

The other case relied upon by the petitioner, Chaplin v. Superior Court, supra, presents a state of facts in many respects similar to those in the instant case. It was decided principally upon the authority of Baker v. Baker, supra. No petition for a transfer of said cause to this court was ever made, and accordingly no opportunity was given this court to review the decision therein.

The facts in the case of Murray v. Murray, 115 Cal. 266, 47 P. 37, 39, 37 L. R. A. 626, 56 Am. St. Rep. 97, are more like those in the instant case than are those in the case of Baker v. Baker, supra. In Murray v. Murray, the wife sued for separate maintenance, while in the present action she seeks maintenance during the pendency of the action, attorneys' fees and costs, and also a divorce and a division of community property and permanent alimony. In the Murray Case, the wife sought to have a fraudulent conveyance of property by her husband set aside, while in the present action, the wife seeks equitable relief regarding the community property, which she alleges the husband is endeavoring to dispose of and by fraudulent means to deprive her of her rights therein. In each case, a receiver was appointed at the commencement of the action without notice to the husband, who was absent from the state, and substituted service was thereafter obtained upon him by publication. In holding against the contention of the defendant in that case that the trial court had no jurisdiction to appoint a receiver to take charge of defendant's property, this court said: "By section 140, Civ. Code, the court in an action such as this, or for divorce, may require the husband to give reasonable security for providing maintenance, and may enforce the same by appointing a receiver. This court has said recently that the only authority for the appointment of a receiver in a divorce suit is to be found in that section. Petaluma Sav. Bank v. Superior Court [111 Cal. 488], 44 P. 177, 179. If this be true, also, of an action for maintenance without divorce, it would seem that the language of the section is yet sufficient to justify the appointment of the receiver made in this case at the commencement of the suit. * * * But, assuming that the statute does not reach so far, still, in our opinion, the action is, by reason of the inadequacy of purely legal remedies, so much a subject of equitable cognizance that it carries with it the right to have a receiver appointed, under the general provision for such an officer in all cases 'where receivers have been heretofore appointed by the usages of courts of equity.' Code Civ. Proc. § 564. That the relief sought is within the general powers of a court of equity to grant, and is not dependent upon statute, has been decided by this court, and the principle has found quite general acceptance. (Citing authorities.) 'The wife's claim to alimony is an equitable demand against the husband, and there can be no doubt of her right to attack for fraud any transfers of property made by him with intent to defeat her claim, and that such fraudulent grantees may properly be made defendants to the suit for alimony.' Hinds v. Hinds, 80 Ala. 225. The wife having such a demand, and her position being assimilated to that of a creditor of her husband (citing authorities), it would appear that a receiver in aid of the enforcement of the demand should be appointed, when the occasion arises, for reasons like to those on which a creditor seeking to avoid fraudulent conveyances of a debtor is permitted to employ the same instrumentality. The rule in equity is that a receiver may be appointed before answer, provided the plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve the same from loss. (Citing authorities.) As shown, the plaintiff here has a demand enforceable in equity, and it may be charged specifically upon the property described in the complaint. (Citing authorities.) It seems necessarily to follow that the

court had power to appoint the receiver at the beginning of the action. Of course, such a power should be very cautiously exercised, but there is nothing in the present record to show that the court was indiscreet in that behalf."

[1] The case of Murray v. Murray is direct and convincing authority that in an action for separate maintenance, in order to preserve the rights of the wife, the court has the power to appoint a receiver to take charge and possession of the separate property of the husband situated in this state when it appears that the husband is without the state and is endeavoring by fraudulent means to deprive her of her right to support. If the court has such power in an action by the wife against her husband for separate maintenance, we can perceive of no reason why this same power should not be exercised by the court in an action for divorce brought by the wife against her husband in which she seeks not only for permanent maintenance, but for a division of the community property. In fact it seems to us that the reason for the exercise of such power is accentuated in the latter case over that existing in an action for separate maintenance only. In the case of a wife suing for separate maintenance payable out of the separate property of her husband, the wife stands in the relation merely of a creditor, but where community property is involved, she is seeking to recover her own property. If, therefore, the husband's attempt to fraudulently defeat the wife's claim against his separate property for support and maintenance appeals to a court of equity, how much stronger should this appeal be when by like fraudulent acts the wife's right to her portion of the community property is in danger of being lost to her. Every equitable consideration favors the application of the same rule in each of the two cases. Besides in the instant case, the plaintiff is asking for permanent support and maintenance, and in that respect her demand is practically the same as was that of the plaintiff in Murray v. Murray. There is no rational basis for making a distinction between an action in which separate maintenance is the sole relief asked, and one in which permanent maintenance is asked for in connection with a final decree of divorce.

The further question remains to be answered and that is the jurisdiction of the court to make such an order without previous notice to the defendant. This question was given attention by the court in Murray v. Murray, and answered in the following manner: "We have dwelt somewhat upon the matter of the receivership because of the influence of that proceeding on the question of the jurisdiction of the court to render any judgment at all. Service of summons by publication, or other form of substituted service of process for notifying an absentee or nonresident defendant of an action against him, is allowed to be effectual 'where, in connection with process against the person for commencing the action, property within the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein.' (Citing authorities.) Perhaps the jurisdiction in this case is maintainable on the ground that the judgment is sought as a means of affecting an interest in the property described in the complaint. However that may be, we have no doubt that, by means of the receiver's possession of the property, and the due publication, etc., of the summons, the court acquired jurisdiction to subject the property seized to the satisfaction of its lawful judgment. According to the common experience of mankind, the owner of property keeps some oversight of it, wherever situated, and will probably be apprised of the seizure thereof, and so warned of the purpose of the seizure. To accomplish this object, the taking of property into the possession of a receiver is at least as well adapted as the similar taking by process of attachment; and it is common practice to apply property which has been attached in the course of an action in personam against a nonresident to the satisfaction of the judgment obtained, although no personal service of summons has been effected. Attachment is not the only means by which the court may acquire control of the property of the absentee defendant, so as to impress the action, as to such property, with the jurisdictional characteristics of a proceeding in rem."

While this language was used in reference to the jurisdiction of the court to render a final judgment in that case, we think it is equally applicable when considered in reference to the preliminary order made in the instant case. In that case it was held that the action in effect was one in rem against the property of the husband within the state and that, after sequestering the property by means of the appointment of a receiver, the court acquired jurisdiction to thereafter proceed upon substituted service by publication to subject the property thus seized to the satisfaction of its lawful judgment. If the court had jurisdiction to appoint a receiver and to

subject the property in the hands of the receiver to the satisfaction of a final judgment in the action, we see no reason why it should not have the equal right to order payment from the same source of the preliminary expenses and charges of such action. In fact, if the court had jurisdiction to appoint a receiver to preserve the property for the protection of the wife's rights therein, and we think it clear that the court had such power, these preliminary costs and charges and temporary support for the wife were simply incidental to the main purpose of the action which was to establish the wife's right to a divorce, and to a division of the community property. It will be noticed that the order of May 2, 1931, for alimony, attorneys' fees and costs did not require the defendant to pay said amounts personally. The order simply fixed the amounts which should be paid for those purposes, and then directed that these should be paid by the receiver from the proceeds of the community property in his possession and control. It was in all its essential features simply an action in rem and, as such, personal service on the defendant was not required.

[2] Defendant makes the further objection that the power of the court to direct payment of alimony pendente lite, attorneys' fees and costs in a divorce action is limited to a direction to the husband alone to make such payments, and cannot run against any other person, such as in the present case, the receiver. Practically this same question was before the court in the case of Murray v. Murray, supra, where the court directed the receiver not only to pay these incidental expenses of the action, but the bill of a physician incurred by the wife. On that subject the court said (page 278 of 115 Cal., 47 P. 37, 41): "So far as the facts are disclosed by the record, we see no error in the direction that the receiver pay a physician's bill incurred by plaintiff. It must be assumed that this was found to be part of the necessary maintenance of plaintiff, which was the very purpose for which the funds were in the hands of the receiver." (Citing authorities.) The theory upon which the defendant advances the contention that the court has no authority to direct these preliminary charges to be made by the receiver, or by any other person, is based upon a very technical and strained construction of section 137 of the Civil Code. The contention is, in our opinion, without merit.

Defendant places much reliance upon the case of Petaluma Savings Bank v. Superior Court, 111 Cal. 488, 44 P. 177, 179, which contained a statement to the effect that "the only authority for the appointment of a receiver in a divorce suit is to be found in section 140 of the Civil Code." This case, as we have seen, was considered by the court in its opinion in Murray v. Murray, supra, and the court's conclusion as to the effect of that decision upon the power of the court to appoint a receiver in cases of divorce and for separate maintenance is fully set forth in that portion of the opinion hereinbefore quoted. It was there held that the decision in the Petaluma Savings Bank Case was not a barrier to the court's power to appoint a receiver in such cases. Section 140 of the Civil Code applies to actions for separate maintenance as well as to actions for divorce. If this section of the Code, therefore, does not control the power of the court to appoint a receiver in one case, it does not in the other. Such is the only conclusion to be drawn from the decision of this court in the case of Murray v. Murray, and it completely answers the contention of defendant that the case of Petaluma Savings Bank v. Superior Court, supra, is a controlling authority upon the power of the court to appoint a receiver under the facts before the trial court at the time it made its order of May 2, 1931.

[3] Our conclusion, therefore, is that under the facts and circumstances existing in the action of Nichols v. Nichols, the trial court did not exceed its jurisdiction in appointing a receiver to take charge of the community property of the parties to said action, and that the order of May 2, 1931, is valid and binding upon the defendant in so far as it affects his interest in the said community property. These views render it unnecessary to pass upon the other reasons advanced by respondent in support of said order of May 2, 1931.

It is therefore ordered that the alternative writ is discharged and the petition is denied.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; SPENCE, Justice pro tem.

1 Cal.2d 601

CONKLIN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 14677.

Supreme Court of California.

Oct. 3, 1934.

Rehearing Denied Nov. 1, 1934.

1. Mandamus ⇐163

General demurrer to petition for writ of mandate to command court to appoint receiver for community property in divorce action, *held* to admit allegation of judge's refusal on ground of lack of jurisdiction to make such order.

2. Receivers ⇐8

Appointment of receiver rests largely in trial court's discretion.

3. Mandamus ⇐38

Court refusing to appoint receiver for community property in divorce action under mistaken belief that it was without authority so to do would be commanded by writ of mandate to assume jurisdiction of application for such appointment and to exercise discretion in passing thereon.

In Bank.

Petition by Nellie A. Conklin for a writ of mandate to the Superior Court in and for Los Angeles County, Emmet H. Wilson, Judge. On general demurrer to the petition.

Writ issued.

Silverberg & Gilford, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondents.

CURTIS, Justice.

Petition for a writ of mandate directed to the Superior Court of the county of Los Angeles commanding said court to appoint a receiver to take charge of the community property belonging to petitioner and her husband in an action for divorce brought by petitioner against her husband and for the division of said community property. In said divorce action, upon the filing of the complaint, the court made an order ex parte appointing a receiver to take charge of said community property. The court thereafter vacated said order, and, at a still later date, the plaintiff made a second application for the appointment of such a receiver for the same purposes for which such an officer had been originally appointed, and upon the same being presented to the respondent court, the judge thereof refused to entertain the same on the ground that said court had no jurisdiction to appoint a receiver in cases of that character. This proceeding was thereupon commenced in this court for the purpose of obtaining a writ of mandate directed to said trial court commanding said court to appoint a receiver as prayed for by petitioner in her said application. It does not appear that the defendant in said divorce action had ever appeared therein, nor was any notice of said application ever made upon defendant. It is alleged in the petition herein that an order for the publication of summons was made in said divorce action on the ground that the defendant "has departed from the state of California, conceals himself to avoid service of summons, and cannot after due diligence be found within this state," and that publication of service was completed prior to the date of the making of said application for the appointment of a receiver. This court issued an alternative writ directed to the trial court commanding that court to appoint a receiver in said action as prayed for by petitioner, or to show cause before this court why it had not done so. The respondent court has appeared, and, as a return to said writ, has filed a general demurrer to said petition.

[1-3] It is alleged in the petition herein that the respondent judge refused to make the order appointing a receiver on the ground that he had no jurisdiction to make such order. The general demurrer admits this as well as all other allegations of the petition. We have just held in the case of Nichols v. Superior Court, 36 P.(2d) 380, this day filed, that the Superior Court has jurisdiction to appoint a receiver under a state of facts somewhat similar to those set forth in the petition herein. In view of our holding in that case, the present proceeding appears to present a clear case where the court having jurisdiction of a matter then before it refused to act upon said matter upon the mistaken belief that it was without authority so to do. In such a case, mandamus will lie to compel the court to act, but as the appointment of a receiver rests largely in the discretion of the trial court [Lowe v. Copeland, 125 Cal. App. 315, 13 P.(2d) 522; Dabney Oil Company v. Providence Oil Company, 22 Cal. App. 233, 133 P. 1155], it will not, of course, be compelled to act in a particular manner [Hilmer v. Superior Court (Cal. Sup.) 29 P. (2d) 175]. This principle is clearly enunciated in the case just cited (29 P.(2d) 175, at page 176) as follows: "The principal point of dispute herein is whether the respondent court in the exercise of its jurisdiction has

acted upon and denied petitioner's motion for security or whether it has refused to exercise its jurisdiction in the premises. If the former be the fact, then, under the rule above stated, mandamus will not lie, for a court may act as efficiently by denying as by granting a motion or request. On the other hand, should it be determined that the respondent court has refused to act, mandamus will, and should, issue to put it in motion, but not, of course, to compel it to act in a particular manner, inasmuch as the situation here presented is not one within the exception, in which the court can exercise its discretion in but one way."

It follows that it was the duty of the respondent court to entertain jurisdiction of said petition and in its discretion to either grant or deny the same, or make such order as to it appeared proper under the facts then before it.

Let a writ of mandate issue directed to the respondent court commanding it to assume jurisdiction of petitioner's application for a receiver in the case of Conklin v. Conklin, No. D,117014, heretofore presented to said court, and to make such order disposing of said application and petition as to it may seem meet and proper.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

1 Cal.App.2d 125

CITY OF PASADENA v. CHAMBERLAIN, City Clerk.*

Civ. 9867.

District Court of Appeal, Second District, Division 2, California.

Sept. 27, 1934.

Hearing Denied by Supreme Court Oct. 5, 1934.

1. Municipal corporations ⇐58

City charter was subject to rule of legislative interpretation that state and its agencies are not bound by general words limiting rights and interests of its citizens unless included expressly or by necessary implication.

2. Municipal corporations ⇐426

Special assessments under improvement acts were not avoided by tax deed to or entry upon parcel of land by city, and no action except payment by city could relieve parcel of burden of assessments, since improvement acts expressly subjected land within assessment district to assessment (St. 1911, p. 730, as amended; St. 1925, p. 849, as amended; Const. U. S. art. 1, § 10, and Amend. 14).

3. Municipal corporations ⇐426

Where there is legislative authority therefor, property owned by municipality and devoted to public use may be liable for special assessment for public improvements.

4. Municipal corporations ⇐70

Statute providing that land within assessment district should be subject to assessments levied to pay installments due on improvement bonds was not contrary to constitutional provision prohibiting Legislature from imposing tax upon city, since Legislature was merely providing for creation of improvement district (St. 1911, p. 730, as amended; St. 1925, p. 849, as amended; Const. art. 11, § 12).

5. Municipal corporations ⇐426

City entering upon parcel of land included in assessment district after imposition of assessment was in same position as if it had owned parcel and had consented to obligation at time of creation, regardless of fact that purpose of entering was to devote parcel to public use (St. 1911, p. 730, as amended; St. 1925, p. 849, as amended).

6. Taxation ⇐733

Where city and county taxes on parcel of land had not been paid or canceled, interest of city and county in parcel by reason of unpaid taxes continued unimpaired by city's purchase of parcel on tax sale (Pol. Code, § 3804a).

7. Municipal corporations ⇐871

Application of money to be derived from sale of bonds to payment of special assessments against land bought by city at tax sale would be proper use of public money for public purpose and not an unlawful gift of public funds, and fact that private benefit might result through construction of park was immaterial (St. 1911, p. 730, as amended; St. 1925, p. 849, as amended).

8. Taxation ⇐730

City which had purchased land on tax sale had only defeasible title which would become complete only on city's entering upon land, paying uncanceled past taxes and assessments and assuming future assessments to pay its share of improvement bonds (St. 1911, p. 730, as amended; St. 1925, p. 849, as amended).

9. Municipal corporations ⇐910

Bond issue for purpose of enabling city to perfect title to land which it had purchased on tax sale by paying past taxes and

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied 36 P.(2d) 392.

assessments and assuming future assessments *held* authorized under statute, since purpose was to enable city to acquire complete title to parcel, and not to pay obligations on land already owned by city (St. 1901, p. 27, as amended; St. 1911, p. 730, as amended; St. 1925, p. 849, as amended).

10. Municipal corporations ⇐865(2)

Proposed bond issue to enable city to complete title to land purchased at tax sale by paying past taxes and past and future assessments under improvement acts *held* not contrary to constitutional provision limiting indebtedness, merely because proposed issue would not pay off entire future obligation under acts, since constitutional provision did not require that money be available in one year to pay assessments in future years (St. 1911, p. 730, as amended; St. 1925, p. 849, as amended; Const. art. 11, § 18).

11. Municipal corporations ⇐910

Law requires only reasonable foresight and prudence based on past experience and present conditions, and fact that such expectation might not be fully realized would not foreclose city from submitting to its electors proposed bond issue for paying off past taxes and past and future assessments on land to which city held tax title (St. 1911, p. 730, as amended; St. 1925, p. 849, as amended; Const. art. 11, § 18).

12. Municipal corporations ⇐864(1)

Proposed bond issue to enable city to complete title to land purchased at tax sale by paying past taxes and past and future assessments under improvement acts *held* not contrary to constitutional provision limiting indebtedness because of possibility that burden would be imposed upon land by defaults of other property owners in payment of assessments (St. 1911, p. 730, as amended; St. 1925, p. 849, as amended; Const. art. 11, § 18).

13. Municipal corporations ⇐279

Voting of bonds for purchase of property by city for park purposes would be sufficient assent by voters to accomplishment of project (St. 1911, p. 730, as amended; St. 1925, p. 849, as amended).

14. Constitutional law ⇐183
Municipal corporations ⇐907

Proposed act of city in issuing bonds to complete purchase of property to which it held tax title would not impair rights of owners as they existed at time of tax sale, since their rights were terminated by entry of city (St. 1911, p. 730, as amended; St. 1925, p. 849, as amended).

Application for writ of mandamus by the City of Pasadena against Bessie Chamberlain, city clerk of the City of Pasadena.

Writ granted.

Application for hearing denied by Supreme Court in 36 P.(2d) 392.

Harold P. Huls, City Atty., and John W. Holmes, Dep. City Atty., both of Pasadena, for petitioner.

Cruickshank, Brooke & Evans, of Pasadena, for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ.

SCOTT, Justice pro tem.

Petitioner seeks a writ of mandate to compel respondent, its city clerk, to proceed with the holding of an election on November 6, 1934, for the purpose of submitting to its electors two alternative bond issues. No conflict appears as to the facts. Within the city limits of Pasadena there is an area known as "Carmelita Gardens," suitable for use as public park. It consists of parcel A, nine and one-half acres, and parcel B, two and three-quarters acres. These proceedings concern parcel B, which petitioner desires for park purposes. To acquire it the board of directors of petitioner adopted an ordinance calling an election for November 6, 1934, and submitting two propositions: No. 1, which calls for voting of $215,000 of bonds, and No 2 which calls for $185,000 of bonds. Said ordinance requires respondent, as city clerk, to make appropriate arrangements for the holding of such election as provided by the city charter. Upon her refusal to proceed, assigning legal reasons therefor, petitioner has sought this writ.

On April 26, 1929, parcel B was sold to petitioner for nonpayment of taxes. It was and is part of an assessment district created under the Acquisition and Improvement Act of 1925 (St. 1925, p. 849, sometimes called the Mattoon Act, as amended) to improve Colorado street. Bonds of that improvement district in the amount of $1,453,003.90 are now outstanding. In 1928 the taxes against parcel B as a portion of such district were $2,515.50. No taxes have been paid since date of sale, and on May 21, 1934, said parcel was deeded to petitioner by the city assessor, tax and license collector under said act and Ordinances 490 and 3108 of the City of Pasadena. Petitioner holds said tax deed to the parcel. $40,003.16 unpaid taxes levied against it because of said obligation under the improvement act are outstanding. On the basis of the ratio of the value of the parcel to the total bonded debt of the district, such taxes for the future are estimated to be $136,404.18, not including any amount to cover nonpayment of such taxes by other property owners in said district. Parcel B is further obligated on a street bond by proceedings under the Im-

provement Act of 1911 (St. 1911, p. 730, as amended), the amount required to retire said bond being $8,970.15. County taxes of $8,483.84 and city taxes of $7,199.84 were levied against parcels A and B as a single parcel, and are unpaid.

If proposition No. 1 is adopted, the $215,000 bonds will pay all these charges against parcel B, with $14,000 remaining over. If as an alternative No. 2 is adopted, it is proposed to pay the charges accrued to date and invest the balance derived from the sale of the bonds with the expectation that the principal and estimated interest together will be sufficient to pay the remaining amounts charged against the property as they become due.

Respondent bases her refusal to proceed with the election on the following grounds:

1. That since petitioner holds tax title to parcel B such charges against it need not be paid, and any such payment out of bond proceeds would be unlawful as a gift of public funds.

2. That proposition 2 would not provide sufficient money from sale of the bonds issued thereunder to pay the aggregate past due and estimated future charges against parcel B; that entry into possession and performance of other necessary acts by petitioner would constitute an incurring of debt in such amount as would exceed the income and revenue of the city for the current year and would violate article 11, § 18, of the Constitution of California.

3. That if the other property in the acquisition and improvement district failed to pay the assessments when due, the total amount of nearly a million and a half dollars might under the act fall in its entirety upon parcel B, and would be an amount far in excess of the proceeds of bonds issued under either proposition.

Amici curiæ on behalf of respondent have interposed further objections to the granting of the writ, summarized as follows: (1) The Municipal Bond Act of 1901 (St. 1901, p. 27, as amended) under which such bonds would be issued does not authorize such bonds to pay taxes and assessments. (2) The obligation to pay such taxes and assessments is one imposed by law and not one for which bonds can be issued under article 11, § 18, Constitution of California. (3) The assent of two-thirds of the electors to the proposed bonds would not constitute an assent to the incurring of the obligation arising out of future acquisition and improvement district assessments. (4) That the former owners have the right to redeem even if petitioner enters the land and pays the charges as proposed. (5) That the proposed bond issues are ultra vires.

Passing to a consideration of the objections above outlined, it appears that neither of said proposed bond issues involves a gift of public funds. Section 47 of Ordinance 3108 of the City of Pasadena, as amended, in effect at the time the tax deed to petitioner was executed, provides in part: "A redemption of property sold [for nonpayment of taxes] may be made by the owner or any person in interest within five years from the date of the sale to the city or at any time prior to the entry upon or sale of said property by the city." This contemplates, as the first step toward perfecting of the title by the city in this case, the entry by it upon the property. Section 58 of that ordinance provides: "Whenever the city shall have become the owner of any property sold for taxes and the deed to the city has been filed with the city clerk and recorded or registered as provided in section 53 hereof, the right of redemption may be terminated absolutely by the city by its entry thereon and the adoption thereof for municipal use and the performance by the city of any acts necessary in the perfection of title in the manner provided by law." From these sections it appears that the entry by petitioner on the property would cut off the right of redemption.

Our attention is directed to section 15 of article 12, Pasadena City Charter, which provides in part: "The mode and manner of collecting such municipal taxes and enforcing such tax lien and the proceedings thereafter shall be prescribed by ordinance and shall conform as nearly as practicable to the general law governing county taxes." It is suggested that this portion of the charter applies to Ordinance 3108, and that when that ordinance requires the city to perform acts necessary in the perfection of title in the manner provided by law, it refers to and embodies in it the provisions of Political Code, §§ 3897a and 3897b. Those sections require deposit by the city with the tax collector of sufficient funds to pay all delinquent taxes, special assessments, penalties, charges, and expenses.

[1-3] It would appear that the above charter provisions would not have the suggested effect. The charter is subject to the rule of legislative interpretation that "the state and its agencies are not bound by general words limiting the rights and interests of its citizens" unless included expressly or by neces-

sary implication. Kubach Co. v. McGuire, 199 Cal. 215, 248 P. 676. The determination of this question is unnecessary, however, in view of other considerations. The special assessments in this case, imposed under the Acquisition and Improvement Act of 1925 and the Improvement Act of 1911, are not obviated by the deed to or entry by petitioner, and no action except payment by petitioner is effectual to relieve it of that burden. As the court observed in City of Inglewood v. County of Los Angeles, 207 Cal. 697, 280 P. 360, 363: "There is a broad and well-recognized distinction between a tax levied for general governmental or public purposes, and a special assessment levied for improvements made under special laws of a local character. * * * 'While these local assessments are taxed under a taxing power, they are not taxes in the ordinary understanding of that term, * * * consequently, the usual exemptions from taxation will not preclude the property exempt being subject to them.'"

It is suggested that the holders of other land in the district would be deprived of their property without due process of law, contrary to Amendment 14, Constitution of the United States, if the city by its mere entry upon such a parcel of land were to absolve it of assessments theretofore levied against it, by shifting that burden onto other property in the district, or that such a course would impair the obligation of the contract of the holders of such improvement bonds by reducing the security for their bonds, contrary to article 1, § 10, Constitution of the United States. The true and fundamental reason why the property remains subject to the assessments levied against it until paid, even though the city enters and devotes the land to public use, lies in the fact that the improvement acts cited expressly subject the land within the district to the assessments levied to pay instalments due on improvement bonds. Where there is legislative authority therefor, property owned by a municipality and devoted to public use may be liable for special assessments for public improvements. This was pointed out by the court in City of Inglewood v. County of Los Angeles, supra.

[4, 5] It is not contrary to article 11, § 12, of the Constitution of California for the Legislature to make such provision, since it is not the imposition of a tax on the city by the Legislature but a provision whereby such improvement district may be created. American Company v. City of Lakeport (Cal. Sup.) 32 P.(2d) 622, 626. The district having been created, and having included in it the land comprising parcel B, the city in entering upon such property after the imposition of the assessment is in the same position that it would occupy if it had owned the property and consented to the obligation at the time it was created, even though it is now entering upon the land with the avowed intention of devoting it to public use.

[6] With reference to the city and county taxes past due on the property, it is urged that under Political Code, § 3804a, such taxes would be discharged and canceled upon application to the body imposing them. City of Los Angeles v. Board of Supervisors, 108 Cal App. 655, 292 P. 539. They are not so canceled nor otherwise affected until and unless the body seeking relief from such taxes has complied with the provisions of the section just cited and has made application for such cancellation. People v. Board of Supervisors, 126 Cal. App. 670, 15 P.(2d) 209. Petitioner has not sought cancellation nor reduction of the past due taxes here in question, but has proposed by the bonds here assailed to provide funds to pay them. Our attention has not been directed to any authority which would construe the provisions of Political Code, § 3804a, permitting such an application for relief from taxes, as requiring the body entitled thereto to make such a request. Such unpaid taxes do not dissolve by merger in the greater estate upon acquisition of tax title by the city. City of Santa Monica v. Los Angeles County, 15 Cal. App. 710, 115 P. 945. The interest of the city and county in the land by reason of unpaid taxes continues unimpaired and undiminished unless the taxes are paid or canceled.

[7] The money derived from the sale of the proposed bonds, far from being an unlawful gift of public lands, would be a proper use of public money for a public purpose, to wit, the payment of an obligation or burden imposed upon the land which the law requires to be paid before the city can perfect its title to the same. The fact that incidental thereto a private benefit may result is no sufficient obstacle to the course outlined. It is well understood that public improvements, such as streets, parks, etc., for which public funds are properly expended, result in private benefits to individual citizens. Sacramento, etc., Drainage District v. Riley, 199 Cal. 668, 251 P. 207; Patrick v. Riley, 209 Cal. 350, 287 P. 455; American Company v. City of Lakeport, supra.

[8, 9] The suggestion that the bonded indebtedness cannot be incurred by the propositions in issue here for the purpose of paying

taxes and assessments to parcel B because the law does not authorize such bonds for such purpose (Municipal Bond Act of 1901, St. 1901, p. 27, as amended) confuses the payment of such obligations on property already held by the city with such a payment on property like the parcel under discussion, to which the city received a deed after the obligation to pay such charges had accrued. The tax title held by the city is defeasible, that is, the owner has a right of redemption unless the city enters upon the land. To complete its title the city must (1) enter upon the land, (2) pay uncanceled past taxes and past assessments, and (3) assume the future assessments to pay its share of the improvement bonds. The proposed bonds are to enable the city to perform acts in the future to acquire complete title to the land, which is precisely what section 58 of Ordinance 3108 requires when it provides that the city after entry shall perform "any acts necessary in the perfection of title in the manner provided by law."

In City of Pasadena v. McAllaster, 204 Cal. 267, 267 P. 873, 877, the court in considering the question whether the taxpayers of that city could be required to pay out of general funds for assessments to be levied against city property for improvements under the Acquisition and Improvement Act of 1925, decided that under the facts they could not be subjected to this burden and declared that "if the improvements be important enough to warrant expenditure of general funds in excess of ordinary income and revenue, the authorities having the matter in charge should not hesitate to submit the question of the incurring of the liability therefor to the electors for their approval or rejection as plainly contemplated by the constitutional provision." Similar reasoning would direct the course which petitioner seeks to follow in this case.

[10] The further contention that proposition No. 2 would be contrary to section 18, article 11, of the Constitution of California does not find support in that section. Respondent reasons that since the proceeds of bonds sold under proposition 2 would not equal the total of past taxes and assessments plus the total future liability under the Acquisition and Improvement Act of 1925 above set out, it would be an obligation in excess of the amount for which money was provided in the current year. That section does not require that money be available this year to pay assessments in future years. While the assumption of such past due and future assessments on land used in the performance of a public function is the incurring of a debt or obligation within the meaning of that section of the Constitution (City of Pasadena v. McAllaster, supra; see, also, Southlands Co. v. City of San Diego, 211 Cal. 646, 668, 297 P. 521), either proposition No. 1 or 2 would make provision therefor as required by the said section. "Section 18 of article 11 of the Constitution merely prohibits the incurring of an indebtedness exceeding in any year the income and revenue provided for such year. It does not require that the money be on hand at the time the indebtedness is incurred or, in fact, that the income should have been provided at that time. It is sufficient if the indebtedness is within the income which has been provided or which will, in the ordinary course, be provided within the year." Wyckoff v. Force, 61 Cal. App. 246, 249, 214 P. 489, 490. Furthermore, such an obligation is one voluntarily incurred and not imposed by law, since it is the consequence of wilful, affirmative acts as above indicated, and "under these circumstances it would seem idle to argue that the obligation thus assumed is imposed by the law and therefore involuntary." City of Pasadena v. McAllaster, supra.

[11, 12] Respondent is apprehensive lest the anticipated interest earnings of the unused proceeds of bonds issued if proposition 2 is adopted be insufficient, when added to the principal, to pay the future assessments. The law only requires reasonable foresight and prudence, based on past experience and present conditions, and the fact that such expectation might not be fully realized would not foreclose petitioner from the course proposed. Addyston Pipe & Steel Co. v. Corry, 197 Pa. 41, 46 A. 1035, 80 Am. St. Rep. 812. Nor would the potential detriment to parcel B, due to the cumulative imposition upon it of unpaid assessments levied upon other property in the assessment district, American Securities Company v. Forward (Cal. Sup.) 32 P.(2d) 343, preclude its acquisition by the city by reason of section 18 of article 11 of the Constitution. It constitutes a contingent obligation which would not be realized nor complete until and unless other persons failed to do that which the law requires and experience indicates they will ordinarily do. "The inhibitions of the constitutional debt limit do not apply to contingent obligations." American Company v. City of Lakeport, supra. "A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens." Doland v. Clark, 143 Cal. 176, 76 P. 958, 960. In addition, the property upon which such assessments are thus unpaid still remains part of the tax-base underlying the improvement bonds, and is subject to sale for nonpayment of the charges against it, from

the proceeds of which sale the amount levied against it might be recouped. As the court said in Municipal Improvement Co. v. Thompson, 201 Cal. 629, at page 637, 258 P. 955, 958: "If some of the special assessment payments become delinquent from year to year, it would not follow that the lands of the delinquent owners would be relieved from paying the charge. It would be merely postponed. With the penalties and costs accruing to the bond fund, it is reasonable to assume that the burden is equalized during the period that the bonds are outstanding."

[13] The second contention advanced by counsel as amici curiæ as above quoted is to the effect that the adoption of propositions 1 or 2 by two-thirds of the electors would not constitute an assent by that number of electors to incurring the obligation for which the proceeds of the bonds would be paid, considered in the light of the language already quoted from the case of City of Pasadena v. McAllaster, supra. It would seem unreasonable to hold that when two-thirds of the electors vote to obligate themselves for the cost of a project a separate vote is required to ascertain whether they desire its accomplishment. The voting of the bonds by the adoption of either proposition will constitute an effectual assent by the voters which will fully comply with the constitutional requirements.

[14] It is not questioned that the laws in force at the time the property is sold for delinquent taxes are applicable to the redemption of said property from said taxes. San Diego County v. Childs, 217 Cal. 109, 17 P. (2d) 734. Ordinance 490 of the City of Pasadena was in effect at the time of the tax sale, and provided in section 44 that "a redemption of property sold may be made by the owner or any person interested within five years from date of sale to the city or at any time prior to the entry upon or sale of said land by the city." The rights of the owners of the property which was sold for nonpayment of taxes and assessments are therein defined, and the proposed action by petitioner would not impair nor violate the rights of such owners as they existed at the time of the tax sale. After entry by the city their rights are terminated and they have no right to reenter except by virtue of some new title subsequently acquired.

The objection that the proposed bond issue is ultra vires, in so far as it requires discussion, is covered by the foregoing views.

The writ is granted, and respondent is directed to proceed with the performance of her official duties as prayed for in the petition herein.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 125

CITY OF PASADENA v. CHAMBERLAIN.

Civ. 9867.

Supreme Court of California.

Oct. 4, 1934.

Courts ⊂=212

Application to have cause heard by Supreme Court after judgment in District Court of Appeal had been pronounced, but before it had become final, was denied in view of constitutional provision granting Supreme Court power to order cause to be heard by Supreme Court only where cause was pending before District Court of Appeal, or in civil cases, within 30 days after judgment should have become final (Const. art. 6, § 4c).

In Bank.

Application for writ of mandamus by the City of Pasadena against Bessie Chamberlain, City Clerk of the City of Pasadena. On respondent's application to have cause heard by Supreme Court.

Application denied.

For opinion of Court of Appeal, see 36 P. (2d) 387.

Harold P. Huls, City Atty., and John W. Holmes, Dep. City Atty., both of Pasadena, for petitioner.

Cruickshank, Brooke & Evans, of Pasadena, for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ.

PER CURIAM.

Petitioner's application to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal of the Second Appellate District, Division 2, is denied. Judgment in this case was entered in the District Court of Appeal on September 27, 1934. The Constitution, article 6, § 4c, grants power to the Supreme Court to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. Such order may be made before judgment has been pronounced by the District Court of Appeal or, in civil cases, within thirty days after judgment in the appellate tribunal shall have become final.

1 Cal.App.2d 157

HARVELD v. MILANI et al.

Civ. 8927.

District Court of Appeal, First District, Division 1, California.

Sept. 28, 1934.

1. Trial ⇐296(4, 5)

In action for injuries in automobile collision, instruction that plea of contributory negligence admitted defendants' negligence *held* not reversible error, where evidence on negligence was in favor of plaintiff and court gave other instructions on contributory negligence, none of which was challenged.

2. Appeal and error ⇐978(1)
New trial ⇐39

In granting new trial on grounds of erroneous instructions, trial court should be allowed wide discretion, and order granting new trial will not be disturbed unless abuse of discretion appears.

3. Automobiles ⇐249

Verdict of $6,000, for injuries in automobile collision, exceeding statutory limitation of amount to be recovered from owner of automobile operated by another with his consent, will be reduced to $5,000 to conform to statutory requirements (Civ. Code, § 1714¼).

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by John Harveld against Mrs. E. Milani and another. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

Hadsell, Sweet & Ingalls and Robert L. Lamb, all of San Francisco, for appellants.

Frank B. Thompson, of San Francisco, for respondent.

KNIGHT, Justice.

An automobile belonging to the defendant Mrs. E. Milani and driven by her daughter, Adele Milani, with Mrs. Milani's permission, collided with another automobile driven by one Lundgren about 10:30 o'clock at night on Cliff House Hill in San Francisco. Plaintiff was riding with Lundgren at the time and was injured. On account of said injuries he brought this action for damages against Miss Milani and her mother; and a jury returned a verdict in his favor and against both defendants for the sum of $6,000. From the judgment entered thereon defendants appeal.

The evidence, although conflicting on some points, is amply sufficient to show that the collision was proximately caused by the negligent operation of the Milani car. At the time of the accident it was descending the hill at an excessive speed, and testimony was introduced by plaintiff to prove that as it approached the Lundgren car, which was ascending the hill, it swerved suddenly to the left directly toward the Lundgren car, which was traveling at a reasonable rate of speed, and although Lundgren tried to escape being struck by maneuvering his car suddenly to his right, away from the Milani car, he was unable to get out of the way, and his car was struck with great force. The testimony on the part of plaintiff was strongly supported by the physical conditions existing immediately following the impact.

[1] Two grounds for reversal are urged, one of them being that the court erred in giving an instruction on contributory negligence. This instruction correctly declared the law upon the subject up to the concluding sentence, which read as follows: "It [contributory negligence] admits actionable negligence on the part of the defendant, the responsibility for which he avoids by showing a concurring and contributory negligence on the part of the person injured."

In some of its earlier decisions, particularly in Linforth v. S. F. Gas & Electric Co., 156 Cal. 58, 103 P. 320, 19 Ann. Cas. 1230, which was reaffirmed in Wiezorek v. Ferris, 176 Cal. 353, 167 P. 234, the Supreme Court has said that such an instruction is sound in point of law; but as declared in Sheets v. Southern Pacific Co., 212 Cal. 509, 515, 299 P. 71, the later decisions have refused to approve such an instruction and have intimated that should the giving thereof affect substantial rights of the defendant, reversible error might well be concluded to have resulted therefrom.

After a review of the entire record in the present case, we are satisfied that no miscarriage has resulted from the giving of this instruction. The evidence is overwhelmingly in favor of plaintiff on the issue of negligence and the court gave some eight other instructions upon the subject of contributory negligence, the correctness of none of which is challenged. Two late cases, identical in principle with the present one, wherein the court refused to reverse the judgment for the giving of such an instruction, are Jackson v. Lactein Co., 209 Cal. 523, 288 P. 781, and Dullanty v. Smith, 203 Cal. 621, 627, 265 P. 814, 816. As said in the latter case: "The * * * instruction mentioned has not our

unqualified approval and it would have been better to have omitted it; still, it does not appear that the substantial rights of the defendant were prejudiced thereby or that the giving of it constituted reversible error."

[2] Appellant relies mainly on the case of Sheets v. Southern Pacific Co., supra. There, however, the appeal was not from the judgment, but from an order granting a new trial on the ground of errors of law. In other words, the trial court determined in effect, on motion for new trial, that in view of the record in that particular case, the giving of an instruction in the form here given did operate prejudicially against the defendant and doubtless resulted in a miscarriage of justice. In this regard it is well settled that in granting a motion for a new trial on the grounds of erroneous instructions, it is proper that a wide discretion should be allowed to the trial court, and the order granting the new trial should not be disturbed unless there appears to be an abuse of discretion. Sheets v. Southern Pacific Co., supra; Pope v. Wenisch, 109 Cal. App. 608, 293 P. 622; Montgomery v. Globe Grain & Milling Co., 109 Cal. App. 695, 293 P. 856; Thompson v. California Construction Co., 148 Cal. 35, 82 P. 367; Associated Fruit Co. v. Marone, 68 Cal. App. 358, 229 P. 868. And therefore, in the Sheets Case, supra, in affirming the ruling of the trial court granting a new trial, the Supreme Court in substance and effect held that owing to the closeness of the evidence in that case, it would not hold that the trial court had abused its discretion in ruling that the instruction was prejudicial. In the present case the trial court determined on motion for new trial that said instruction did not operate prejudicially; and as above indicated we are in accord with such conclusion.

[3] The remaining point urged by defendants is that in view of the limitation fixed by section 1714¼ of the Civil Code of the amount of damages which may be recovered against the owner of an automobile operated by another with his consent, the judgment against Mrs. E. Milani should be reduced to $5,000. Plaintiff so concedes.

It is ordered, therefore, that the judgment as to the defendant Adele Milani be and the same is hereby affirmed; and that the judgment against the defendant Mrs. E. Milani be modified by reducing the amount thereof to $5,000, and as thus modified it will stand affirmed. The trial court is directed to reenter judgment to that effect, in the form suggested on pages 5 and 6 of defendants' opening brief, except that said judgment shall bear interest at the legal rate from the date of the entry of the original judgment. Plaintiff will recover his costs of appeal.

We concur: TYLER, P. J.; CASHIN, J.

1 Cal.App.2d 49

DRYDEN v. WESTERN PAC. R. CO.

Civ. 4903.

District Court of Appeal, Third District, California.

Sept. 24, 1934.

1. Master and servant ⇐265(6)

Where train, its contents, crew, and operations for rerailing derailed car loaded with pig lead were under immediate direction and command of deceased as conductor, and car, allegedly because of shifted load, toppled over during rerailing operations, killing deceased, res ipsa loquitur doctrine *held* inapplicable (Federal Employers' Liability Act, as amended [45 USCA §§ 51–59]).

2. Master and servant ⇐265(5)

In action for injuries to employee, "res ipsa loquitur" doctrine applies only when control of instrumentality is in employer or servants of employer other than injured person, since doctrine rests on principle that those in control have in some way been negligent.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

3. Master and servant ⇐265(5)

As respects applicability of "res ipsa loquitur" doctrine, where servant, who himself has control of instrumentality, has been negligent and thus brings about accident, servant cannot recover for injury, since there can be no recovery by servant against master for own wrong.

4. Master and servant ⇐96(1)

Where derailed car, loaded with pig lead, overturned during rerailing operations, killing conductor in charge of operations, and the overturning was allegedly caused by shifted load, circumstances or causes of derailment or any asserted negligence respecting derailment *held* not proximate cause of accident, and could not be considered as bearing thereon (Federal Employers' Liability Act, as amended [45 USCA §§ 51–59]).

5. Master and servant ⇐124(4)

Where car owned by defendant railroad was loaded with pig lead and sealed on line

of another railroad and received by defendant as intervening carrier, defendant *held* required only to inspect car in ordinarily prudent manner when received by it, as respects its liability when car, after being derailed, toppled over during rerailing operations, allegedly because of shifted load, and killed conductor (Federal Employers' Liability Act, as amended [45 USCA §§ 51–59]).

6. Evidence ⇐123(11), 357

In action for death of conductor caused when car loaded with pig lead overturned, telegram, sent shortly after accident by yard clerk to trainmaster, directing that inspector thereafter inspect all such cars for shifted loads, *held* properly excluded, since not part of res gestæ or authorized by company official, as against contention that telegram tended to show knowledge of railroad's agent that lead might have been improperly loaded (Federal Employers' Liability Act, as amended [45 USCA §§ 51–59]).

7. Evidence ⇐121(2), 242(1)

Declaration of agent, to be admissible under res gestæ doctrine, must be within scope of authority and concerning the act or transaction pending at the moment.

8. Appeal and error ⇐931(1)

On appeal, all circumstances of case, with inferences therefrom, will be marshaled in support of judgment.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Maggie E. Dryden, as administratrix of the estate of Jacob J. Dryden, deceased, against the Western Pacific Railroad Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. Oscar Goldstein, of Chico, and A. E. Ooghe, of Richmond, Va., for appellant.

C. W. Dooling and Edwin V. McKenzie, both of San Francisco, and H. B. Wolfe, of Quincy, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff, as administratrix, brought an action under the provisions of an act of Congress entitled "An Act Relating to the liability of common carriers by railroad," etc., approved April 22, 1908, and amendments thereto (45 USCA §§ 51–59), for the death of her son, who was killed while an employee of defendant Western Pacific Railroad Company. The issues were tried before a jury, who returned a verdict in favor of defendant, and plaintiff now appeals from the judgment thereon.

The original complaint set up specific acts of negligence, but prior to the trial an amended complaint was filed; the first count containing the specific allegations of negligence as set forth in the original complaint, and the second cause of action alleging general negligence.

The deceased at the time of his death was employed by defendant as a freight conductor. On the evening of May 20, 1931, as such freight conductor, he took charge of a freight train at Portola on the Western Pacific System, consisting of some seventy loaded cars, and left with the train west-bound for Oroville. About two miles west of Spring Garden, and while going around the "Loop," a box car, about the fifth or sixth from the caboose, became derailed. In the rerailing operation this car suddenly toppled over, killing Conductor Dryden, and for his death this action was brought.

The car in question was a Western Pacific box car having a permissible loading capacity of 95,000 pounds. The cargo consisted of bars of pig lead, each weighing approximately 75 pounds, the total load aggregating 90,056 pounds. This car had been loaded and sealed at Murray, Utah, on the line of the Denver and Rio Grande, and was received by the Western Pacific at its eastern terminal at Salt Lake City. The car was destined for Selby Smelting & Lead Company in Contra Costa county, Cal. Respondent was transporting it as an intervening carrier to Oakland, at which point it would be turned over to the Southern Pacific Company. It is conceded the Western Pacific is engaged in interstate commerce and that it owned the roadbed and car here involved.

Proceeding now to a narrative of the events preceding the death of the conductor, we find that the train of which this car was a part arrived at Portola, a division point on the Western Pacific, about 6 o'clock on the evening of the accident. The train was there made up and inspected preparatory to continuing westward, under the direction of Jacob Dryden as conductor. When the train entered and when it left Portola it was given a rolling inspection in addition to a standing inspection while in the yard. The standing inspection was made by car inspectors who examined each car in the train for mechanical defects in safety appliances, running gear, side bearing clearance, etc. The inspector who examined the car in question at Portola

testified there was nothing apparently wrong with the car, and the side bearing clearance was between the minimum of one-eighth of an inch and maximum of five-sixteenths of an inch. Side bearing clearance is the space between two side bearings, and determines whether the car itself is riding on the center bearing. If the intervening space between the upper and lower portions of either side bearing on either truck is above the maximum or below the minimum, it is an indication of a tilt in the car, indicating a shifted load. The car was sealed, and no inside inspection was made at any time prior to the accident. It was testified in that regard that, when a box car was brought into the division sealed and it showed normal with respect to side bearing clearance and in all other respects, the seal was not broken. If the side bearing clearance was not normal, the car was opened and an examination made.

After leaving Portola, the train and car in question received a rolling inspection at Sloat, about seven miles west of Portola. Spring Garden is about twenty miles further south of Portola, where a standing inspection was again made, this time by the conductor and one of the brakemen, who walked from the rear of the train to the engine and examined each car in the train,—the conductor on one side and the brakeman on the other. Nothing unusual was found and no indication of a shifted load in the car of bullion. As the train was proceeding westerly from Spring Garden at about eighteen miles per hour, rounding the loop which approximates an eight-decree curve with a difference in elevation between the high and low side of the curve of about four inches, the car here in question left the track. The train was stopped, and on examination it was found the forward truck had left the rails and was resting on the ties of the roadbed, a few inches from the rails, the rear truck still on the rails. The derailed car was uncoupled from the rest of the train, and the engine took the cars ahead of the derailed car to Massack, and then returned to assist in the rerailing operations. In the meantime a section crew had arrived. The conductor and others of the train crew inspected the car from the outside, but observed nothing that would indicate a shifted load. In order to rerail the car, it was necessary to raise the trucks high enough to permit the flange of the outer wheels to slip over the outer and higher rail and drop into place. To do this the conductor directed that frogs, or rerailing irons, be used. This contrivance is somewhat in the shape of an elongated turtle and enables the wheels to be drawn gradually up the incline plane of the turtle back to the required height, and permits the flange to slip into its accustomed place on the inside of the rail. The low frog was placed on the inside of the curve and the high frog on the outside and spiked to the ties just ahead of the wheels of the derailed truck.

Deceased was standing on the inside of the curve and near the front end of the derailed car where he could observe the operations and supervise the work. After the frogs were adjusted and spiked to his satisfaction, he gave the signal to the engineer to proceed ahead slowly. The car moved forward very slowly, and gradually the forward truck lifted on the frogs, when suddenly the car toppled and fell upon its side, pinning Dryden beneath it, causing his death. The cause of the accident is ascribed by appellant to the shifted load. It is claimed no bracing was used to hold the bars of lead from slipping, and the jolting of the car in its travel caused the load to shift, derailing the car and causing it to topple over when lifted on to the frogs. The respondent, however, claims the truck slipped on the frogs and rotated toward the inside, disturbing the equilibrium, and the flange of the wheels on the inside of the curve passed over the rail, causing the car to topple over, and was not the result of any shifted load.

Appellant urges some twenty-two points for reversal, including errors in the admission and rejection of evidence during the trial and errors in instructions. The principal objection, however, seems to relate to the conclusion of the court that the doctrine of res ipsa loquitur was not applicable. It is suggested that the doctrine is not applicable for the reason such doctrine is not accepted under the rules of federal practice, and, inasmuch as respondent is a carrier engaged in interstate commerce, the rules of law of the federal courts rather than our state courts are to be applied. Roberts, Federal Liabilities of Carriers, vol. 2 (2d Ed.), pars. 812, 813; Smithson v. A., T. & S. F. Ry. Co., 174 Cal. 148, 162 P. 111; Connor v. Atchison, T. & S. F. Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462.

[1-3] The claim that the doctrine is not applicable in the federal court is strenuously denied by appellant, and, in view of the apparent uncertainty of the federal practice, we prefer to leave that to a federal forum for a clear declaration of its policy, but we do believe that the doctrine of res ipsa loquitur is not here applicable for another reason. In the instant case the deceased was the conductor of the train, and as such in charge

thereof. It was his duty to inspect cars making up his train, which in fact he did. He also had in his possession a train sheet and waybills showing the contents of each car in the train, its point of origin and destination. When the car was derailed, it became his duty either to attempt rerailment by the use of the frogs, assisted by his train crew and the section men, or to summon the aid of a wrecking crew. He chose to attempt the rerailment by the use of the equipment at hand. He supervised the placing of the frogs, and it was the deceased who gave the signal to proceed, and he himself chose his position on the inside of the curve and within the area of the car if it should fall. In other words, the train, its contents, the crew, and the rerailing operations were under the immediate direction and command of the deceased as conductor. The doctrine of res ipsa loquitur cannot therefore be held applicable to the deceased. Such a rule can only be held applicable when the control of the instrumentality is in the employer or its servants, other than the injured person, for the doctrine itself is predicated on the principle that those in control have in some way been negligent. If, therefore, the servant who himself has control has been negligent, and thus brings about the accident, he cannot recover, for there can be no recovery by a servant against the master for his own wrong. Brown v. Board of Trustees, 41 Cal. App. 100, 182 P. 316; 19 Cal. Jur. 708, and cases there cited. The authorities relied upon by appellant, namely, Rost v. Kee, etc., Dairy Co., 216 Ill. App. 497, and Goldman & Freiman Bottling Co. v. Sindell, 140 Md. 488, 117 A. 866, were cases where plaintiffs were injured by particles of glass in a bottle of milk, and do not go so far as to suggest that a customer who purchases such a bottle of milk is in "control" of the instrumentality. Neither, of course, was the seaman in Lejeune v. General Pet. Corp., 128 Cal. App. 413, 18 P.(2d) 429, in "control" of the vessel or the operation of the winch, both different situations than where a conductor is in charge of a railroad train.

[4] The court also properly held, and so instructed the jury, that it could not consider the circumstances of the derailment of the freight car which toppled over, or the causes which brought about the derailment or any asserted negligence with respect to the derailment as bearing in any way upon the subsequent accident, there being as a matter of law no proximate cause existing between the derailing and the accident.

As was said in the case of Great Northern Ry. Co. v. Wiles, 240 U. S. 445, 36 S. Ct. 406, 408, 60 L. Ed. 733, where a drawbar of a freight train drew out, breaking the train into two sections. Under the rules of the railroad it became the duty of the brakeman to go to the rear and flag any on-coming train. This he failed to do, but remained in the caboose. An engine ran into the rear of the train, killing the brakeman. In an action brought for his death, the court found in favor of the company, saying: "The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles,—a duty not only to himself, but to others." It is therefore seen that the pulling out of a drawbar and the stopping of the train caused thereby merely created the condition out of which arose his duty to act.

Irrespective of the cause of the derailment it merely produced a condition which required the performance of certain duties upon the part of the deceased. It made no difference what caused that derailment; whatever its cause might have been, it had no effect as a legal casualty to the subsequent toppling over of the freight car.

[5] Appellant also complains of the giving of an instruction that the defendant was not required to supervise the loading of a car originating on a foreign railroad; its duty being to inspect said cars in an ordinarily prudent manner when they were received by the intervening carrier. It will be recalled that the car in question was a freight car loaded on the lines of the Denver & Rio Grande Railroad, and was received by defendant at its terminal at Salt Lake City. Upon being loaded, the car was sealed. It cannot be that a railroad receiving cars loaded upon lines outside of its system is required to break the seal and examine the contents of every car so received unless there is something to indicate a necessity therefor. The car in question had been inspected for side-bearing clearance, running gear, etc., at various points and stations along the way of the Western Pacific, and at no time does it appear that there was any indication of anything unusual in regard to the particular car in question.

The fact is stressed by appellant that the derailed car was a Western Pacific car and the accident occurred upon the system of the Western Pacific, but that of course is not important, for the ownership of the car was merely incidental; the real fact being that the actual loading was done upon another road and under that company's supervision. The citation by appellant of 39 Corpus Juris, 388, does not support his contention.

The rule seems to be that the connecting lines owe a duty to employees to exercise reasonable care to see that such cars are in proper condition.

The rule is well expressed and amply supported by authority in 26 Cyc. 1110, as follows:

"While there are decisions to the effect that the responsibility of a railroad company to its servants are the same in respect to cars of other companies which the servants are compelled to handle as in respect to its own, the better view seems to be that the duty of a railroad company in respect to a car received by it for transportation over its roads in the ordinary course of business, is one of inspection only, and that it is not to be held responsible for latent defects which cannot be discovered by such an inspection as the exigencies of traffic will permit in the exercise of reasonable care. * * *

"Where the servant of a railroad company is injured by reason of the improper loading of a car received from another company, or which has been loaded by the shipper, the company is not liable unless it has been in the habit of receiving and transporting cars loaded in such a manner, or unless it has failed to provide a system of inspection and proper persons to inspect cars after they have been loaded and before they have been received for transportation. * * *

"An inspection will be presumed to have been proper in the absence of evidence to the contrary." Oglesby v. Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758.

No claim is here made that the inspections as made were improper, except as to failure to examine the interior of each car.

[6, 7] Another point urged by appellant is that the court erred in refusing to admit a telegram sent to A. J. Christensen, trainmaster at Portola, by X. L. Owens, yard clerk at the same point, acting, so appellant claims, under the order of J. M. McSweeney, trainmaster. This telegram was sent shortly after the accident here in question, directing that inspectors thereafter open all cars of bullion and inspect the same for shifted loads. Appellant claims that the telegram was admissible as bearing upon the veracity of certain witnesses, and also because it tended to show knowledge on the part of defendant's agents that the bullion may have been improperly loaded. The ruling of the trial court was not error. The telegram was admittedly sent by a clerk of defendant after the accident. It was not part of the res gestæ, and, in the absence of authority from an official of the company, it was not binding upon it. It is analogous to an attempt after an accident caused by a dangerous instrumentality to show installation of safety devices. A declaration of an agent, to be admissible under the doctrine of res gestæ, must be within the scope of his authority and concerning the act or transaction pending at the moment. Froeming v. Stockton Electric Ry. Co., 171 Cal. 401, 153 P. 712, Ann. Cas. 1918B, 408; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 P. 286; Hoffman v. Southern Pacific Co., 168 Cal. 627, 143 P. 1032; Burgesser v. Bullocks, 190 Cal. 673, 214 P. 649; 10 Cal. Jur. page 1116.

As to the alleged errors in admission or rejection of evidence, we believe the rulings were correct in the main, although as to some of the minor objections the court might have reached a different conclusion, but it could not legally have effected a change in the result.

[8] It must be recalled that a jury has passed upon the issues of fact here presented, and the rule is well established that on appeal all of the circumstances of the case, together with their respective inferences which may be drawn therefrom, will be marshaled in support of the judgment.

Many other points are presented by counsel for appellants, all of which have been closely examined, but we believe no useful purpose will be performed by setting forth more in detail than we have already done. Counsel for both appellant and respondent have been able and industrious in presenting the many questions involved, but we have found nothing to merit a reversal.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

1 Cal.App.2d 217

RILEY v. BERKELEY MOTORS, Inc., et al.

Civ. 9053.

District Court of Appeal, First District, Division 1, California.

Oct. 2, 1934.

Hearing Denied by Supreme Court Nov. 30, 1934.

1. Automobiles ⇐181(2)

Prospective automobile purchaser injured while riding with demonstrator is not a "guest" within statute, but a "passenger for

hire," to whom dealer is liable for negligent direction of operation, although automobile is driven by such passenger (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Guest" and "Passenger for Hire," see Words & Phrases.]

2. Automobiles ⇐226(2)

Violation of speed statute by prospective purchaser driving automobile under direction of demonstrator will not preclude recovery by purchaser for injuries negligently caused by demonstrator, unless such violation was a proximate cause of the injuries.

3. Automobiles ⇐245(59, 90)

In action for injuries received by prospective purchaser when automobile driven by her under demonstrator's direction turned over when attempt was made to turn into intersection at unlawful speed, whether proximate cause of injuries was demonstrator's failure to reduce speed or purchaser's violation of law or undertaking to drive car without knowing how to manipulate brakes *held* for jury.

4. Automobiles ⇐245(71)

In action for injuries received by prospective purchaser when automobile, driven by her under demonstrator's direction, turned over when attempt was made to turn into intersection at unlawful speed, whether purchaser was negligent in attempting to drive without knowing how to manipulate brakes *held* for jury.

5. Pleading ⇐236(1)

Permission to amend complaint *held* not error, since matter rested in discretion of trial court.

6. Automobiles ⇐245(66)

In action for injuries received by prospective purchaser while driving automobile under demonstrator's direction, refusal to instruct that, if plaintiff's injury was due to an unavoidable accident, there could be no recovery, *held* not error, where there was no evidence that accident was unavoidable.

7. Automobiles ⇐246(56)

In action for injuries received by prospective purchaser while driving automobile under demonstrator's direction, refusal to instruct that, if demonstrator did not know of the road into which plaintiff turned or of plaintiff's intention to turn, verdict should be for defendants, *held* not error under evidence.

8. Trial ⇐260(1)

Refusal of instructions on matters fully covered by other instructions given *held* not error.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Lorraine Riley against the Berkeley Motors, Inc., and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Kirke La Shelle, Jr., of San Francisco, for appellants.

Dutton & Gilkey and Errol C. Gilkey, all of Oakland, for respondent.

PER CURIAM.

An action to recover damages for personal injuries alleged to have been caused by defendants' negligence. The jury returned a verdict for the plaintiff, and from the judgment entered thereon defendants have appealed.

Defendant Jones was a salesman in the employ of the defendant corporation, which was a dealer in automobiles. On the date of the accident, defendant Jones invited plaintiff to ride in an automobile owned by the corporation; his object being to induce her to purchase the same. Plaintiff alleged and testified that she was wholly without experience in the operation of automobiles, and the salesman admitted that he agreed to instruct her with respect to its operation. At his suggestion she attempted to drive, and he at the same time undertook to direct the operation of the car. In attempting to turn at an intersection the car overturned and plaintiff was injured.

In approaching the turn, the car was traveling between thirty and forty miles an hour, and plaintiff testified that the salesman had instructed her to make the turn, but did nothing to reduce the speed, and that she was not sufficiently familiar with the manner of operation to do the acts necessary to make the turn in safety. The testimony as to what was said and done by the salesman at the time is conflicting, but there is sufficient to support the conclusion that he was wanting in the degree of care which a prudent man would have exercised in the circumstances.

Defendants contend that the plaintiff, as a volunteer student driver lacking ordinary skill, was responsible for her own injuries; further that the speed at which the car was traveling exceeded that permitted by law, and that plaintiff's failure to ascertain the method of operating a car before attempting to do so were facts constituting contributory negligence, and bar a recovery.

[1] It has been held that a prospective purchaser of an automobile, who is injured while riding with a dealer who is demonstrating the car for the purpose of making a sale, is not a guest as the term is defined by section 141¾ of the California Vehicle Act (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), but occupies the situation of a passenger for hire (Crawford v. Foster, 110 Cal. App. 81, 293 P. 841; Bookhart v. Greenlease, etc., Co., 215 Iowa, 8, 244 N. W. 721. See, also, Champagne v. Hamburger, 169 Cal. 683, 147 P. 954); and that the dealer is liable if he negligently directs the operation of the car although the customer is driving (Bookhart v. Greenlease, etc., Co., supra; Greenie v. Nashua Buick Co., 85 N. H. 316, 158 A. 817; Martin v. Maxwell, etc., Vehicle Co., 158 Mo. App. 188, 138 S. W. 65; Buick Auto. Co. v. Weaver (Tex. Civ. App.) 163 S. W. 594; Lobley v. Penobscot, etc., Motors, 129 Me. 21, 149 A. 383). Assuming that the car in approaching the turn was exceeding the limit of speed permitted by law, the question remains whether this was negligence on plaintiff's part which would preclude a recovery.

[2] While a violation of law is commonly said to constitute negligence, this will not prevent recovery by a plaintiff unless such violation was a proximate cause of the injury. McPhee v. Lavin, 183 Cal. 264, 191 P. 23; Burtt v. Bank, etc., 211 Cal. 548, 296 P. 68; Godeau v. Levy, 72 Cal. App. 13, 236 P. 354. The question is ordinarily one for the jury. Kroijer v. Jenkins, 119 Cal. App. 175, 6 P.(2d) 96. And it has been held that, when the plaintiff's act or omission in violation of a statute or ordinance which contributes to his injury is itself caused by the negligence of the defendant, the negligence of the former will not be regarded as the proximate cause of the damage (Grohn v. Lucey (Tex. Civ. App.) 246 S. W. 1059); also that, where each party contends that the other was responsible, the issue is to be determined against the party who is shown to have had the better opportunity or been in the better position to prevent the occurrence; and this party is the one who was better enabled or in a better position to foresee the injury. Eddy v. Stowe, 43 Cal. App. 789, 185 P. 1024; Cal. Jur., 1928 Supp. Automobiles. And, where the relation between the parties is such that it is the duty of the defendant to care for the plaintiff's safety, and the situation is one where the plaintiff has a right to look to the defendant, his agents or servants, for direction, advice, or instruction in a matter involving such safety, the plaintiff may be deemed to have used ordinary care when acting under such direction, advice, or instruction, even though but for such circumstance his conduct would be clear evidence of negligence. Shearman & Redfield on Negligence (6th Ed.) § 91.

[3] These principles are peculiarly applicable to the present case, and the question as to whose negligence was the proximate cause of plaintiff's injuries was for the jury.

[4] So also was the question whether plaintiff was negligent in failing to learn the method of manipulating the brakes before undertaking to drive the car.

[5] There is no merit in the claim that the court erred by allowing plaintiff to amend her complaint. This was a matter of discretion, and the court committed no error in so doing, or in denying defendants' motion for a nonsuit, a directed verdict, or by its refusal to enter a judgment in defendants' favor notwithstanding the verdict.

[6] Defendants allege error in the giving or refusal of certain instructions, but an examination shows that the instructions of which defendants complain correctly stated the law. They requested an instruction that, if plaintiff's injury was due to an unavoidable accident, there could be no recovery. This was properly refused, as there was no evidence which would justify the conclusion.

[7] The court also refused to charge that, if the salesman did not know of the existence of the road into which plaintiff turned, or that she intended to make a turn at the point where the injury occurred, then their verdict must be for the defendants. The refusal of this instruction was not erroneous, as the salesman testified that he was told by the plaintiff some time before that she intended to turn into the next crossroad and that he was on the lookout as they approached. His testimony shows beyond reasonable question that ordinary care and observation would have disclosed the crossroad when the car was a considerable distance away.

[8] Instructions as to the speed permitted in entering intersections and turning into intersecting roads, and the care to be used in so doing, were also refused; but these matters were fully covered by other instructions given by the court. When such is the case, the refusal is not error. 24 Cal. Jur., Trial, § 79, p. 806.

The verdict was fairly sustained by the evidence, and the record discloses no evidence which would justify a reversal of the judgment.

The judgment is affirmed.

1 Cal.App.2d 37

JAMES et al. v. WHITE TRUCK & TRANSFER CO. et al.

Civ. 8017.

District Court of Appeal, Second District, Division 1, California.

Sept. 24, 1934.

1. Trial ⇐143

Directed verdict is proper whenever upon whole evidence, even though conflicting, judge would be compelled to set contrary verdict aside as unsupported by evidence, and directed verdict is improper when conflict in evidence is substantial.

2. Automobiles ⇐173(4)

In action for death of motorist whose automobile collided on highway at night with trailer of stalled truck parked 12 feet from right curb, truck owner *held* not negligent because driver failed to back truck and trailer to curb where drive chain connecting motor with truck was lost and by releasing of brakes trailer was just as likely to have veered toward middle of highway as toward curb (St. 1923, p. 517, § 99 et seq., as amended).

3. Evidence ⇐594

While weight of testimony is for jury, jury may not arbitrarily disregard undisputed testimony where there is no inherent improbability therein.

4. Trial ⇐139(1)

That compliance with statute by a defendant charged with negligence does not under all circumstances prove that there was no negligence, does not relieve court from determining as matter of law whether there is sufficient evidence to support finding of negligence if jury's verdict is for plaintiff.

5. Automobiles ⇐245(17)

Where drive chain connecting motor with defendant's truck was lost and driver parked truck and trailer on highway at night with tail red lights of truck and trailer burning, and plaintiff's automobile collided with trailer, court was required upon motion for directed verdict to decide whether reasonable minds might conclude that driver acted as prudent person would have done in going for help instead of remaining on highway at rear of trailer to warn motorists of danger (St. 1923, p. 517, § 99 et seq., as amended).

6. Automobiles ⇐173(5)

Driver who left truck and trailer stalled on highway at night and walked for aid *held* not negligent because he did not remain in rear of trailer to warn travelers of danger, where tail red lights of truck and trailer were burning and night was clear, and there were no other lights in vicinity (St. 1923, p. 517, § 99 et seq., as amended).

7. Automobiles ⇐149, 173(5)

Whether red light is on swift or slow moving vehicle, or on stationary obstruction, from time light is first observed, it conveys information of danger and observer is bound to heed its warning (St. 1923, p. 517, § 99 et seq., as amended).

Appeal from Superior Court, City and County of Los Angeles; Fletcher Bowron, Judge.

Action by Wilma James and others, infants, by Estelle Stacey, their guardian ad litem, against the White Truck & Transfer Company, a corporation, and another. From a judgment for defendants notwithstanding jury's verdict for plaintiffs, plaintiffs appeal.

Affirmed.

E. R. Simon, of Los Angeles, and O. E. Mark, of San Diego, for appellants.

Joe Crider, Jr., Henry L. Knoop, and David D. Stuart, all of Los Angeles, for respondents.

HAHN, Justice pro tem.

Plaintiffs appeal from a judgment ordered by the court to be entered in favor of defendants, under the provisions of section 629 of the Code of Civil Procedure, after a verdict had been returned by the jury for $6,000 damages in favor of plaintiffs. The appeal is predicated upon the contention that there was sufficient evidence before the jury to support the court's refusal to grant defendants' motion for an instructed verdict, and that the court erred in ordering judgment for defendants after the jury returned its verdict in favor of plaintiffs.

It appears from the evidence that on the night of October 6, 1928, a large truck and trailer belonging to respondent White Truck & Transfer Company, in charge of one Otto Harris, an employee of the transfer company, was traveling north on San Fernando boulevard, loaded with nineteen tons of well pipe. Proceeding down a slight grade in the road, Harris removed his foot from the throttle, thus permitting the truck to move on its gathered momentum. When he reached the low point in the road, he "stepped on his gas" and discovered that his drive chain was not connecting the motor with the truck. Bringing his truck to a stop by the application of his brakes, the driver upon investigation found his drive chain lying on the road to the rear of his trailer. Realizing that he would re-

quire aid to remove his vehicles from the highway, the driver first endeavored to flag passing motorists in the hope of securing a ride to the nearest telephone in order to secure aid from the company garage. Failing to induce any passing driver to heed his signals, he started out on foot to find a telephone. When he left his truck, the truck and trailer stood about 12 feet westerly from the east curb of the highway, which at this point was about 70 feet wide. Both headlights on the truck were burning. On each side of the truck and trailer were two red lights and two green lights while at the rear of the trailer was a red tail-light. It is not disputed that these lights were all burning and in every way met the requirements of the California Vehicle Act (St. 1923, p. 517, § 99 et seq., as amended). Shortly after the driver left in search of a telephone, William James, father of plaintiffs, while driving along San Fernando road with one C. J. Crawford in somewhat of a hurry to meet an engagement, crashed into the rear end of the stalled trailer, receiving injuries which resulted in his death.

This action was brought by plaintiffs as the surviving heirs of William James, to recover damages for his death which they allege was caused by the negligence of the defendants. Defendants' motion for a nonsuit was denied, and upon the close of the case, their motion for an instructed verdict was also denied. At the time of the hearing of defendants' motion for a new trial, the court concluded and so declared that defendants' motion for an instructed verdict should have been granted, and thereupon ordered that the jury's verdict and judgment thereon in favor of plaintiffs be set aside, and judgment in favor of defendants be entered.

[1] The only question here involved is whether or not defendants under the evidence were entitled to have the jury instructed to return a verdict in their favor. The rule with regard to instructed verdicts, so frequently declared in this state, is stated in the case of In re Estate of Baldwin, 162 Cal. 473, 123 P. 267, 268, as follows: "A directed verdict is proper unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence; but to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one." (Citing cases.)

Appellants predicate their argument that the court erred in granting defendants' motion to enter judgment in their favor notwithstanding the jury's verdict, upon the contention that there is sufficient evidence to support a finding of negligence on the part of defendants in two respects: First, in the failure of the driver to back his truck and trailer from the place where they came to a stop, over to and near the curb before he left the vehicles remaining on the highway. Second, in the failure of the driver to have remained "on guard at the rear of the truck to warn approaching motorists that the truck was disabled and was standing stationary."

[2, 3] As to the first point, appellants assume that there was a sufficient grade in the road at the point where the truck and trailer came to a stop to have enabled the vehicles to have moved backward by force of gravity upon the driver releasing the brakes, and that when so in motion the driver in some way could have controlled the motion of truck and trailer so as to have spotted them close to and alongside the easterly curb of the highway, where it is argued the vehicles would have been outside the path of the car driven by deceased. One difficulty with this contention arises from the fact that it is based on an assumption, not justified by the evidence, that there was a sufficient grade in the highway to have caused the vehicles to start to move backward of their own weight, upon release of the brakes. But a more complete answer lies in the undisputed testimony of the truck driver that with no power control on the truck, assuming that the vehicles would have moved backward upon releasing the brakes, there was no way to have controlled the movement of the trailer; that the trailer was just as likely to have veered out toward the middle of the highway as toward the curb. If the trailer with its load of pipe had moved athwart the middle of the highway, it cannot be disputed that the vehicles would have there constituted a greater menace to travel than in the position where they were left. While it is true the weight to be given to the testimony of witnesses is one for the jury to determine, the jury may not arbitrarily disregard the undisputed testimony of a witness "where there is no inherent improbability in the statement." Hayward v. Rogers, 62 Cal. 348; Hutchison v. Holland, 47 Cal. App. 710, 190 P. 1072.

It is surely not too much to say that the testimony here under consideration is not only lacking in "inherent improbability," but even one of limited knowledge of such matters would find it difficult, if not wholly impossible upon any reasonable hypothesis, to justify the rejection of the driver's statement as to the control of the trailer, if the vehicles had been allowed to move backward under their own weight.

Furthermore, it may be fairly assumed that had there been any question as to the correctness of the testimony of the driver, it would have been an easy matter for the plaintiffs to have secured competent testimony that would at least have raised a conflict on this point.

Appellants state their second point in the following language: "If it were impossible, as a matter of fact, to back the truck and trailer to the easterly curb, then we submit that it was again the sole province of the jury to determine as a fact, whether or not (under all the circumstances relative to the position of the truck on the highway, the traffic, and that it was at night time) the driver of the truck was justified in leaving the truck and trailer standing on the highway, where it had stopped, with only the lights burning, as was testified to, or whether or not it was necessary, under the circumstances, for the driver of the truck to take further precautions and remain on guard at the rear of the truck to warn approaching motorists that the truck was disabled, and was standing stationary. Motorists approaching from the south, upon observing the truck and trailer in the position it was then occupying in the middle of the east half of the highway, had a right to assume that the truck was in motion. But, if approaching motorists had observed a man standing at the rear of this truck and trailer, this would have been notice to them that the truck was not in motion, but was standing still. At least, this was a question of fact for the determination of the jury."

[4, 5] Conceding, as argued by appellants that, "compliance with a statute by a defendant charged with negligence does not under all the circumstances prove that there was no negligence," this fact does not relieve the court from determining as a matter of law whether or not there is sufficient evidence to support a finding of negligence in the event that the jury's verdict is for the plaintiff. In this case, there being no dispute as to the fact, the court was required, upon the defendants' motion, to decide whether or not a reasonable mind might conclude that the driver acted as a prudent person would have done in going for help instead of remaining all night at the rear of the trailer, endeavoring to warn approaching motorists of the danger of the stalled vehicles.

[6] The provisions of the California Vehicle Act concerning lights and particularly the red tail-light were fully complied with. A red light is universally recognized in the statutes and by common usage as the most effective method of giving warning of danger during the hours of darkness. It is indeed the only method in common use to give warning at night of excavations in the roadway, of piles of dirt, building materials, road machinery, road barricades, and other objects or conditions on the highway that constitute a menace to travelers. There was no fog at the time and place of the collision, nor does the record disclose any other condition or circumstance existing just prior to the collision, that would characterize the situation as differing in any way from the usual situation of a stalled vehicle, or any other large obstruction on the highway. Unless there exists some particular condition or circumstance that would suggest to an ordinarily prudent person that the red light warning specified by law and universally regarded as entirely adequate to advise those prudently using the highway that danger lurks ahead, was or would be ineffective, it would seem to do violence to reason to say that a prudent man would not feel that he had fully performed the duty he owes to the traveling public when he leaves his disabled vehicles on the highway, lighted as the undisputed evidence shows the truck and trailer were.

[7] It does not appear that there were any street lights, or lights other than those on the truck and trailer in the vicinity of the vehicles. With this condition of darkness, there would seem to be no merit in the contention of appellants that an on-coming motorist who failed to see the red lights on the truck would have seen a man at the rear of the trailer waving his arms. Appellants suggest that a motorist observing a red light ahead would assume or believe that it was attached to a moving vehicle, and therefore entitled to some other warning of a stationary object. We cannot give assent to this contention, nor approval to the doctrine involved in the suggestion. Whether the red light is on a swift or slow-moving vehicle, or on a stationary obstruction, from the time it is first observed, it conveys the information of danger and the observer is bound to heed its warning.

We do not discuss the question of the contributory negligence on the part of the deceased, for the reason that upon the considerations discussed, we have concluded that the judgment of the trial court must be sustained. It is so ordered.

Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J.

1 Cal.App.2d 231

BAKER v. PECK.

Civ. 5065.

District Court of Appeal, Third District, California.

Oct. 3, 1934.

Hearing Denied by Supreme Court Nov. 30, 1934.

1. Assault and battery ⇐28

In action for malicious battery with intent to oppress, evidence that plaintiff had previously called on defendant for payment of plowing done, that defendant refused to pay for work he had not seen, and that after acrimonious discussion defendant promised to meet plaintiff and inspect the work, *held* admissible to show defendant's attitude toward plaintiff (Civ. Code, § 3294).

2. Appeal and error ⇐207

Objection to opening statement of counsel for plaintiff cannot be made for first time on appeal.

3. Assault and battery ⇐42

In action for malicious battery with intent to oppress, whether battery was so made *held* for jury (Civ. Code, § 3294).

4. Appeal and error ⇐200, 236(1)

Where no motion for change of venue was made, panel was not challenged, jurors were not examined on voir dire, and no challenges were interposed, contention on appeal that jury were prejudiced against appellant cannot be considered.

5. Appeal and error ⇐207

Objection to argument of counsel cannot be made for first time on appeal.

6. Appeal and error ⇐715(2)

Appellate court cannot consider affidavit that certain sheets of paper with writing and figures thereon in handwriting of member of jury were found in jury room after return of verdict and that figures showed that jury included improper items in the verdict.

7. Appeal and error ⇐1004(3)

Appellate court cannot revise damages awarded by jury and sustained by trial court unless they are so grossly disproportionate to any compensation reasonably warranted by facts as to raise immediate presumption of passion, prejudice, or corruption.

8. Appeal and error ⇐218(1)

In action for punitive and compensatory damages for malicious battery with intent to oppress, complaint cannot be made for first time on appeal that damages were not segregated by jury (Civ. Code, § 3294).

9. Assault and battery ⇐40

$6,500 as punitive and compensatory damages *held* excessive by $3,250 for malicious assault with intent to oppress where plaintiff was struck with fist four times on jaw and face resulting in temporary loosening of certain teeth, soreness, swelling of jaw and larynx, bleeding of nose, and headache (Civ. Code, § 3294).

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by E. E. Baker against James F. Peck. From a judgment for plaintiff, defendant appeals.

Affirmed on condition of remittitur, otherwise reversed and new trial granted.

Andrew R. Schottky, of Merced, Elizabeth M. Maxwell, of San Francisco, and Philip Carey, of Oakland, for appellant.

F. M. Ostrander and Hugh H. Griswold, both of Merced, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought by plaintiff against defendant for recovery of compensatory and punitive damages resulting from a battery committed by defendant upon plaintiff on May 15, 1933, in the city of Merced. The plaintiff in the action alleges damages of $5,000 for an assault with premeditation and malice, and for exemplary damages of $50,000.

The answer of defendant admitted the striking of plaintiff, but alleged that no damage was done to plaintiff thereby and further alleged that he struck in self-defense. A jury was impaneled and a general verdict was returned in favor of plaintiff for $6,500. This is an appeal from the judgment entered upon such verdict, and from the order denying a motion for a new trial.

It is urged for reversal that error was committed in regard to the admission of certain testimony and in the giving and refusal to give certain instructions; that the attorney for plaintiff, as well as the jury, were guilty of misconduct; and that the verdict was excessive. For a proper understanding of the issues, it will be necessary to set forth the salient facts.

Defendant is an attorney who maintains his offices in San Francisco and also owns and operates considerable ranch property in the county of Merced. Plaintiff was employed either by defendant or one of his tenants to do certain tractor work on one of the ranches. This work was done some time in the month of February, 1933. Plaintiff, not having been paid for this work, called on defendant in his office in San Francisco about April 15th. Defendant at that time told plaintiff he had not seen the work and would not pay until he had himself examined it. After some acrimonious discussion, defendant agreed to meet plaintiff at the ranch a few days later. Accordingly the parties met and the work was found satisfactory and $381 was agreed upon. Defendant then promised to mail plaintiff a check for that amount in three or four days. This was not done. After an interval of perhaps three weeks, plaintiff learned that defendant was in Merced, and, on the day of the encounter hereinafter referred to, plaintiff went to Merced and met defendant at the courthouse and renewed his request for the payment of the plowing. Defendant replied that he was then engaged in the trial of a case and could not discuss other matters until the trial was finished. Plaintiff testified, which defendant denies, that defendant then suggested that they meet at the hotel during the noon intermission. In any event plaintiff, accompanied by his wife and his business associate, Mr. Blair, went to the hotel. He first inquired at the desk for Mr. Peck and was connected with his room by telephone. Plaintiff, Mr. Blair, and Mrs. Baker waited until Mr. Peck came down and until he had finished a conversation with others in the lobby. Mr. Baker then approached him and said that the oil company was crowding him for payment and was threatening suit unless the account was met, and reminded defendant of his promise to pay. This promise defendant denied, and, after some argument, called plaintiff a "damn liar" and struck him twice upon the jaw, followed by two more to the face, whereupon a friend intervened and plaintiff left the lobby. He then visited a physician, who testified he found some redness and swelling of the face and jaw and certain teeth noticeably loosened. Plaintiff returned to the doctor's office four days later and at that time there was considerable tenderness in the neck and throat over the larynx. On a subsequent visit on May 24th, the teeth had tightened, but the neck was still tender and the larynx swollen. Plaintiff had also during the time suffered headaches and bleeding of the nose, and also, so he testified, suffered pain both in the neck and in his throat.

[1] Defendant cites as error the admission of evidence of the meeting in San Francisco on October 15th, claiming the same to be immaterial and tended to distract the attention of the jury from the real issues, and resulted in prejudicing defendant in the eyes of the jury. The evidence was properly received, as tending to show the attitude and state of mind toward plaintiff. One of the issues before the jury was whether the defendant struck plaintiff with malice. Defendant denied the elements of malice and it was therefore proper for plaintiff to show any act or statement of defendant that might bear upon that issue. Furthermore, defendant denied that he was indebted to plaintiff, and, on cross-examination, plaintiff was entitled to contradict that testimony if possible, thereby impeaching the credibility of the witness. Certain objections, occupying many pages in the brief of defendant, were made to the instructions to the jury. The instructions are in some instances quite long and no useful purpose would be served by setting them forth here. We have examined them carefully, but can find no errors therein. The court seems to have fully and fairly stated the law as applicable to the case.

[2] It is then claimed that the attorney for plaintiff was guilty of misconduct in that in his opening statement he narrated the performance of the work done by plaintiff upon the ranches of defendant; that plaintiff had endeavored to collect the money due therefor and the incidents attendant upon his visit to the offices of defendant in San Francisco and the reply by defendant to the demands of plaintiff. We can see nothing particularly objectionable thereto and must assume counsel did not, either, for at the time the statement was made, no objection was interposed thereto. Such an objection before the trial court is a prerequisite to a basis of complaint on appeal. If counsel felt that plaintiff was exceeding his bounds, he should have called that fact to the attention of the court that the improper remarks could have been stricken out and the jury admonished in regard thereto.

[3] Appellant strongly urges also that the evidence was insufficient to sustain the contention of plaintiff that the acts were done maliciously and with the intent of oppressing plaintiff. The complaint reads that "defendant * * * maliciously and intending thereby to oppress plaintiff, violently struck plaintiff. * * *" It will be observed that plaintiff bases his claim for punitive damages not alone upon the presence of malice, but oppression as well. Section 3294 of the Civil Code sets forth in what cases exemplary damages are allowed. Oppression is defined by the Standard Dictionary as "an act of subjecting to cruel and unjust hardship," and in 46 California Jurisprudence 1121, as "an act of * * * domination." To show the state of mind and attitude of defendant toward plaintiff, plaintiff introduced evidence of prior meetings and conversations between plaintiff and defendant on the subject of dispute at the time of the assault in the hotel. At one meeting in response to a remark of plaintiff, defendant told him to be God damned careful of what he said or he would go down quicker than he came up. Defendant, in relating this incident, said plaintiff "then came off his perch."

At the time of the encounter at the hotel, plaintiff said to defendant, "you tried to knock me out, didn't you. If I had not been a good man you would have * * *," to which defendant replied, "It is too God damned bad that I didn't knock you out, you would be a better man if I had," and defendant then struck plaintiff two more blows.

In regard to the actual encounter, defendant said: "* * * Every blow I struck was made as forcibly as I could make it," and "I tried to knock him down but I was not successful," and "I tried to hit him as hard as I could." All of which indicates a sufficient intention to maliciously oppress plaintiff. An examination of the record disproves the claim of defendant that he struck in self-defense. No testimony is offered that plaintiff made any move to threaten or strike defendant. During the encounter, he stood with his hands at his sides and made no move of any kind toward defendant.

Another point stressed by appellant is that the jury were prejudiced against defendant and were guilty of misconduct. To establish such misconduct appellant filed affidavits, setting forth, among other things, that on account of his connection with the organization of the Merced irrigation district, within the boundaries of which most, if not all, of the jurors resided, he, affiant, was charged with many malevolent purposes and blamed for the financial loss that many of those in the district had sustained; and, as an indication of that feeling, affiant recites that at one time he owned a dwelling house in the city of Merced that took fire, and, when it was discovered whose property was afire, the fire department of the city made no effort to extinguish the flames and the house was destroyed. It was also averred extraneous matters were called to the attention of the jurors by counsel for plaintiff, all of which would make it impossible for a fair and impartial trial. It was also set up by affidavit of defendant that certain sheets of paper, with writing and figures thereon in the handwriting of a member of the jury, were found in the jury room after they had returned their verdict. These figures were claimed to show the jury included many improper items to make up the total of their verdict. It was also charged that counsel pictured defendant as a wealthy individual who refused to pay his just account to a poor farmer, thereby making a class appeal and branding the conduct of appellant as heartless.

[4] It will be observed, first, in answer to the foregoing, that appellant did not move for a change of venue, and, if the feeling of the people of Merced county were so wrought against affiant, such fact must have been known to defendant and to his local counsel.

Secondly, no challenge was interposed to the panel when returned into court.

Thirdly, there was no examination of the jurors upon their voir dire, except generally by the court, and no requests were made by defendant of the court, nor did he himself prosecute the inquiry as to any feeling of prejudice or bias on the part of the individual venireman toward him.

Fourthly, no challenges were interposed to the jurors, appellant accepting the first twelve jurors summoned to the box.

[5] Also no objection was made to the trial court of the argument of counsel, which, of course, should have been if the comments of counsel were objectionable.

[6] Lastly, the matters set forth in the affidavits in regard to the memoranda found in the jury room are not matters this court can consider in the impeachment of the verdict of a jury. Fererira v. Silvey, 38 Cal. App. 346, 176 P. 371; Siemsen v. Oakland, etc., Ry. Co., 134 Cal. 494, 66 P. 672; 20 Cal. Jur. 61, 62.

[7] This brings us to the final point urged for reversal, namely, that the verdict of the jury was excessive and the result of passion and prejudice. Such a question is in the first

instance addressed to the trial court upon the motion for a new trial. That court had the opportunity of observing what influence, if any, may have swayed the jury, and, as said in the case of Sherwood v. Jackson, 126 Cal. App. 441, 14 P. (2d) 861:

"Unless we (the reviewing court) are able to say that the award of damages made by the jury and sustained by the trial court was so grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision." Kelley v. Hodge Transp. System, 197 Cal. 598, 242 P. 76.

Accepting the testimony offered upon behalf of plaintiff as true, which apparently the jury did, the record discloses that plaintiff suffered, as a result of the blows by defendant, a loosening of the left upper molars and the left upper and lower bicuspids, a soreness and swelling of the jaw, and a swelling and tenderness over the larynx, together with bleeding of the nose and headache the following day. Plaintiff and his wife also testified that for two or three weeks following the encounter he did no work and complained of not feeling well and being groggy. During this time he did not plow any crops, although they were awaiting his attention. He also had difficulty in swallowing his food and was compelled to eat soft foods during that time. He made three visits to his doctor's office for which he paid a fee of $12.

[8, 9] The foregoing constitutes the basis for an award for compensatory damage. The verdict returned by the jury was a general verdict of $6,500 and it is impossible to ascertain what allowance was made by the jury for compensatory and what amount for exemplary damage, but appellant not having requested a segregation, cannot now be heard to complain of that fact. The jury were fully instructed, however, on the question of damage, both exemplary and compensatory, and we must assume that they gave heed thereto. However, in view of the extent of the actual outlay by plaintiff, the somewhat general enumeration of his injuries sustained, and having in mind that the punitive damages must be reasonable in proportion to the compensatory damage, we believe the amount awarded by the jury is in some degree disproportionate.

It is therefore the order of this court that the judgment be reversed and a new trial granted unless plaintiff, within fifteen days from the date of the filing hereof, shall in writing remit all of the judgment in excess of $3,250, and, if plaintiff shall remit the sum of $3,250 from the judgment within fifteen days from the date of the filing hereof, then and in that event, the order denying the motion for a new trial shall be sustained and the judgment in the sum of $3,250 shall be affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

1 Cal.App.2d 328

HOBART ESTATE CO. et al. v. STATE BOARD OF EQUALIZATION et al.

Civ. 5230.

District Court of Appeal, Third District, California.

Oct. 10, 1934.

1. Taxation ⇐104

Where state was not authorized to tax "Dual Use Property," it could not tax income of such property, since tax on income was to all intents and purposes tax on property (Pol. Code, §§ 3665a, 3665b (e); Const. art. 13, § 14 (a).

2. Taxation ⇐47(7)

Where counties in which "Dual Use Property" is situated tax such property, taxation by state of income derived from such property is in effect "double taxation" prohibited by law (Pol. Code, §§ 3665a, 3665b (e); Const. art. 13, § 14 (a).

[Ed. Note.—For other definitions of "Double Taxation," see Words & Phrases.]

3. Taxation ⇐104

Where statute permitted state to tax "Exclusively Operative Property" and counties to tax "Dual Use Property," state's right to impose gross income tax did not extend to income from "Dual Use Property" but was confined to income of "Exclusively Operative Property" (Pol. Code, §§ 3665a, 3665b (e); Const. art. 13, § 14 (a).

4. Taxation ⇐363½

Where statute permitting state to tax "Exclusively Operative Property" and counties to tax "Dual Use Property" did not fix

method of apportioning gross income derived from both kinds of property which could not be segregated as between respective properties, income should be apportioned according to value of respective properties, as such properties bear to entire gross receipts (Pol. Code, §§ 3665a, 3665b (e); Const. art. 13, § 14 (a).

5. Taxation ⇐47(7)

Under statute authorizing state to tax gross income from "Exclusively Operative Property" only and to deduct from gross receipts sum necessary to eliminate double taxation, levy on gross income produced by use of "Exclusively Operative Property" in connection with "Dual Use Property" was annulled for failure to make such deduction (Pol. Code, §§ 3665a, 3665b (e); Const. art. 13, § 14 (a).

Petition by the Hobart Estate Company and another, doing business under the names and styles of the Angels Electric Light & Power Company and the Utica Mining Company, against the State Board of Equalization and others for a writ of mandate to compel the respondents to set aside and annul a tax assessment for the fiscal year 1934–1935, and to proceed with the levying of a tax in accordance with the prayer of the petition, and to refund excessive taxes levied and collected.

Judgment in accordance with opinion.

J. Richard Townsend, of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the application of the petitioners for a writ of mandate praying for an order of this court setting aside and annulling an assessment levied upon the properties of the petitioners for the fiscal year 1934–1935, and further directing the respondents to proceed with the levying of a tax in accordance with the prayer of the petition, and likewise directing refunds for and on account of excessive taxes levied and collected during the fiscal years 1932–1933 and 1933–1934.

For the purposes of the decision herein, we will confine ourselves to discussion of the tax levy for the fiscal year 1934–1935, for the simple reason that the principles involved for the fiscal year just stated are likewise applicable to both of the preceding fiscal years.

The record before us shows that the assessment and taxes under consideration are based upon the gross receipts of the properties operated by the petitioners, including property described as "Exclusively Operative Property," and also "Dual Use Property." By these terms we mean property in the first class used exclusively in the business which gives to the state the right to make an assessment and levy a tax according to the gross revenue derived therefrom. By "Dual Use Property" we mean the property which is subject only to taxation by the counties in which the property is situate, in this case the counties of Alpine, Calaveras, and Tuolumne being the respective counties entitled to assess and levy taxes upon the respective portions of the "Dual Use Property" therein situate.

On the 28th day of June, 1934, at the termination of a hearing had for such purpose, the state board of equalization made and entered an order determining the character of the property owned and operated by the petitioners for the purposes of taxation, and therein determined the property which should be classed as "Exclusively Operative Property" and, likewise, the property which should be classed as "Dual Use Property." After making this classification, the state board of equalization directed the assessors, where the "Dual Use Property" is situate, to make assessment of such property. Following the completion of such classification, the state board of equalization proceeded to levy a tax of 9 per cent. upon the gross income of all the properties owned and operated by the petitioners, including as well the income derived from "Exclusively Operative Property," and income derived from "Dual Use Property," the total receipts being the sum of $107,716.78, which, at 9 per cent., by this method made, and by the state board of equalization the taxes alleged to be due the state, were fixed at the sum of $9,694.52.

It likewise appears from the record that the taxes which will be levied and placed upon properties belonging to the petitioners classified as "Dual Use Property," will be subject to a tax for the same fiscal year in the sum of $5,036.94. This calculation is based upon the assessment made upon the "Dual Use Property" belonging to the petitioners, for the fiscal year of 1933–1934, the actual amount of the assessment and tax levy not being fixed by the respective counties at the date of the filing of the petition herein.

We do not need to follow the allegations in the petition seriatim, for the simple reason

that what we have said also is applicable to the various assessments and tax levies involved. We may also state that while the petition and the argument of counsel for the petitioners have covered a very wide field, the reply of the respondents is directed almost immediately to the points involved, and, after a thorough study, we have concluded that the questions presented for determination are really simple, and involve no necessity of the citation of any great number of authorities.

Before considering the legal questions involved, a portion of the petitioners' brief presents, we think, a concrete statement which warrants the application of the rules set forth in subdivision (e) of section 3665b of the Political Code. We quote therefrom as follows: "In the present case it is impossible to say what part of the total gross receipts of petitioners' electric business is produced by the exclusively operative property, or what part by the dual use property. There is no means available for making an actual segregation of the total gross receipts between exclusively operative property and dual use property. Moreover, neither the Constitution nor the statutes prescribe any method of segregating the total gross receipts where, as here, such receipts are produced as a unit by the combined efforts of exclusively operative property and dual use property, and both classes of property are essential to the production of any gross receipts."

[1, 2] Paragraph (a) of section 14 of article 13 of the Constitution limits the state in the taxation of properties belonging to the petitioners herein, to the gross receipts of such property which, under the law, is known and classified as "Exclusively Operative Property." The law places within the domain of the counties the right to levy and collect taxes upon property described as "Dual Use Property." It follows, therefore, as a logical conclusion, that if the state has no power or authority to levy an assessment upon, and tax "Dual Use Property," it has no power or authority to levy and collect a tax upon the income of such property. We do not need to cite authorities to the point that a tax upon the income of property is, to all intents and purposes, a tax upon the property itself. Nor do we need to cite authorities to the effect that the law prohibits double taxation. Thus, if the counties where the "Dual Use Property" is situate, levies and collects the tax thereon, and the state proceeds to levy and collect a tax upon the income derived from such property, there is in effect a double taxation of the "Dual Use Property." The questions before us do not involve the escape of property from taxation; nor is there any contention made that any of the properties belonging to the petitioners should be relieved from taxation, but only that an adjustment be made, to the intent and purpose that double taxation be not imposed.

[3] In the case of Hobart Estate Co. et al. v. Waters (Cal. App.) 18 P.(2d) 768; Id. (Cal. Sup.) 32 P.(2d) 613 (opinion of this court adopted as the opinion of the Supreme Court), this court had occasion to collect and cite practically all of the leading cases having to do with "Exclusively Operative" and "Dual Use" properties, showing clearly the rights of the counties, and the right of the state board of equalization, to wit: That the counties and the state board of equalization should restrict their assessments and levies, first, by the counties, to "Dual Use Property," and, second, by the state board of equalization to "Exclusively Operative Property." The application of the principles there discussed and the case cited lead unerringly to the conclusion that the right of taxation to "Exclusively Operative Property" means the right of taxation upon the gross income of "Exclusively Operative Property." Any other conclusion would simply mean that the state might levy a tax upon the income of "Dual Use Property," and that the respective counties where the "Dual Use Property" is situate, might levy a tax upon the property itself. This injustice is not contemplated by the Constitution, and we find nothing in any of the sections of the Political Code which would lead to or authorize any such conclusion. We think the opinion in the Hobart Case, supra, is so complete in its citation of authorities that no further collection or analysis of cases having to do with "Exclusively Operative Property" or "Dual Use Property" need be set forth.

[4] While the provisions of the Constitution to which we have referred restrict the power of taxation by the state board of equalization to the income derived from "Exclusively Operative Property," it does not specifically set forth the method of ascertaining the amount of the income derived from the operation of such property when the gross income of any company whose business is subject to state taxation is partly derived from the operation of "Dual Use Property." In this condition we think that the various sections of the Political Code describing "Operative Property," "Dual Use Property," "Property Non-operative," and the procedure to be followed in making a just levy, do not in any wise controvert the constitutional provision relative to levying a tax upon the income of

"Exclusively Operative Property," but only provides a way for determining the amount of the gross income upon which the state tax may be levied, to wit: If the income from the respective properties cannot be segregated, then the gross income should be apportioned according to the value of the respective properties, as such properties bear to the entire gross receipts. As calculated by the petitioners, this would give a gross income liable to state taxation for the fiscal year 1934–1935, of $57,369.96, upon which there would be due a tax payable for such period of $4,-531.21. These figures are not controverted by the respondents, but we do not adopt them as the figures upon which the assessment is to be made, nor the amount of the assessment or taxes to be collected, but only as illustrative of the method of determining the tax to be levied upon the "Exclusively Operative Properties" belonging to the petitioners.

Counsel for respondents are correct in their assumption that in the decision in the Hobart Case, supra, this court did not intend to invalidate or hold that the state was not entitled to levy and collect a tax upon the gross income of the "Exclusively Operative Properties" belonging to the respondents. The conclusion, however, cannot be avoided that where the income from "Exclusively Operative Property" and the income from "Dual Use Property" enter into and become component parts of the total gross revenue, double taxation cannot be imposed.

[5] Section 3665a of the Political Code empowers the state board of equalization, where double taxation would result in making a levy upon gross income, to reduce from the gross receipts such sum as might be found necessary to eliminate such double taxation. In the present case there is, and there can be no dispute that the method followed has resulted or would result in double taxation as claimed by the petitioners. It therefore becomes the legal duty of the board to make the reduction authorized by this section whenever a levy upon the gross receipts results in such imposition.

It follows from what we have said that the levy made by the state board of equalization upon the gross income of the properties operated by the respondents, having included the income of properties not subject to state taxation, as well as the income of properties subject to state taxation, the levy so made must be annulled and set aside. And it is so ordered.

It is also further ordered that the state board of equalization proceed, in the event it finds it impossible to segregate the income derived from the "Exclusively Operative Properties" and the income derived from the "Dual Use Properties," to determine the ratio that the respective properties bear to the entire gross income, and assess and levy a tax upon the gross income found to be attributable to the "Exclusively Operative Properties."

This discussion demonstrates the right to credits and refunds to which petitioners may be entitled on account of double taxation which may be open for adjustment between the petitioners and the respondents, but as to which we make no order, in view of the fact that the record shows suits in the superior court are now pending for the recovery of sums alleged to have been collected on account of double taxation.

The petitioners will prepare a writ of mandate drawn in accordance with the views expressed in this opinion.

We concur: PULLEN, P. J; R. L. THOMPSON, J.

1 Cal.App.2d 380

PEOPLE v. MYERS et al.

Cr. 174.

District Court of Appeal, Fourth District, California.

Oct. 11, 1934.

Criminal law ⇦1182

Burglary conviction would be affirmed where no appearance was made on behalf of accused on oral argument, no brief was filed for him, and accused's attorney informed court that no brief would be filed (Pen. Code, § 1253).

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Roy Myers and Scott Rackley were convicted of burglary in the first degree, and they appeal. On motion by the Attorney General to affirm the judgment as to the second named defendant.

Judgment against second named defendant affirmed.

Arthur Frame, of Clovis, for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendants were jointly charged with the crime of burglary. A jury found each defendant guilty of burglary in the first degree, and, from the ensuing judgment, each defendant has appealed. The transcript was filed in this court on August 1, 1934, and the cause regularly placed on the calendar for September 11, 1934, for oral argument. No appearance was made on behalf of the appellant Rackley, no brief has been filed for him, and the attorney who acted for him in the trial court has sent in a letter stating that no brief would be filed. The Attorney General has moved to affirm the judgment as to Rackley under section 1253 of the Penal Code.

The judgment against the defendant Rackley is affirmed.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.App.2d 161

LESSER v. COLLINS, Registrar of Voters.

Civ. 9207.

District Court of Appeal, First District, Division 2, California.

Sept. 28, 1934.

1. Criminal law ⇐93

Superior court *held* without jurisdiction of count of indictment charging conspiracy to violate statute denouncing willful omission of official duty, where judgment on other counts was arrested, since remaining crime charged was only misdemeanor (Pen. Code, §§ 176, 182, 1187).

2. Judgment ⇐489

Judgment of conviction is always subject to collateral attack where want of jurisdiction is apparent upon face of judgment roll (Code Civ. Proc. § 1916).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Petition by Harry Lesser for a peremptory writ of mandate against Charles J. Collins, Registrar of Voters of the City and County of San Francisco. From a judgment granting the writ, defendant appeals.

Affirmed.

John J. O'Toole, City Atty., and Edmond P. Bergerot, Deputy City Atty., both of San Francisco, for appellant.

Morgan J. Doyle, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from a peremptory writ of mandate issued by the superior court in the city and county of San Francisco commanding defendant to register petitioner as a qualified elector. Registration was denied on the ground that it appeared from the judgment roll of a criminal proceeding in Alameda county that the petitioner had been convicted of an infamous crime and therefore was ineligible to register because of the provisions of section 1, article 2, of the Constitution. In granting the writ of mandate, the trial court found that the judgment of conviction was void on its face.

In support of the judgment, the learned trial judge prepared and filed a written opinion which fully covers the main issue raised on this appeal, the pertinent portions of which we adopt as the opinion of this court:

"The petitioner, Harry Lesser, is a male person over the age of twenty-one years, and is a natural born citizen of the United States of America, being born at Oakland, Cal., June 29, 1881, and has never renounced his allegiance to the United States.

"On March 5, 1930, Lesser was indicted by the grand jury of the county of Alameda with A. A. Horwege and James Austin for conspiracy in three counts as follows:

"Count 1. 'The Grand Jury of the County of Alameda hereby accuses Harry Lesser, A. A. Horwege and James Austin of a felony, to-wit: a violation of subdivision 1 of section 182 of the Penal Code of the State of California, to-wit: conspiracy to commit bribery.'

"Count 2. 'And the said defendants Harry Lesser, A. A. Horwege and James Austin are further accused by the Grand Jury of the County of Alameda of a felony, to-wit: a violation of subdivision 1 of section 182 of the Penal Code of the State of California, to-wit: conspiracy to violate section 176 of the Penal Code of the State of California.'

"Count 3. 'And the said defendants, Harry Lesser, A. A. Horwege and James Austin, are further accused by the Grand Jury of the County of Alameda, of a felony, to-wit: bribery, a violation of section 67 of the Penal Code of the State of California.'

"On June 19, 1930, a jury in the superior court, theretofore impaneled, convicted Lesser on all three counts in the indictment. However, thereafter, on June 24, 1930, the judge of the trial court, Hon. Fred V. Wood, superior judge, granted a motion in arrest of judgment as to the convictions in counts 1 and 3 of the indictment.

"Section 1187 of the Penal Code of the state of California provides as follows:

"'§ 1187. *Effect of Arresting Judgment.* The effect of an order arresting the judgment is to place the defendant in the same situation in which he was before the indictment was found or information filed.' * * *

[1] "It will be thus seen that the record discloses that Lesser was absolved, so to speak, of the crime of conspiracy to commit bribery (which is a felony) and of the crime of conspiracy to commit the giving or offering bribes to executive officers (which is a felony), and leaving only the conviction of conspiracy to violate section 176 of the Penal Code of the State of California (which is a misdemeanor). * * *

"Section 176 of the Penal Code provides as follows:

"'*Omission of Duty by Public Officer.* Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.' * * *

"The punishment prescribed in section 182 of the Penal Code for criminal conspiracy may be summarized as follows: First, where the object of the conspiracy is a felony, then the punishment is the same as is provided for that particular felony; second, where the object of the conspiracy is to commit any act injurious to public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws, then the punishment shall be in the same manner and to the same extent as is provided for the punishment of the commission of the respective act; third, where the object of the conspiracy does not come within the above-named two classifications, then the punishment shall be by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

"This latter classification refers to such crimes as simple assault, petit theft, and like misdemeanors which are not included in the category of crimes understood to be or prescribed to be crimes which are injurious to the public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws.

"For example, if the conspiracy charged against Lesser and his alleged confederates was a conspiracy to commit petit theft or simple assault and a conviction followed, then he would be punishable by imprisonment in the county jail or in the state penitentiary not exceeding two years, or by a fine not exceeding $5,000 or both, and he could be prosecuted and tried therefor in the superior court pursuant to the special provisions of section 182 of the Penal Code. In the present situation we find that Lesser was convicted of conspiracy to violate section 176 of the Penal Code, which is not only a misdemeanor, but is also classified in the Penal Code, in chapter 7, among 'Other Offenses Against Public Justice,' and is a crime coming within the category of crimes 'tending to pervert or obstruct justice, or the due administration of the laws' (section 182), and is punishable as a misdemeanor by an imprisonment in the county jail not exceeding six months, or by a fine not exceeding $500, or both. Section 19, Penal Code. Section 176 states in part: '* * * is punishable as a misdemeanor.'

"In substance, count 2 of the indictment charged Lesser, Horwege, and Austin with a conspiracy to place one Frank Phillips, a street inspector at Oakland, Cal., on the pay roll of the California Construction Company, under the fictitious name of F. Rose, and that Phillips corruptly received moneys under that name to allow Lesser and his confederates to depart from following the plans and specifications called for in such street work.

"It is alleged in this count 2 that this conspiracy was to violate section 176 of the Penal Code and 'said omission of duty being a delinquency where no special provisions have been made for its punishment.' As above pointed out, however, the violation of section 176 of the Penal Code is the willful omission of a duty where a special provision has been made in the section itself making the violation thereof 'punishable as a misdemeanor.'

"It will also be noted that section 182, which defines conspiracy, does not state that all conspiracies to commit crimes are felonies. The difference in the punishment prescribed

only denotes whether the particular violation is a misdemeanor or a felony. * * *

"In my opinion, the judgment of the trial judge was void, for the reason that the superior court did not have jurisdiction to try Lesser and his alleged confederates on count 2, and that the jurisdiction of that count (count 2) was wholly within the jurisdiction of the Oakland police court.

"The fact that Lesser did not appeal and that he seemed to treat the penitentiary as a place of refuge instead of a place of incarceration for punishment, in that he did not sue out a writ of habeas corpus while there imprisoned, does not enter into the present controversy.

"The fact that the court had no jurisdiction to try count No. 2 leaves the defendant in the same status as if he were not indicted or tried so far as his civil rights are concerned. He is entitled to the right to register and to vote."

[2] The appellant urges the further point that the proceeding is a collateral attack upon the judgment of conviction. But the attack is based upon a want of jurisdiction in the superior court to enter the judgment of conviction which is apparent upon the face of the judgment roll. Where such is the case, a judgment is always subject to a collateral attack. Section 1916, Code Civ. Proc.; 15 Cal. Jur. p. 138 et seq.

For these reasons, the judgment is affirmed.

I concur: STURTEVANT, J.

1 Cal.App.2d 323

CALIFORNIA PACIFIC TITLE & TRUST CO. v. MacARTHUR et al.

Civ. 9132.

District Court of Appeal, First District, Division 2, California.

Oct. 10, 1934.

Hearing Denied by Supreme Court Dec. 6, 1934.

Notaries ⇨11

Bank loaning on deeds of trust forged by notary having right to cash its cashier's checks made out to purported signers of deeds on forged indorsement by notary, where it had no notice of forgery, title insurance company which insured deeds in reliance on notary's false acknowledgment and paid losses to bank could recover for losses on notary's official bond, since loss resulted from invalidity of deeds within terms of title policy and not from bank's alleged negligence in cashing checks.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the California Pacific Title & Trust Company against J. J. MacArthur and the Columbia Casualty Company. Judgment for plaintiff, and the second named defendant appeals.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Henry E. Monroe and Robert A. Woodyard, both of San Francisco, for respondent.

STURTEVANT, Justice.

The appeal is by the defendant Columbia Casualty Company, a corporation, from a judgment for $2,687.34 in an action upon the official bond of a notary public.

The complaint contained two causes of action involving separate transactions, and was directed against J. J. MacArthur, a notary public in and for the county of Marin, and the Columbia Casualty Company, the surety on his official bond.

In the first cause of action it was alleged that the Bank of America (formerly the Bank of Italy) loaned the sum of $2,000 upon a promissory note secured by a deed of trust purporting to be executed by one Margaret Ashton Kerrell, and that the plaintiff, at the request of the bank, issued its title policy insuring the validity of this deed of trust. It was further alleged that the note and deed of trust were forgeries; that as a result thereof the bank lost the sum of $1,837.17; and that upon demand the title company, pursuant to its title policy, paid the bank the said sum of $1,837.17. Plaintiff sought damages in the said sum, and alleged that the same was caused by the official misconduct or neglect of the notary in making a false certificate of acknowledgment to the said deed of trust.

In the second cause of action a similar transaction was alleged with reference to a promissory note in the sum of $1,000 secured by a deed of trust purporting to be executed by Adolph N. Schopke and C. Burke. It was similarly alleged that these documents were forgeries, that the deed of trust bore a simi-

larly false certificate of acknowledgment by the notary, and that the validity of the deed of trust was similarly insured by the plaintiff title company. Damage in the sum of $850.17 was claimed in this transaction.

Copies of the respective notes and deeds of trust were attached to the complaint by way of exhibits, and by amendment to the complaint copies of the respective title policies were attached as exhibits.

The defendant MacArthur was not served with summons and did not appear in the action, which proceeded to trial solely against the defendant surety. In its answer that defendant put in issue the allegations of the complaint respecting misconduct or neglect of the notary, proximate cause, and losses, and affirmatively alleged that negligence of the bank and the title company had proximately contributed to the loss and injury asserted in each transaction.

The findings of the court were brief and general and in favor of the allegations of the complaint, and upon these findings the court entered judgment for the sum of $2,687.34 as prayed for in the complaint. Following the denial of its motion for new trial, the defendant duly filed its notice of appeal.

The plaintiff alleged, and the trial court found, that the trust deeds were sent to MacArthur as notary public for him to attach certificates of acknowledgment; that he attached the certificates and that the bank relied thereon. The plaintiff alleged, and the trial court found, that the plaintiff examined the deeds of trust and the certificates of acknowledgment, and, having no knowledge of any facts to the contrary, it relied on said certificates.

The defendant quotes from the reporter's transcript the following: "The notary, MacArthur, who had been a friend and customer of the Mill Valley Branch of the bank for several years, availed himself of that relationship and devised a scheme to defraud the bank. In pursuance of that scheme he represented himself as agent for the respective borrowers and made applications to the bank for the respective loans. When the loans were accepted he forged the signatures of the purported borrowers to the respective notes and deeds of trust, attached false certificates of acknowledgment to the deeds of trust, procured the checks issued by the bank for the proceeds of the loans, forged the endorsements of the payees thereon, and obtained the proceeds of the loans for himself. It is conceded that the title company issued its title policies insuring the validity of each deed of trust, and that it responded to the demand of the bank and paid the amount claimed as a loss in each transaction." It then makes one point. The judgment lacks evidentiary support, for the reason that the evidence does not establish that any official misconduct or neglect of the notary was the proximate cause of the losses asserted by plaintiff. That point it subdivided into two: (1) The official misconduct of Notary MacArthur in making false certificates of acknowledgment was not the proximate cause of the losses claimed by the bank; and (2) the losses paid by plaintiff to the insured, the bank, were not within the terms of its title policy. In support of its first contention, the defendant asserts that the bank's loss arose, not because of the false certificates of acknowledgment, but by reason of its paying the checks the indorsements on which were forged. It claims that a purported payment on a forged check is, in law, no payment, and that the law will consider the moneys as still in the bank. Ryan v. Bank of Italy Nat. T. & S. Ass'n, 106 Cal. App. 690, 289 P. 863. Continuing, it claims that the principle just stated would have applied with full force in the instant case if the bank had brought the suit. Hatton v. Holmes, 97 Cal. 208, 31 P. 1131; American Surety Co. of New York v. First Nat. Bank, 203 Ala. 179, 82 So. 429; State v. Globe Indemnity Co., 222 Mo. App. 918, 9 S.W.(2d) 668; Howcott v. Talen, 133 La. 845, 63 So. 376, 49 L. R. A. (N. S.) 45, and extended note. Thereupon it makes the further claim that the plaintiff stands in no better position than its insured bank. If the real estate dealer had made a forged check, and if the bank had cashed such forged check, the reasoning of the defendant would find support in the authorities cited. But he did not do so. The check involved was the check of the bank's cashier. That fact is quite material. When the deeds of trust, having attached thereto the false certificates, were presented to the bank, it is not claimed that it had any knowledge putting it on notice of the fact that the signatures to the deeds of trust were forgeries. Therefore it had a right to rely on the certificates and act thereon. Joost v. Craig, 131 Cal. 504, 507, 63 P. 840, 82 Am. St. Rep. 374. It did so, and issued its checks payable to the record owner. Thereafter said checks were returned and presented for payment. They were indorsed by the same hand that had signed the deeds of trust and to which the false certificates were attached. The original wrongful cause which the forger had started continued and was not broken by any intervening cause of any kind or nature. The bank, therefore, had the right to pay said

checks. Having been defrauded, it had the right to sue. As it had the right to sue, no reason appears on the face of the record why this plaintiff, the bank's insurer, did not have the right to sue.

The second subdivision of the point made by the defendant seems to be disposed of by what we have said above. It remains to consider the terms of the policy which the plaintiff had issued. The policy provided, among other things: "This policy shall and does expressly insure any insured, mortgagee, trustee, or beneficiary against any defect or invalidity, existing at the time of the record thereof, in any mortgage or deed of trust to which said property is subject as herein set forth, in which said insured shall have an interest."

In contending that the policy did not cover the plaintiff's loss, the defendants assert that: "The loss suffered by the bank in each instance did not result from any defect or invalidity in the particular deed of trust, but because the bank was negligent in cashing checks on forged instruments." We have shown above such was not the fact. The defendant cites and relies on State v. Globe Indemnity Co., 222 Mo. App. 918, 9 S.W.(2d) 668, 669. It is not helpful. It involved a forged check issued by the vendee and not a valid check issued by the lender. That the distinction was material in the mind of the court rendering the decision appears from another case decided in the same jurisdiction involving other acts of the same wrongdoer. State v. Globe Indemnity Co., 222 Mo. App. 153, 2 S.W. (2d) 815.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

1 Cal.App.2d 381

LENNON et ux. v. WOODBURY et al.

Civ. 1505.

District Court of Appeal, Fourth District, California.

Oct. 11, 1934.

Appeal and error ⇐1127

Where serious question whether evidence was sufficient to sustain judgment was presented, motion to dismiss appeal or affirm judgment would be denied, since such motion should not be used to advance cause on calendar (Rules for District Courts of Appeal, rule 5, § 3).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by William L. Lennon and Carol Lennon, husband and wife, against C. F. Woodbury and another. From a judgment for the plaintiffs, the defendants appeal. On motion to dismiss the appeal or affirm the judgment.

Motion denied.

West & West, of Santa Ana, for appellants.

Euler & Subith, of Los Angeles, and Charles D. Swanner, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

The respondents recovered judgment for injuries sustained by one of them while riding as a guest in an automobile owned and operated by the appellants, on the theory that the respondent driver was guilty of willful misconduct in the operation of the automobile. The main contention of the appellants is that the evidence is not sufficient to establish willful misconduct on the part of the driver. Briefly stated, the main question presented is whether willful misconduct appears where the driver of an automobile "did continue to drive his car on the wet and slippery highway at a speed of over forty miles an hour in the rain by reason of which the automobile suddenly without warning skidded off the highway." The usual briefs were filed and the respondents' brief, containing 118 printed pages, is devoted largely to an attempt to show that willful misconduct could be inferred from the evidence. After all the briefs were filed, the respondents moved to dismiss the appeal or affirm the judgment, under rule V, section 3, of the rules of this court, on the grounds that the appeal was taken for delay only and that the questions presented are so unsubstantial as not to require further argument.

An inspection of the appellants' opening brief discloses that a serious question is presented as to the sufficiency of the evidence to sustain the judgment, which deserves the usual consideration. Full recognition of this fact is disclosed by the respondents' brief, in which the matter is thoroughly presented.

It is fully apparent that the rule upon which this motion is based has no proper application here. This rule should not be used

merely for the purpose of advancing a cause on the calendar. Rubio v. Nye & Nissen, Inc. (Cal. App.) 35 P.(2d) 195.

The motion is denied.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.App.2d 224

PEOPLE v. DILLON.

Cr. 2557.

District Court of Appeal, Second District, Division 2, California.

Oct. 3, 1934.

1. Larceny ⇐62(1)

Evidence that accused, who was manager of warehouse for Red Cross, sold goods intended for distribution to charity, representing that they were unclaimed shipments procured from steamship companies, sustained conviction of theft.

2. Larceny ⇐59

Where value of property stolen as determinative of grade of offense was required to be estimated exclusively in United States gold coin, establishing value on basis of United States currency *held* sufficient, where at time of alleged theft currency was redeemable in gold coin (Pen. Code, § 678).

3. Criminal law ⇐304(19)

District Court of Appeals would take judicial notice that at time of alleged theft United States currency was redeemable in United States gold coin (Pen. Code, § 678).

4. Larceny ⇐65

Evidence that accused, who was manager of warehouse of Red Cross containing goods intended for distribution to charity, bargained for sale of goods of value of over $200, and shortly thereafter took them from warehouse and delivered them to buyer in own automobile, supported conviction of grand theft.

5. Larceny ⇐15(3)

Appropriation of property in his custody by custodian or servant is "trespass," and "larceny" or "theft" occurs on wrongful disposition thereof,

[Ed. Note.—For other definitions of "Larceny," "Theft" and "Trespass," see Words & Phrases.]

6. Larceny ⇐23

As regards value of property stolen, appropriation of property in his custody by custodian or servant constitutes one "theft" where several articles or groups of articles are taken away successively in one transaction as result of one intent (Pen. Code, § 20).

7. Larceny ⇐23

When custodian of warehouse formed felonious intent to take merchandise from warehouse and deliver it to another, and executed intent by delivery, there was but one "theft," though there were several deliveries (Pen. Code, § 20).

8. Larceny ⇐23

Transaction comprising successive acts of taking, set in motion under single felonious impulse and operated upon by single uninterrupted force, constitutes continuous act, and must be treated as one larceny (Pen. Code, § 20).

9. Criminal law ⇐780(2)

In prosecution for theft of goods from Red Cross warehouse, where there was no evidence that buyer of goods was accomplice, refusal to instruct with reference to testimony of accomplice *held* not error.

10. Criminal law ⇐713

District attorney *held* not guilty of misconduct in argument to jury in giving opinions and suggestions within legitimate bounds of record.

11. Criminal law ⇐699, 1154

Determination of whether district attorney oversteps bounds of legal propriety in conduct of prosecution is within discretion of trial judge, and his judgment that attorney's conduct was not prejudicial to accused will not be set aside unless contrary clearly appears.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

John E. Dillon was convicted of grand theft, and he appeals.

Affirmed.

Benno M. Brink, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WILLIS, Justice pro tem.

In an indictment, appellant was charged with three counts of grand theft, the first charging the felonious taking on October 27, 1933, of 100 dozen men's work shirts of the value of $450, in lawful money of the United

States, the property of American National Red Cross, a corporation; the second similarly charging the taking on August 24, 1933, of 3,000 yards of cotton gingham fabric, of the value of $225, the property of the same corporation; and the third a similar taking on October 17, 1933, of 30 dozen men's cotton trousers of the value of $225 in lawful money of the United States, the property of the same corporation. At the trial before the court and jury, he was convicted on the first two counts and acquitted on the third. A motion for new trial was made and denied, and, from the judgment entered and the order denying that motion, appellant has taken this appeal, assigning five points as error, namely: (1) That there was no proof that any of the property was stolen; (2) that there was no proof that the merchandise taken was of a value in excess of $200; (3) that it cannot be ascertained from the records if all the merchandise was taken at one time or at various times, and, if taken at various times, how much was taken at each time; (4) that the court erred in refusing to instruct the jury with reference to the testimony of an accomplice; (5) that the district attorney was guilty of misconduct in his argument to the jury.

The record of proceedings at the trial of this case comprises slightly over 500 pages, a careful reading and study of which reveals that defendant was capably represented and that the lower court was extraordinarily patient and lenient in allowing him wide latitude of cross-examination and defense. A summary of the facts which the evidence tended to establish appears necessary as a basis on which to predicate our decision herein on the several points raised.

Since April, 1932, appellant had been, and at the dates of the offenses charged herein was, employed as manager of the warehouse of the Los Angeles Chapter of American National Red Cross, located at Fourth and Anderson streets, in Los Angeles, Cal., and wherein was received and kept for distribution to agencies of charity throughout the county large quantities of merchandise which was in the charge and care of appellant, and which he distributed out on requisitions presented to him by those on the list of agencies. Some six blocks distant from the warehouse one Harry Horowitz operated a department store. To him the appellant, giving the name of Broderick, sold, about August 24, 1933, 3,000 yards of cotton gingham fabric, and about October 27, 1933, 100 dozen men's work shirts, and about October 17, 1933, 30 dozen men's cotton trousers. Prior to these dates, and beginning in July, 1933, appellant had made many similar sales of merchandise to Horowitz, and over the period up to November, when appellant was arrested, such sales had aggregated some $1,500, of which Horowitz still owed about $650. Horowitz did not know or suspect that "Broderick" was Dillon, the man who was in charge of the warehouse, but was informed by the latter that the goods he was selling had been procured from steamship companies as unclaimed or undelivered shipments, a well-known source of such merchandise to Horowitz. Shortage of stock being discovered or suspected, an investigation and audit followed, culminating in the indictment herein.

[1] Appellant's first point is that the prosecution failed to prove that the property in question was stolen from the Red Cross warehouse, and cites the case of People v. Williams, 57 Cal. 108, in support of his claim. In that case, wherein judgment of conviction was reversed, the evidence revealed that the alleged owner of the money charged to have been stolen was dead, and no proof was offered or given to establish the fact that the deceased had ever lost any money or suffered any theft of his money. In this case there is a plentitude of evidence to sustain the implied finding of the jury that the property sold to Horowitz came from the warehouse in question, and that it had been taken by appellant with the felonious intent of permanently depriving the owner thereof. Appellant lays special stress on insufficiency of evidence adduced through the auditors who took inventory of stock on hand in the warehouse and checked with records found therein, and their testimony as to shortage in gingham and shirts found by them to exist. It would unduly prolong this opinion to recite the proofs in respect to loss of property from the warehouse over the period in question, and it must suffice herein to say that we discover no error of the lower court in its rulings on admissibility of evidence or motions to strike, and that the evidence admitted and not stricken, produced through the auditors, taken in conjunction with that of many other witnesses who gave testimony tending to identify the merchandise in question, is clearly sufficient to support the finding of the jury that the goods in question were stolen from the Red Cross warehouse.

[2, 3] There is no merit in the point that value was not established at a sum in excess of $200 as to property described in each of the first two counts. Appellant's contention is founded on the language of section 678 of the Penal Code, which provides that value

of property, where it is determinative of the grade of an offense, "shall be estimated exclusively in United States gold coin." The estimates of value given by the witnesses herein were made on the basis of United States currency which, at the time of the alleged offense, we take judicial notice, was redeemable in United States gold coin. As was aptly said in a similar instance in the case of People v. Keach, 28 Cal. App. 194, 151 P. 747, 748: "And it would surely be catching at a straw to reverse this case merely because no witness had estimated the value 'in gold coin of the United States of America.'"

[4-8] Appellant's third point presents a technical question, and the argument of his counsel is highly imaginative, in that it is sought to cast doubt on the sufficiency of the evidence to show that the whole of the merchandise described in each separate count was taken at one time, and by which it is suggested that it may have been taken at various times in quantities of less value than $200 and stored at some other convenient place before delivery to Horowitz thus reducing the grade of the offense below that charged in the indictment. The proof is quite clear that appellant delivered in his own automobile the entire 3,000 yards of gingham to Horowitz in one delivery. This fact taken in connection with the fact that appellant was custodian at the warehouse where this gingham was stored, only some six blocks distant from the Horowitz store, and that it was delivered soon after bargaining for the sale on the basis of a sample, is sufficient to support the implied finding by the jury that these 3,000 yards of gingham were all taken by appellant from the warehouse at the same time for delivery to Horowitz, with intent to permanently deprive the owner thereof. As to the 100 dozen shirts, the evidence is of similar character and probative effect, but with the variation in respect to delivery, there being two deliveries of about 50 dozen each on the same day, after sale had been agreed upon between appellant and Horowitz. Appellant was custodian of this property for distribution on the orders and under the rules imposed by his employer, American National Red Cross, through its Los Angeles chapter. Where there is an appropriation by a custodian or servant of property in his custody, there is a trespass, and larceny, or theft as it is now termed by the Penal Code, occurs on a wrongful disposal thereof (McClain on Criminal Law, § 556); and, although several articles, or groups of articles, are taken away successively but in one transaction, as the result of one intent, the whole will constitute one theft (McClain on Criminal Law, § 551). When appellant once formed the felonious intent to take from the warehouse a certain quantity of merchandise in his custody and deliver the same to Horowitz, and then executed that intent by delivery thereof, all the elements necessary to constitute the offense of theft were united, and but one offense is committed, though there may have been several deliveries, for in such case there occurs the union or joint operation of act and intent prescribed by law. Section 20, Pen. Code. A transaction comprising successive acts of taking, set in motion under a single felonious impulse and operated upon by a single unintermittent force, constitutes a continuous act and must be treated as one larceny. Wharton, Criminal Law (11th Ed.) § 1169.

[9] In respect to appellant's point 4, there was no error in the court's refusal to instruct the jury with reference to the testimony of an accomplice. There is no evidence whatever in the record to support even a suspicion that Horowitz was an accomplice, and an instruction on that subject would have been entirely outside the issues submitted to the jury.

[10, 11] Appellant's last point is that the district attorney was guilty of misconduct in his argument to the jury, and that the court erred in failing to admonish the jury to disregard the remarks to which appellant made assignment of misconduct. We have read the argument of the district attorney as reported, and studied those portions quoted in appellant's brief, and find nothing therein that can be properly characterized as misconduct. The opinions or suggestions and statements therein expressed fairly and reasonably fall within the limits and legitimate bounds of the record, and nothing therein can be said to create or arouse any prejudice against the accused, especially in view of the conclusion which the record herein forces upon the mind; namely, that no verdict other than that of guilty could have been honestly given. The declination of the trial judge to advise the jury to disregard the remarks, assigned as misconduct, as requested by appellant, indicates convincingly that the trial judge was not impressed with any belief that the remarks were outside the record or improper in their substance or effect. It has been held that much must be left to the discretion of the trial judge in determining whether an attorney oversteps the bounds of legal propriety in his conduct at the trial, and, unless it clearly appears to the contrary, the judgment

of the trial court that his conduct has wrought no prejudice to the defendant will not be set aside. "Counsel's conduct must reach a course of proceeding militating against justice, and the fair and orderly conduct which should characterize judicial proceedings in criminal cases, before error can be predicated of it." People v. Mayes, 113 Cal. 618, 45 P. 860, 861.

The judgments and the order denying the motion for new trial are and each of them is affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

1 Cal.App.2d 400

Ex parte TARTAR.

Cr. 1345.

District Court of Appeal, Third District, California.

Oct. 13, 1934.

1. Indictment and Information ⇐114

Information charging accused with having suffered two prior convictions *held* insufficient to support judgment adjudging him a habitual criminal, where information failed to allege accused had served any term for prior convictions.

2. Habeas corpus ⇐50

Petition for habeas corpus, by defendant convicted of second degree burglary, attacking judgment adjudging him an habitual criminal *held* premature, where brought before petitioner had served term for burglary (Pen. Code, § 461).

Proceeding in the matter of the application of George P. Tartar for a writ of habeas corpus.

Writ denied.

George P. Tartar, in pro. per.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for respondent.

PER CURIAM.

[1] Petitioner was on January 2, 1930, convicted of the crime of burglary in the second degree. The information also charged petitioner with having suffered two prior convictions. Following his conviction of the crime of burglary as above stated, he was adjudged to be an habitual criminal and committed to the state prison at Folsom. The information failed to allege petitioner had served any term for the prior convictions, which is prerequisite to holding petitioner to be an habitual criminal. People v. Dawson, 210 Cal. 366, 292 P. 267.

[2] However, the petition is premature, for the punishment of burglary of the second degree is one year to fifteen years (Pen. Code, § 461), and it is apparent petitioner has not yet served the term for which he was legally committed.

Writ denied.

1 Cal.App.2d 26

SONOMA COUNTY et al. v. SANBORN, County Clerk, etc.

Civ. 5242.

District Court of Appeal, Third District, California.

Sept. 22, 1934.

1. Time ⇐6

Statutory requirement that notice of election on school bond issue must be published once in each calendar week for three successive weeks prior to election *held* not to require publication of notice of election for duration of three full calendar weeks before day of election (School Code, § 4.961, as added by St. 1931, p. 718, § 2).

2. Time ⇐6

Statutory requirement that notice of election on school bond issue must be published once in each calendar week for three successive weeks prior to election was met by publication of notice once in each calendar week of three successive weeks which preceded the election (School Code, § 4.961, as added by St. 1931, p. 718, § 2).

3. Time ⇐6

In construing statute containing term "calendar week," that term ordinarily refers to period of time from Sunday to Sunday as it appears on calendar, although term may consist of any seven days of given month, where language employed makes it clear such was intention of contracting parties or Legislature.

[Ed. Note.—For other definitions of "Calendar Week," see Words & Phrases.]

4. Time ⇐6

Where school bond issue election was held June 19, 1934, notice of election, published June 1, 8, and 15, appeared once in each successive calendar week of the three calendar weeks preceding election as required by statute (School Code, §§ 4.960, 4.961, 4.966, as added by St. 1931, p. 718 et seq.).

5. Schools and school districts ⇐97(4)

Where statutory requirement as to publication of notice of school bond issue was substantially complied with and electors were fully informed of time, place, and purpose of election, and there was no fraud in holding election, election was lawfully held, and bonds would be validated (School Code, §§ 4.960, 4.961, 4.966, as added by St. 1931, p. 718 et seq.).

6. Schools and school districts ⇐97(4)

After school bond issue election has been called and held in substantial compliance with statute, slight irregularities, which do not affect substantial rights of taxpayers, should be disregarded (School Code, § 4.982, as added by St. 1931, p. 1939).

7. Schools and school districts ⇐97(4)

Statutes providing for notices of school bond issue election are mandatory when they are applied to situation as it exists prior to election, but, in absence of statutory declaration to contrary, such statutes are construed to be merely directory in action to invalidate bonds after election has been held and bonds have been carried (School Code, § 4.982, as added by St. 1931, p. 1939).

8. Schools and school districts ⇐97(4)

Test for determining whether school bond issue election is invalidated for want of notice prescribed by statute is whether voters generally have had knowledge of election and full opportunity to express their will and omission has resulted in depriving sufficient number of electors of opportunity to exercise their franchise to change result of election (School Code, § 4.982, as added by St. 1931, p. 1939).

Petition for writ of mandamus by Sonoma County and Analy Union High School District against George P. Sanborn, as County Clerk of Sonoma County, and ex officio Clerk of the Board of Supervisors of Sonoma County.

Writ issued.

Edward J. Dole, District Attorney, of Santa Rosa, for petitioners.

Orrick, Palmer & Dahlquist, of San Francisco, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition for a writ of mandamus to compel the issuing of Analy union high school district bonds in the principal sum of $160,000, pursuant to the provisions of section 4.966 of the School Code, as added by St. 1931, p. 718, § 2, as validated and existing obligations against the school district, having been duly authorized by that district by a two-thirds vote of the electors thereof at an election called and held therein for that purpose as required by the provisions of division 4, part 5, chapter 1 of the School Code (section 4.960 et seq., as added by St. 1931, p. 718 et seq.).

The respondent concedes that all of the allegations of the petition are true, and that "in all respects * * * the proceedings for the issuance of said bonds were legal and in accordance with law," except that it is contended the notice of the holding of the bond election was not published as required by section 4.961 of the School Code, as added by St. 1931, p. 718, § 2, "for three successive calendar weeks prior to the election."

It is alleged that Analy union high school district is a duly organized high school district as a political subdivision of the county of Sonoma and is represented by five named trustees as required by law. In March, 1934, the high school buildings of that district were condemned as unsafe for occupancy. The pupils thereof are elsewhere temporarily housed in inadequate quarters to the great detriment of that educational institution and of the health and efficiency of the pupils and teachers thereof. The condemnation of the school buildings and the necessity of voting bonds to replace them were promptly and widely advertised by newspapers circulated throughout the district and by an elaborate printed circular which was promptly mailed to the post office address of each elector in the district and by placing a copy thereof in each rural and post office box of residents thereof as shown by the records of the post office department of the city of Sebastopol, which is a part of said district and which city contains a large proportion of the residents thereof. Pursuant to that notice, the trustees of Analy union high school district, by resolution duly adopted at a regular meeting of the board, called a bond election of the district to be held May 29, 1934, for the aforesaid purpose. Notices of the time and place and purpose of this election were posted and published as required by the provisions of section 4.961 of the School Code. That proposed

election was also widely advertised in newspapers of general circulation which were especially distributed throughout the district.

Just prior to the date of election which was first set, defects in the proceedings were discovered, and new proceedings were instituted by the board of trustees, by means of which the board, at a regular meeting thereof, on May 28, 1934, again called a special election for the aforesaid purpose of voting school bonds in the principal sum of $190,000 to repair, restore, and equip appropriate buildings to be used for high school purposes in lieu of the condemned buildings. This election was called for June 19, 1934. Notices thereof were posted as required by section 4.961 of the School Code for more than twenty days prior to the date of election. Three of these notices were also posted for that length of time in conspicuous places in each separate precinct of the district. Notices of election were also published in the Sebastopol Times, a newspaper of general circulation in that district, once in each calendar week for three successive weeks immediately prior to the date of election, to wit, on June 1, 8, and 15, 1934. A copy of the Sebastopol Times, containing a front half-page advertisement of the election, with bold half-inch headlines extending across the entire page in the following language: "Bonds for New Analy Building Up to Voters Tuesday"—was mailed on June 15th to each and every elector and mail box holder of the district as shown by the Sebastopol post office department. Notices of the election, articles and editorials with respect thereto were also repeatedly published in the Santa Rosa Press Democrat and the Sebastopol Times, each of which newspapers has wide circulation in the district. Under the direction of the trustees of the district some twenty public meetings were held throughout the district in the towns of Sebastopol, Guerneville, Occidental, Monte Rio, Duncans Mills, and elsewhere, under the auspices of leading fraternal lodges, service clubs, chambers of commerce, farm centers, and school councils, at which the proposed bond election was discussed. The election was also given repeated and general notice in the churches and moving picture theaters of the district. It is difficult to conceive of a more thorough and effective means of advertising to the electors of a comparatively sparsely settled district, the holding of a school election, than that which was employed in the present case. No fraud, misconduct, or coercion in the calling or holding of the election was charged. It does not appear that any elector of the district was ignorant of the time, place, or purpose of the election. No one was deprived of his privilege of participating therein. The election appears to have been regularly and lawfully called and conducted in every essential respect. At the election the largest vote was polled which has ever been cast in that district at a school election. The issuing of the bonds was voted by a substantial majority in excess of the two-thirds vote required by law. The returns were canvassed by the board of supervisors, and the bonds were declared to have been carried and ordered to be issued in the manner required by law. They were duly advertised for sale, and R. H. Moulton & Co., as the highest and best bidder therefor, became the purchaser of bonds numbered from 1 to 160, for the principal sum of $160,000. The clerk of the board refused to issue, sign, or certify to the bonds on account of the alleged defect of notice above mentioned. This petition for a writ of mandamus was then instituted.

The only defect of proceedings relied upon by the respondent is that the board of trustees failed to publish the notice of election for the full period of three successive calendar weeks prior to the election, as it is contended section 4.961 of the School Code requires. Only five days elapsed after the final publication of notice appeared in the newspaper, before the day of election. It is claimed this defect renders the election void and invalidates the bonds.

[1, 2] We are of the opinion the statute does not require the publication in a newspaper of notices of the election for the duration of three full calendar weeks before the day of election. On the contrary, we are of the opinion the requirement of the statute was fulfilled by publication of the notice "once in each calendar week" of the three successive calendar weeks which preceded the election. Section 4.961 of the School Code provides in that regard: "The election must be called by posting notices, signed by a majority of the governing board of the district in at least three public places in the district, not less than twenty days before the election. If there is a newspaper of general circulation published in any county in which any part of the district is situated, the notice must be published therein at least once in each calendar week for three successive calendar weeks prior to the election."

[3, 4] The respondent contends that the foregoing section requires the publication in a newspaper for the duration of three entire weeks before the election, which constitutes

a publication equivalent to twenty-one full days prior to the election. This construction of the statute is predicated on the assumption that a calendar week begins on the first day of the first publication of the notice, which, in the present case, was Friday, the 1st day of June, and that, since the election occurred on June 19th, only eighteen days of publication elapsed before the day of election. It is true that a calendar week may consist of any seven days of a given month, provided the language employed makes it clear that such was the intention of the contracting parties or the Legislature in the employment of that term. Upon the contrary, the term "calendar week" as it is ordinarily used, refers to the period of time from Sunday to Sunday, as it appears on the calendar. Scilley v. Red Lodge-Rosebud Irr. Dist., 83 Mont. 282, 272 P. 543, 551. In construing a statute which required the publication of notice "at least once a week for two successive calendar weeks," in the case last cited, the court held that it was not necessary to publish notice for the duration of two full weeks, and that three insertions of the notice in a newspaper was therefore not required. It was there held the use of the term "calendar week" specifically distinguished the period of time from the usual and ordinary term of a week which consists of any seven consecutive days of a month or year. It is said the term "calendar week" must be given special significance to distinguish it from an ordinary week. The Montana court quotes with approval the definition of the word "calendar" as it appears in Webster's Dictionary, as follows: "A 'calendar' week is a block of seven days registered on the calendar in general use, as beginning with Sunday and ending with Saturday." Calendar or solar periods of time are computed and so designated to distinguish them from lunar periods of time. If the Legislature had intended to require the publication of notice of the election in a newspaper for the duration of the full period of three consecutive weeks before election, it would have plainly said it must be published once a week for three consecutive weeks immediately preceding the day of election. It must be assumed the term "calendar week" was deliberately used for the express purpose of distinguishing it from the usual reference to a week consisting of any seven days of the month or year. The notice was published as the statute requires "once in each calendar week" for the three consecutive calendar weeks which preceded the day of election. The important portion of the statute is that the notice must be published once in each calendar week of that period of time designated as the "three successive calendar weeks prior to the election." The clear inference of the statute, by specifically referring to "calendar weeks," is that the notice is not required to be published for the entire duration of three full weeks before election. A glance at the calendar of June, 1934, will show that the notice which was published in the issues of June 1st, 8th, and 15th of that month just prior to Tuesday, June 19th, on which the day of election was set, appeared once in each successive calendar week of the three calendar weeks immediately preceding the election, whether the calendar weeks are computed from Sunday to Sunday as they appear on the calendar, or are deemed to be the three successive groups of seven days so as to include the 18th day of June immediately preceding the day of election. We are therefore of the opinion the requirement of section 4.961 of the School Code with respect to the publication of the notice of election was strictly complied with.

[5] Even though the statute heretofore referred to be construed to require publication of the notice of election for the duration of three consecutive calendar weeks immediately preceding the day of election, we are of the opinion it was substantially complied with, and that the election was lawfully held and the bonds should be validated for the reason that the electors of the district were fully informed of the time, place, and purpose of the election, and the defect of notice complained of is unessential and trivial after an election has been formally held and carried, and it appears that no fraud or misconduct in the calling or holding of the election is charged, and no elector of that district who desired to participate in the election was prevented from doing so.

The school bond election was thoroughly advertised with unusual activity throughout every precinct of the district for a period of nearly three months by means of newspaper editorials and advertisements in at least two papers of general circulation therein, by posting notices as required by law, by frequent notices and advertisements in churches and moving picture theaters, and by discussions in at least twenty public meetings of the district held under the auspices of fraternal lodges, service clubs, chambers of commerce, farm centers, and school councils. It appears the largest vote which was ever polled in a school election in that district was cast at that election. It does not appear that any elector of that district was ignorant of the exact time, place, and purpose of the elec-

tion, or that any qualified elector who desired to vote thereat was prevented from doing so. The substantial rights of no taxpayer of the district were injuriously affected by the alleged defect of notice. It is inconceivable, under the circumstances of this case, that any individual in that district who had the slightest interest in public affairs or in the welfare of his community, lacked information of the exact time, place, and purpose of that school bond election. For these reasons the election should be upheld as lawful and the bonds should be validated.

[6] After an election has been called and held in substantial compliance with the statute, slight irregularities which do not affect the substantial rights of the taxpayers should be disregarded. Section 4.982 of the School Code, as added by St. 1931, p. 1939 provides in that regard: "No error, irregularity or omission which does not affect the substantial rights of the taxpayers within such district or the electors voting at any election at which bonds of any district of any kind or class are authorized to be issued hereunder shall invalidate the election or any bonds authorized thereby."

[7] It has been held that statutes providing for notices of a bond election are mandatory when they are applied to the situation as it exists prior to the election, but, in the interest of public policy, such statutes are construed to be merely directory in an action to invalidate the bonds after the election has been held and the bonds have been carried, in the absence of a statutory declaration that the election will be invalidated for failure to strictly pursue the statute. Section 4.982, School Code; East Bay Municipal Utility Dist., etc., v. Hadsell, 196 Cal. 725, 239 P. 38; Weisgerber v. Nez Perce County, 33 Idaho, 670, 197 P. 562; King v. Independent School Dist., etc., 46 Idaho, 800, 272 P. 507, 510; Seymour v. City of Tacoma, 6 Wash. 427, 33 P. 1059; McLoughlin v. City of Prescott, 39 Ariz. 286, 6 P.(2d) 50; State v. Superior Court, 171 Wash. 423, 18 P.(2d) 51.

[8] The test in determining whether the slight omission to publish notice of the election for the duration of the full period of three consecutive weeks immediately preceding the day of election, as contended for by the respondent, "affects the substantial rights of the taxpayers" of the district, so as to invalidate the election, is to ascertain from the record whether the voters of that district generally had notice of the election, or whether upon the contrary a sufficient number of qualified voters therein were prevented by that defect of notice from participating in the election so as to make it likely that the result of the election would have been changed by a strict compliance with the statute. In 20 C. J. 96, § 80, it is said in that regard: "The test for determining whether an election is invalidated for want of a notice prescribed by statute is whether, on the one hand, the voters generally have had knowledge of the election and full opportunity to express their will, or whether, on the other hand, the omission has resulted in depriving a sufficient number of electors of the opportunity to exercise their franchise to change the result of the election."

We have no hesitancy in saying from the record that no considerable number of the electors of that district were ignorant of the time and place of the election. It does not appear that a single voter of that district who desired to participate in the election failed to do so. From the record in this case it would be absurd to hold that the lapse of two other days following the final publication of notice which was given in the newspaper would have resulted in informing other voters of that district of the proposed election who did not already possess that knowledge. We are therefore of the opinion the notice was published in substantial compliance with the statute even if the respondent's construction thereof should prevail, and that the rights of no taxpayer of that district were injuriously affected by the alleged defect of notice.

Irrespective of the alleged defect of publication of notice of the election, the bonds should be validated for the reason that it appears the substantial rights of the electors of that district were not injuriously affected by the alleged omission. In the case of East Bay Municipal Utility Dist. v. Hadsell, 196 Cal. 725, 239 P. 38, 45, a utility district bond election was held to be legal and bonds in the aggregate sum of $39,000,000, which were voted thereat, were validated in spite of the fact that the election was called and held twenty-one days after the adoption of the ordinance providing therefor, which notice was in conflict with the provision of the Utility District Act (St. 1921, p. 245) under which the bond election was held. The statute declared that "No ordinance passed by the board shall take effect within less than thirty days after its passage." Section 10. In other words, it was there contended the bond election was prematurely held nine days before the statute authorized it to be called. The court there said:

"If the election has been honestly and fairly conducted, and no one has been injured by the manner in which the preliminary steps leading thereto have been taken, no reason exists for declaring it invalid. In the instant case there was no evidence offered on the part of the defendants tending to show that they had been prejudicially affected by the procedure which had been adopted and followed leading up to the election. * * *

"It would follow, as a conclusion from what has been said, that as applied to the facts of this case, notwithstanding some authorities to the contrary, as cited in appellants' brief, the failure to give the full 30 days' notice of the election in nowise affected the substantial rights of the defendants in the premises."

Likewise, for similar reasons, a bond election was declared legal and the bonds were validated in the case of Weisgerber v. Nez Perce County, 33 Idaho, 670, 197 P. 562, 563, which was an action by a taxpayer to enjoin the issuing of the bonds on the ground, among others, that the notices of election were not posted for the duration of twenty days before election as required by the statute with relation thereto. It was there conceded that some of the required notices were not posted for the full time specified by the statute. The court said in that regard:

"We are of the opinion that the correct rule, and the one supported by the great weight of authority, may be stated as follows: Statutory directions as to the time and manner of giving notice of elections are mandatory upon the officers charged with the duty of calling the election, and will be upheld strictly in a direct action instituted before an election; but after an election has been held, such statutory requirements are directory, unless it appears that the failure to give notice for the full time specified by the statute has prevented electors from giving a full and free expression of their will at the election, or unless the statute contains a further provision, the necessary effect of which is that failure to give notice for the statutory time will render the election void. * * *

"The court found that the electors of the county were fully informed as to the time, place, and purpose of holding the election, and as to the polling place in each precinct where the votes would be received. The court also found that none of the defects above referred to affected the result of the election. It is not averred in the complaint, nor shown by the record, that any elector was deprived of his vote by reason of the fact that notices were not posted the statutory length of time in the five precincts. The court further found affirmatively that none of the electors failed to vote by reason of any of the irregularities mentioned in the complaint.

"We are of the opinion that the election was not illegal or void on account of the defects in the posting of notices in the five precincts of the county."

For the foregoing reasons, we are satisfied the school bond election which is involved in this proceeding was lawfully called and conducted and that said bonds for the sum of $190,000 and interest which were voted thereat are valid and binding obligations upon the Analy union high school district of Sonoma county.

It is therefore ordered that the writ of mandamus issue as prayed for, directing the respondent to issue, sign, seal, and certify the Analy union high school district bonds for the principal sum of $160,000, in the manner required by law, and deliver them to the purchasers thereof, as valid binding obligations of that school district for said principal sum and interest according to the terms thereof.

We concur: PULLEN, P. J.; PLUMMER, J.

1 Cal.App.2d 287

PEOPLE v. LANGDON et al.

Cr. 2520.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1934.

Hearing Denied by Supreme Court Nov. 7, 1934.

1. Larceny ⇐65

Evidence sustained conviction of grand theft (Pen. Code, § 504).

2. Criminal law ⇐742(2)

Corroboration of principal witness upon whose testimony conviction of grand theft was obtained was not necessary, where jury impliedly found that such witness was not an accomplice.

3. Criminal law ⇐742(2)

In prosecution against corporation president for embezzling corporation's funds, broker, who overcharged corporation for goods, and who transmitted overcharges to secre-

tary for president's benefit, could not be adjudged an accomplice as matter of law, whose testimony was required to be corroborated, where jury's conclusion that broker was not an accomplice was based on conflicting evidence (Pen. Code, § 504).

4. Criminal law ⇐808½

In grand theft prosecution against corporate president, failure to include, in instruction given substantially in language of embezzlement statute, statement that money so embezzled must belong to corporation, *held* not error where evidence showed that overcharges which came into accused's possession remained at all times money of corporation (Pen. Code, § 504).

5. Embezzlement ⇐48(1)

In prosecution against corporation president for embezzling corporation's funds, instruction defining embezzlement which amounted to charge on disputed facts, and which confined act of embezzlement to act of broker who received corporation's checks containing overcharge, *held* properly refused (Pen. Code, § 504).

6. Criminal law ⇐806(1)

Instruction that jurors must unite in belief that acts constituting grand theft were committed before verdict of guilty could be returned *held* not erroneous as charging that jurors need not be unanimous in their opinion as to count alleging grand theft, where, in several instructions, court charged that to convict jurors must be unanimous in belief.

7. Criminal law ⇐155

Grand theft prosecution against corporation president *held* not barred by limitation because indictment was returned December 14, 1932, and overcharges to corporation constituting amount which president received January 17, 1930, were paid by corporation to broker prior to December 14, 1929, where, under implied finding of jury that overcharges remained at all times corporation's money, date of payment to broker was immaterial (Pen. Code, § 504).

Appeal from Superior Court, City and County of Los Angeles; William Tell Aggeler, Judge.

Frank C. Langdon and John C. Thorn were convicted of grand theft, and second-named defendant appeals.

Affirmed.

See, also (Cal. App.) 33 P.(2d) 5.

Caryl Warner, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., John Barnes, and Alexander H. Van Cott, all of Los Angeles, for the People.

ARCHBALD, Justice pro tem.

Defendant Thorn was jointly charged with Frank C. Langdon in an indictment containing forty-seven counts, charging grand theft and other felonies. Thirty of such counts were dismissed before the case was submitted to the jury, which returned verdicts of guilty as to both defendants on count XVIII (grand theft) and not guilty on those remaining. Defendant Thorn has appealed from the judgment of conviction entered on said verdict as well as from the order denying his motion for arrest of judgment and for a new trial.

Appellant was the president and Langdon the secretary of the California Thorn Cordage, Inc., hereinafter referred to as the company, which was engaged in the manufacture of rope, cordage, and like materials and in such business purchased and used large quantities of hemp. This was purchased by the company from the importers themselves. At the first, appellant had charge of such buying, but later defendant Langdon was charged with such duty, under the direction, however, of appellant. In June or July of 1928, an arrangement was made under which one Clifford L. Ach, after August 1, 1928, acted as a broker in making such purchases. He was induced by Langdon to so act and was instructed to add to the net price which he paid the importers his agreed commission of 2½ per cent., and an additional one cent per pound, for which total price he was to bill the company. The company paid or charged such bills, and Ach, after deducting his commissions and on the instructions of Langdon, issued his checks in favor of Mrs. Langdon for the accumulated overcharge. Such checks, the evidence shows, were deposited in bank accounts of Mr. and Mrs. Langdon which, Mrs. Langdon testified, were used for the benefit of appellant, and eventually practically all of the money so paid by Ach reached appellant, who instead of returning it to the company, as the company's money, treated it as his own. It was the last payment so made by Ach, which apparently represented the aggregate of eleven amounts that had accumulated in his hands to January 16, 1930, and which was paid by check of said Ach, handed to Langdon and deposited January 17, 1930, in an account of the Langdons which, as we have said, was appellant's although in the

Langdon name, that was the basis of said count XVIII.

Appellant urges that the evidence is insufficient to support the judgment, in that it shows that Ach was an independent contractor who purchased such hemp and sold it to the company; that the money paid for it by the company belonged to Ach and not the company, and in consequence there could be no embezzlement as charged; and that the only way the money could have been stolen from the company by defendants would be by making Ach an accomplice in carrying out the scheme devised by defendants.

[1-3] It is sufficient to say that there is evidence from which the jury might possibly have arrived at such conclusion. There is also evidence supporting the conclusion that the plan of the overcharge of one cent per pound originated with appellant, and for the purpose of enabling him to borrow more money from the finance company with which he was doing business, and that by "adding the one cent per pound he [Thorn] got what he thought was a reasonable percentage of the value of the hemp." There is also evidence from which the jury might well have concluded that Ach was informed that defendants owned all of the stock of the company and that the refunds eventually reached the hands of appellant, the company's president, and that Ach did not know that appellant did not return them to the company or that he used or intended to use them for his own purposes. Under such conflicting evidence, and evidence from which conflicting conclusions could be drawn, the question of whether or not Ach was an accomplice was one of fact which the court properly left to the jury; and the jury evidently concluded that Ach was not an accomplice and that the actual embezzlement occurred when appellant, having obtained possession of the amounts overcharged, did not return them to the company, but converted them to his own use. In our opinion the evidence supports the judgment. Even assuming that the testimony of Ach was not corroborated, the jury having impliedly found that he was not an accomplice, no corroboration of his testimony was necessary. The conclusion that Ach was not an accomplice being based on conflicting evidence and evidence from which conflicting conclusions could be drawn, the trial court could not adjudge him an accomplice as a matter of law.

[4] We see no error in failing to include in an instruction given substantially in the language of section 504 of the Penal Code the further statement that the money so embezzled must belong to the corporation, as urged by appellant. Under the testimony of Ach (apparently credited by the jury) the amount of the overcharges remained at all times the money of the company, and was such when the refunds reached the hands of appellant, its president; and when such money was appropriated by appellant to his own use and purposes, the act came squarely within the language of said section.

[5] Nor was there error in refusing the instruction defining embezzlement, offered by appellant, as it amounted to a charge on disputed facts, viz., "that Ach converted the property to his own use," and confines the act of embezzlement to the act of Ach in receiving the company's checks containing the overcharge.

[6] In several instructions the court told the jurors that in order to convict they must "be unanimous in the belief," etc. In reference to said count XVIII they were told that they must "unite" in the belief that acts constituting grand theft were committed before a verdict of guilty could be returned. Appellant urges that in making such charge they were told "that they need not be unanimous in their opinion as to count 18." We see no merit in such contention.

[7] Appellant urges that the offense was barred by the statute of limitations in that the indictment was returned December 14, 1932, and the overcharges constituting the amount of $3,597.99, which was paid by Ach to Langdon by check dated January 16, 1930, and deposited in the Langdon account January 17, 1930, were paid to Ach by the company prior to December 14, 1929. Under the implied finding of the jury the date of the payments to Ach was immaterial, and no embezzlement of the amount charged in said account took place until after January 16, 1930, and was within the statutory period.

Judgment and orders affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 377

DI GIACOMO v. SOUTHERN PAC. CO. et al.

Civ. 1361.

District Court of Appeal, Fourth District, California.

Oct. 11, 1934.

Appeal and error ⇐627(2)

Where county clerk's certificate shows that no bill of exceptions had been filed, and that no additional time had been granted and that time within which to institute any proceeding for preparation of bill of exceptions or transcript had expired, respondents' motion to dismiss appeal for failure to file transcript within prescribed time must be granted (Code Civ. Proc., §§ 650, 953a; Rules for Supreme Courts and District Courts of Appeal, rule 6).

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Florence Di Giacomo against the Southern Pacific Company and others. From a judgment for defendants, plaintiff appeals. On respondents' motion to dismiss appeal.

Appeal dismissed.

Everts, Ewing, Wild & Everts and James W. Campbell, all of Fresno, for appellant.

Conley, Conley & Conley, Galen McKnight, and Ray W. Hays, all of Fresno, for respondents.

JENNINGS, Justice.

In support of their motion to dismiss this appeal for failure of appellant to file a transcript of the record within the prescribed time, respondents have presented the certificate of the county clerk as required by rule VI of the Rules for the Supreme Court and District Courts of Appeal. The facts stated in the certificate are uncontradicted and it appears therefrom that notice of appeal was filed on March 5, 1934; that on the same date a written request for the preparation of a transcript was filed; that no transcript has been filed pursuant to section 953a of the Code of Civil Procedure or otherwise; that any proceedings in the trial court for the preparation of a transcript were terminated by order of court on June 15, 1934; that no bill of exceptions has been filed as provided in section 650 of the Code of Civil Procedure; that no additional time within which to prepare or serve a draft of a bill of exceptions has been allowed by the superior court or any judge thereof; that no proceedings for the preparation of a bill of exceptions or transcript are pending in the trial court; that the time within which to institute any such proceedings has expired. The motion of respondents should therefore be granted. Union Trust Company of San Diego v. Novotny, 125 Cal. App. 417, 13 P.(2d) 974; Steffey v. Standard Stations, Inc., 131 Cal. App. 202, 20 P.(2d) 971; Christensen v. Couey, 136 Cal. App. 268, 28 P.(2d) 689; Hunter v. Paxton, 136 Cal. App. 332, 28 P.(2d) 1075.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

1 Cal.App.2d 178

HOSKING v. DANFORTH.

Civ. 5116.

District Court of Appeal, Third District, California.

Sept. 28, 1934.

1. Appeal and error ⇐930(1)

Reviewing court must assume for purpose of supporting verdict for defendant that defendant's evidence was true.

2. Appeal and error ⇐931(1)

Where testimony on material points is conflicting, reviewing court will assume that trial court resolved conflict in favor of prevailing party.

3. Automobiles ⇐171(4)

Failure of motorist approaching street intersection to yield right of way to automobile already on intersection, as required by statute, constitutes negligence (St. 1931, p. 2126, § 131).

4. Automobiles ⇐171(4)

Motorist entering street intersection and seeing lights of approaching automobile some distance away on street to right had right to assume that driver of approaching automobile would yield right of way, general rule being that every person has right to presume that every other person will perform his duty and obey the law (St. 1931, p. 2126, § 131).

5. Evidence ⇐568(6)

In automobile accident case, defendant's opinion as to speed at which plaintiff's automobile was traveling was not without proba-

tive value although he lacked time to make a reliable observation.

6. Evidence ⇐568(6)

Opinion as to speed where it is entitled to little weight does not create conflict with undisputed physical facts which demonstrate beyond all reasonable doubt that expressed opinion was merely an erroneous guess.

7. Automobiles ⇐244(35)

That plaintiff's automobile weighing 4,600 pounds was overturned in collision with defendant's automobile weighing 2,600 pounds, and sustained extensive damage did not prove that defendant was traveling at excessive speed where there was relatively little damage to defendant's automobile.

8. Evidence ⇐8

It is well known that any automobile, traveling at high rate of speed, may, by its own momentum, be caused to roll over if it gets out of control.

9. Evidence ⇐6

Court will take judicial notice of laws of nature (Code Civ. Proc. §§ 1875, subd. 8, 1960).

10. Evidence ⇐571(8)

Trial court's conclusion, that plaintiff's automobile was traveling at high rate of speed at time of collision, being deduction, as was, in his opinion, warranted by laws of nature, court would not be bound by affidavit of expert witness showing that consequences similar to those shown by evidence would indicate that speed of defendant's automobile was excessive (Code Civ. Proc. §§ 1875, subd. 8, 1960).

11. Appeal and error ⇐1011(1)

Finding of trial court on conflicting evidence is conclusive.

12. Appeal and error ⇐1012(1)

It being for jury or trial judge to weigh and balance probabilities in automobile accident case, reviewing court will not reverse verdict unless finding contravenes recognized physical laws and that it is impossible for accident to have happened in manner described by trial court.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Tecla M. Hosking against E. E. Danforth. Judgment for defendant, and plaintiff appeals.

Affirmed.

Fred J. Harris and James A. Nutting, both of Sacramento, for appellant.

Gerald M. Desmond and Stanley W. Reckers, both of Sacramento, for respondent.

DEIRUP, Justice pro tem., delivered the opinion of the court.

This action arose out of a collision after dark between the automobiles of plaintiff and defendant within the intersection of Seventeenth and G streets in Sacramento. Defendant's car was traveling north in its lane of traffic on Seventeenth street. Plaintiff's car was going west in its lane on G street. The two came together in the northeast quadrant of the intersection, the plaintiff's car being struck in front of the left rear wheel. The force of the impact crushed the fender and broke the wheel; the car turned over two or three times and was badly damaged. Plaintiff was seriously injured. Relatively little damage was done to defendant's car. Plaintiff brought suit for personal injuries and property damage, alleging that defendant was negligent. Defendant denied negligence and pleaded contributory negligence on the part of plaintiff. The trial court found for the defendant on the issue of negligence and entered judgment in his favor. Plaintiff appeals from the judgment.

Plaintiff testified that before she entered the intersection she slowed down to a rate of speed of about 5 miles an hour, after looking to the right and to the left. She saw lights 150 feet down the street to her left, but did not see defendant's car before it struck hers. Defendant and his wife, who was riding with him, testified that they were driving at the rate of from 10 to 15 miles per hour and looked to the right and left before they entered the intersection. They saw the headlights of cars in the street to the right, but not close. They did not identify plaintiff's car until just before it passed in front of them. Defendant estimated its speed then at 35 miles per hour. He threw on his brakes and attempted to turn to the left, but was unable to avoid the collision.

[1-4] In support of the judgment the testimony on the part of the defendant, rather than that of the plaintiff, must, of course, be taken as true. If, upon any material point, the testimony is in conflict, it must be assumed that the trial court resolved the conflict in favor of the prevailing party. Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111. Therefore unless the testimony of defendant's witnesses is shown by other facts and circumstances to be so inherently improbable as not to be worthy of belief, it must be taken as a fact that defendant, traveling at a proper rate of speed, entered the intersection before plaintiff did. It was plain-

tiff's duty to yield the right of way (section 131, California Vehicle Act [St. 1923, p. 560, as amended by St. 1931, p. 2126]), and her failure to do so constituted negligence. Plaintiff contends that defendant could not have looked to the right, for if he had done so he would have seen the other car. But the accident occurred after dark. Defendant saw lights of cars down the street, but not close enough to cause apprehension, and he had a right to assume that the drivers of those cars would yield the right of way to him. The general rule is that every person has a right to presume that every other person will perform his duty and obey the law. Pinello v. Taylor, 128 Cal. App. 508, 17 P.(2d) 1039; Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560.

[5-8] Plaintiff argues that defendant's estimate of the speed of plaintiff's car just before the accident is of no value because he did not have sufficient time to make a reliable observation. He testified that he saw the car just before it passed in front of him and that he had time to throw on his brakes and turn his car to the left. We cannot say as a matter of law that his estimate is entirely without probative value. It is true, however, that such testimony, in cases where it is clearly entitled to little weight, "does not create a conflict with the undisputed physical facts, which demonstrate beyond all reasonable doubt that the expressed opinion was merely an erroneous guess." Waizman v. Black, 101 Cal. App. 610, 613, 281 P. 1087, 1088. Appellant contends that that rule is applicable here. It appears that defendant's Durant, weighing about 2,600 pounds, struck plaintiff's Lincoln, which weighed 4,600 pounds, with sufficient force to crush a fender and break a wheel and that the Lincoln turned over two or three times. Appellant maintains that the effect of the collision proves conclusively that the Durant was traveling at an excessive rate of speed. But, as was said in Austin v. Newton, 46 Cal. App. 493, at page 498, 189 P. 471, 473:

"Common experience and observation teach us that strange and astonishing things sometimes happen in the world of physical phenomena, and accidents sometimes appear to happen in manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence."

Furthermore, it does not appear to us that the effect of the collision indicates that the defendant's automobile was necessarily being propelled at an excessive rate of speed. If, as claimed by appellant, the impact itself had overturned the heavy car, we should expect greater injury to the lighter car than is shown by the evidence. On the other hand, it is well known that any car, traveling at a high rate of speed, may, by its own momentum, be caused to roll over if it gets out of control.

[9, 10] Appellant contends that the trial judge based his conclusion that she was traveling at a high rate of speed upon the fact that her car rolled in the manner indicated. Claiming that she was taken by surprise, she moved the court to reopen the case and presented in support of the motion an affidavit by an engineer that consequences similar to those shown by the evidence would indicate that the speed of defendant's car was excessive. The motion was denied. Appellant contends that the conclusion that was reached by the trial court was a mere inference and that it is overcome by the affidavit referred to. Aside from the fact that the affidavit is not properly in the record, it does not appear from the record that the finding of the court is based solely upon the conclusion complained of; nor can it be said that such a conclusion is an inference that would necessarily be overcome by any type of evidence. The conclusion of the trial judge, if so arrived at, was such a deduction from facts proven as was, in his opinion, warranted by the laws of nature (Code Civ. Proc. § 1960), of which he was compelled to take judicial notice (Code Civ. Proc. § 1875, subd. 8), and he would not have been bound by the testimony of expert witnesses if such testimony had been offered at the trial. Bennett v. Hardy, 108 Cal. App. 473, 291 P. 903.

[11] "The law, of course, is also well established that any finding of the trial court upon conflicting evidence is conclusive, and all reasonable inferences are to be indulged in support of such finding." Ching Wing v. Kishi, 92 Cal. App. 495, 497, 268 P. 483, 484; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332.

[12] Unless, therefore, we can say that in view of the undisputed physical facts the accident was unquestionably caused by defendant's negligence, we must affirm the judgment. It is for the jury or trial judge to weigh and balance probabilities. We cannot reverse upon the ground that the finding of the court is

contrary to the evidence unless we can see that the fact as found contravenes recognized physical laws, and that therefore it is impossible that the accident could have occurred in the manner found by the trial court. Austin v. Newton, supra. Such is not the situation here, and the judgment must therefore be and it is hereby affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

1 Cal.App.2d 346

COON v. BISCAILUZ, Sheriff.

Civ. 10044.

District Court of Appeal, Second District, Division 2, California.

Oct. 11, 1934.

1. Mandamus ⇐3(2)

"Mandamus" is remedy provided to prevent failure of justice when there is no specific remedy in ordinary course of law and may not be resorted to as substitute therefor.

[Ed. Note.—For other definitions of "Mandamus," see Words & Phrases.]

2. Mandamus ⇐10

To authorize issuance of mandamus, there should not only be want of specific remedy, but also there should be a specific legal right, the right must be perfect, not inchoate, and party sought to be coerced must be bound to act.

3. Mandamus ⇐10

Mandamus will be denied if existence of the right is doubtful.

4. Mandamus ⇐3(11)

Petitioner seeking against sheriff release of exempt personal property seized under attachment was not entitled to mandamus, since she had specific remedy at law and could have moved court issuing attachment to order release of property as exempt from execution upon satisfactory showing of her right, and, if motion was denied, had further remedy by appeal (Code Civ. Proc. § 690, subds. 1, 4).

Application for peremptory writ of mandate by H. Conklin Coon against E. W. Biscailuz, Sheriff of Los Angeles County.

Peremptory writ denied, and alternative writ dismissed.

William E. Dudney and A. L. Graham, both of Los Angeles, for petitioner.

Everett W. Mattoon and S. V. O. Prichard, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

The alternative writ of mandamus was issued herein directed to the sheriff of Los Angeles county to forthwith release certain personal property held by him under writ of attachment and release of which had been demanded of him by petitioner on a claim of exemption based on provisions of section 690 of the Code of Civil Procedure, or show cause why he has not done so. By his return the sheriff admits possession of the property under writ of attachment issued in an action against petitioner and others for debt, and that the property is personal property of petitioner, but puts in issue the character or status of petitioner as one entitled to claim the exemption as made.

It appears from the petition that, after levy and seizure of her property by the sheriff, petitioner filed a verified claim of exemption thereof, alleging that she was a mechanical engineer, and that the property attached is necessary to carry on her trade and craft. By a counter affidavit, made on behalf of the attaching plaintiff in the action, her title was denied on information and belief, and on the same basis it was denied that she was a mechanical engineer. Confronted with this controversial situation, the sheriff refused to release the property from attachment, and this method has been employed by the unsuccessful claimant to secure such release. The return herein eliminates the previous issue of ownership, but creates an issue of fact in respect to petitioner's status as a mechanical engineer. From the state of the record herein it appears that claim might be made for exemption of portions of the property described under subdivision 1 of section 690 of the Code of Civil Procedure, and of other portions of such property under subdivision 4 thereof, provided the latter claim was based on undisputed facts as to status of petitioner as a mechanic or artisan.

[1-4] The writ of mandamus is the remedy provided to prevent a failure of justice when there is not a specific remedy in the ordinary course of law. If there is any adequate legal remedy, mandamus may not be resorted to as a substitute therefor. To authorize the issu-

ance of the writ, there should not only be a want of specific remedy, but also there should be a specific legal right; the right must be perfect, not inchoate; and the party sought to be coerced must be bound to act. If the existence of the right is doubtful, the writ will be denied. 16 Cal. Jur. 767, 768. The right of the petitioner herein to secure the release of the property in question is disputed on the basis of facts existing in relation to her status and use of the property. This dispute the sheriff declined to determine, but at his peril refused to release. Thereupon petitioner had a specific remedy in the ordinary course of law. She could have moved the court which issued the writ of attachment to order release of the described property as exempt from execution upon satisfactory showing of her right; and for refusal of the court to grant such motion there was a further remedy in ordinary course of law by appeal. That this remedy was available and constituted a legal remedy is settled by the Supreme Court in the case of Holmes v. Marshall, 145 Cal. 777, 79 P. 534, 537, 69 L. R. A. 67, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, which has never been reversed or modified in respect to this point, and wherein the court said: "Courts have power over their own process, and to set aside a levy of a writ of attachment or execution upon exempt property." Further discussion is unnecessary to this decision.

The alternative writ herein is dismissed and a peremptory writ is denied.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 246

KERBY v. ELK GROVE UNION HIGH SCHOOL DIST. et al.

Civ. 4958.

District Court of Appeal, Third District, California.

Oct. 5, 1934.

1. Judgment ⇐199(1)

Court may render judgment contrary to jury's verdict after denying motion for directed verdict (Code Civ. Proc. § 629).

2. Judgment ⇐199(3)

Rule regarding consideration of evidence authorizing judgment notwithstanding verdict is same as that applying to motion for nonsuit.

3. Judgment ⇐199(3)
Trial ⇐139(1)

Nonsuit or judgment notwithstanding verdict for plaintiff may be granted for latter's failure to prove sufficient cause only when there is no substantial evidence to support some essential issue on which plaintiff's right to judgment depends.

4. Judgment ⇐199(3)
Trial ⇐165

In determining existence of substantial evidence to support judgment for plaintiff on motion for nonsuit or judgment notwithstanding verdict for plaintiff, court must consider all evidence in record, with every reasonable inference or presumption therefrom, in manner most favorable to plaintiff, regardless of witnesses' credibility.

5. Judgment ⇐199(3)
Trial ⇐165

Every conflict in evidence must be resolved in plaintiff's favor on motion for nonsuit or judgment for defendant notwithstanding verdict for plaintiff.

6. Death ⇐17

Blow from basket ball, accelerating or aggravating chronic aneurism of cerebral artery, so as to cause fatal rupture thereof, may be deemed proximate cause of death, though such defect might ultimately have caused death without traumatic injury.

7. Evidence ⇐571(9)

Physician's testimony that violent blow from basket ball on forehead of one suffering from chronic aneurism of cerebral artery might reasonably result in rupture thereof *held* substantial evidence supporting jury's implied finding in action against high school district for death of basket ball player that such a blow caused rupture of artery and consequent death.

8. Schools and school districts ⇐89

High school physical training instructor *held* not negligent in permitting vigorous, robust sixteen year old boy, whom no one knew to be suffering from chronic aneurism of cerebral artery, ruptured as result of blow from basket ball, causing his death, to participate in basket ball game after instructing him as to rules.

9. Schools and school districts ⇐89

High school district *held* not liable for death of basket ball player as result of rupture of cerebral artery by blow of basket ball, thrown during "free play" game, which it

was not physical training instructor's custom or duty to referee, in absence of evidence that instructor, who was in gymnasium at time, failed to perform any duty.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by J. H. Kerby against the Elk Grove Union High School District and the trustees thereof. Judgment for defendants, and plaintiff appeals.

Affirmed.

Butler, Van Dyke & Harris, of Sacramento, for appellant.

Neil R. McAllister, Dist. Atty., Guy P. Johnson, Asst. Dist. Atty., and Ralph H. Cowing, Deputy Dist. Atty., all of Sacramento, for respondents.

Mr. R. L. THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered in favor of the defendants pursuant to the provisions of section 629 of the Code of Civil Procedure, after a verdict for plaintiff had been returned by a jury in a suit for damages for the alleged negligence of the instructor of physical education, as agent of the school district, resulting in the death of plaintiff's son while he was participating in a basket ball game.

Howard Kerby, the son of plaintiff, was regularly enrolled as a pupil in the Elk Grove Union High School. He was sixteen years of age and in apparent perfect physical condition. As such student, he was required by the school law to attend and participate in physical education as prescribed by the school. Section 3.735, School Code. Mr. A. F. Lawrence was the regularly employed instructor of physical training in that school. The game of basket ball was one of the sports included in the adopted course of physical education. This game is regularly conducted with a team consisting of five members on either side. At the time of the accident, a regular game of basket ball was not being played. The students were then employed in what is commonly termed "free play" with some twenty-five students engaged in the activities. A regular game of basket ball with five members of the team on either side is conducted under the supervision of a referee according to strict rules which require the blowing of a whistle when the ball goes out of bounds to indicate that it is then a "dead ball." Under such circumstances, the referee may designate the player who is to return it to the court. Periods of time were set apart for "free play" basket ball to enable all of the students to participate in that activity. This practice was supervised generally by the instructor without adhering to the strict rules of a regular game. It was his duty to also supervise other similar activities which were conducted at the same time at other places requiring him to divide his attention between these several games. In the "free play" game it was not the practice to scrutinize every play of each participant or to blow the whistle when the ball chanced to go out of bounds. The whistle was not blown on such occasions during the game in the course of which the accident occurred. Nor was it conducted under the supervision of a referee. Howard Kerby, who was participating in this "free play" game, had been previously instructed with regard to the rules thereof and fully understood the game. He was a very ambitious and active student of athletic sports and was considered a proficient basket ball player. Regarding the manner in which the accident occurred, Raymond Schmidt, who participated in the game, testified as follows: "We started playing around first. * * * Just shooting baskets, and so forth; then he (the teacher) asked for volunteers * * * hanging up curtains over the windows. * * * The other boys * * * were playing on the court. * * * Nobody was refereeing. * * * I was just watching the game. * * * I just saw the ball was thrown. * * * I saw the boy (who threw it) but that is about all I knew. I don't know the boy. * * * I think he belonged to the class. * * * He was standing on the west side, * * * just outside the basket ball court, that is, where the players stand; if a ball goes out, they throw it in. * * * He was about in the middle of the court, and he was going to throw it to the other end." Apparently Howard Kerby was hit by that ball on his forehead. He was seen to stoop over and rub his forehead. He then left the game and sat upon a bench. The instructor did not observe the incident. Nothing was then said about the accident. The instructor did not know that Howard had been injured. Later he was found unconscious in the dressing room. He was taken to the hospital, where he died the following day. There is no substantial conflict regarding the foregoing statement of facts. This suit for damages was commenced. It was tried with a jury. At the close of plaintiff's evidence, a motion for nonsuit was presented and denied. A verdict was rendered in favor of the plaintiff for the sum of $15,700. On motion of

the defendants, the court rendered a contrary judgment in favor of the defendants under the provisions of section 629 of the Code of Civil Procedure. From this judgment, the plaintiff has appealed.

On appeal it is contended the court erred in rendering judgment contrary to the verdict of the jury for the asserted reason that there is substantial evidence that Howard Kerby died as a result of the negligence of the instructor in failing to properly supervise the game of basket ball by absenting himself from the game and failing to blow a whistle when the ball was knocked out of bounds.

[1-5] The court has authority to render a judgment contrary to a verdict which has been returned, provided a previous motion for a directed verdict has been denied. Section 629, Code Civ. Proc.; Perera v. Panama-Pacific Int. Exp. Co., 179 Cal. 63, 175 P. 454; In re Estate of Caldwell, 216 Cal. 694, 16 P.(2d) 139. The rule regarding the consideration of the evidence authorizing the rendering of judgment notwithstanding the verdict is exactly the same as that which applies to a motion for nonsuit. Hirsch v. D'Autremont, 133 Cal. App. 106, 23 P.(2d) 1066; In re Estate of Fleming, 199 Cal. 750, 251 P. 637. A nonsuit may be granted for failure of the plaintiff to prove a sufficient cause only when there is no substantial evidence to support some essential issue upon which the plaintiff's right to recover judgment depends. In determining the existence of substantial evidence for the purpose of passing on a motion for nonsuit, the court must consider all the evidence in the record together with every inference or presumption which is reasonably deducible therefrom in a manner most favorable to the plaintiff without regard to the credibility of witnesses. For the purpose of this motion, the fact that a conflict of evidence may exist, is not to be considered. Every conflict must be resolved in favor of the plaintiff. 9 Cal. Jur. 551, § 35; Wayland v. Latham, 89 Cal. App. 55, 264 P. 766; Perera v. Panama-Pacific Int. Exp. Co., supra.

[6, 7] Governed by the preceding rule of law, we must determine whether the record on appeal contains substantial evidence that Howard Kerby died as a proximate result of the blow from the basket ball on his forehead, and whether the instructor, Lawrence, was guilty of negligence in failing to properly supervise the "free play" game, or by neglecting to blow the whistle when the ball went out of bounds, and that these omissions, or either of them, proximately caused or contributed to the injuries sustained by Howard Kerby.

The record contains some expert evidence which justified the court in submitting to the jury the question as to whether the blow from the basket ball on the forehead of Howard Kerby aggravated the chronic aneurism of the cerebral artery with which he was afflicted, causing a rupture of that weakened vessel and his consequent death. It appears conclusively from a post mortem examination, without conflict of evidence, that Howard Kerby had an aneurism of a cerebral artery. This physical defect was of long standing, having been congenital in its origin, or it was the result of slow development from some former injury. The walls of this artery were found to be greatly weakened by disease, distended, and ruptured. A profuse flow of blood from this rupture had covered the entire top and sides of the brain. Unusual blood pressure from violent activity or as a result of the blow from the ball on his forehead caused the rupture of the artery. It does seem probable that the violent activity of participating in the strenuous game of basket ball caused the rupture of the artery at the weakened point where the aneurism existed. But even though a latent chronic aneurism of the cerebral artery may have ultimately caused his death without the intervention of violent exercise or traumatic injury, if the blow from the ball did in fact accelerate or aggravate the chronic defect of the artery so as to cause a rupture thereof resulting in death, that blow may be deemed to have been the proximate cause of death so as to create a liability therefor under proper circumstances. Knock v. Industrial Accident Com., 200 Cal. 456, 253 P. 712; Quail v. Industrial Accident Com. (Cal. App.) 32 P.(2d) 402. Dr. Gundrum, who attended the patient as his physician a short time before his death, but who did not participate in the post mortem examination, testified: "The cause of death was rupture of a blood vessel resulting from the injury. * * * Q. Would a blow from a basket ball, or could it, in your opinion, cause a hemorrhage which would produce death? A. Yes, it is possible that it could. Q. It is possible that it could, and, in your opinion in this case, it did? A. Yes." Dr. Christman subsequently performed an autopsy in which he discovered that the boy possessed a chronic aneurism of a cerebral artery which he testified had existed for months or even years before the time of his death. There was a rupture of this artery at the point where the aneurism existed causing a "massive hemorrhage over the entire top of the brain and sides." Dr. Gundrum was not present at the time of this autopsy and did

not know of the actual condition of this artery as it was found to exist. It seems quite probable that the violent exertion of the boy in participating in the strenuous game of basket ball caused sudden and extreme blood pressure which the weakened walls of the artery were unable to withstand. If that be true and the supervisor of athletic sports had no knowledge of the student's chronic aneurism and the consequent danger of permitting him to participate in violent sports, no negligence could possibly be predicated on that cause of death. But if the rupture of the artery was in fact caused by the blow of the basket ball, and that act of throwing the ball could be charged to the negligence of the agent of the school district, liability might follow, even though the blow merely aggravated or accelerated the physical defect which had previously existed. Since Dr. Gundrum did testify that such a violent blow might reasonably result in a rupture of the artery, it may be said there is substantial evidence to support the implied finding of the jury to the effect that the blow from the ball on the forehead of Howard Kerby did in fact accelerate the blood pressure so as to cause the rupture of the artery and the consequent death of the boy.

[8, 9] This leaves the vital question as to what omission or act on the part of the instructor, Lawrence, contrary to his duty as supervisor of physical training, rendered him guilty of negligence so as to create a liability against the school district. The deceased was a vigorous, robust boy sixteen years of age and weighing 140 pounds. No one knew that he possessed an aneurism or any other physical defect. He had been instructed with relation to the rules of basket ball and was considered a proficient player thereof. The instructor was therefore not negligent in permitting him to participate in the game. Basket ball is one of the regular sports commonly included in the physical education program of all high schools. At the time the accident occurred, the instructor was not neglecting his customary duties. Although his duties required him to superintend several similar activities of the school at that very time, he was actually present in the gymnasium and within sight of the students who were engaged in "free play" basket ball. He was then covering the windows at the side of the hall to prevent the glaring sunlight from interfering with the game. It was not the custom or the duty of the instructor to referee a "free play" basket ball game. It was not the custom or his duty to maintain strict scrutiny of the players or to blow a whistle when the ball went out of bounds in that sort of exercise. A regular game of basket ball was not then being played. The presence and supervision of a referee in basket ball games do not prevent irregular plays. The referee merely regulates the game and penalizes foul plays. There are certain hazards and unavoidable accidents which occur in all such athletic sports against which a referee may not guard by the greatest degree of caution. Even if the whistle had been blown when the ball went out of bounds at the time this accident occurred, it is not unlikely that it would have been returned in the same manner and that Howard Kerby would have been struck in the forehead by the ball just as he was struck in that unfortunate play. We are unable to say this accident would not have occurred under the enforcement of the strict rules of a regular game of basket ball. But it was not a regular game and those rules were not invoked in a "free play" game. Ordinary prudence would not necessarily require such rules for the safety of the students. There is no evidence that the instructor omitted to perform any duty at the time of this accident which became the proximate cause thereof. It was a deplorable tragedy and the grievous results thereof invoke the sympathy of all. It was, however, not attributable to the negligence of the instructor and liability of the school district therefore does not follow. We are of the opinion that the court had authority, and properly rendered judgment favorable to the defendants pursuant to the provisions of section 629 of the Code of Civil Procedure, notwithstanding the verdict of the jury.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

TIMBRELL et ux. v. SUBURBAN HOSPITAL, Inc., et al.*

Civ. 8533.

District Court of Appeal, Second District, Division 2, California.

Oct. 10, 1934.

Hearing Granted by Supreme Court Dec. 6, 1934.

1. Hospitals ⇐8

Verdict for special nurse, joined with hospital as defendant in action for injuries to patient, did not exonerate hospital, where other nurses also cared for patient during time within which injuries were received.

2. Hospitals ⇐7

Special nurse, called in by hospital to attend patient when latter's physician said that patient ought to or must have special nurses, *held* employee of hospital, which was responsible for such nurse's negligence proximately contributing to patient's injuries.

3. Hospitals ⇐8

Defendant hospital's offer to prove custom of hospitals respecting engagement of special nurses for patients *held* properly rejected in trial of action for injuries to patient because of special nurse's negligence.

4. Trial ⇐191(7)

Instructions assuming that hospital patient's injuries were burns, as her physician and attending nurses testified in action against hospital for damages, *held* not erroneous, where only contrary evidence was testimony of expert witness, who did not see patient, that there could have been herpes condition.

5. Hospitals ⇐8

Res ipsa loquitur doctrine *held* applicable in action against hospital for injuries to patient, who was unconscious when injuries were inflicted and for several days afterwards.

6. Trial ⇐260(3)

Refusal of instruction that res ipsa loquitur doctrine does not change burden of proof *held* not error, where jury was not told that it did shift burden and was instructed that plaintiffs must prove their case by preponderance of evidence.

7. Trial ⇐253(4)

Instructions in action against hospital for injuries to patient *held* not erroneous as declaring hospital and nurses insurers that patient would not be injured, omitting requirements that negligence be proximate cause of injury and that servant's acts be done in scope and course of employment, or fixing degree of care beyond that required of nurse.

The instructions were that hospital operated for profit must treat all patients with skill and care ordinarily obtained in conduct of such institutions and in manner and with degree of care which their condition necessitates; that it was duty of defendant's nurse, applying hot water bottle to patient, to observe effect thereof and properly regulate heat; that hospital employing nurse is responsible for latter's negligence in failing to perform such duty, if patient is injured thereby; that jury must find that nurse's negligence was cause of injuries to plaintiff, if nurse did not meet such duty, and find hospital liable for resulting damages, if nurse was not hired by plaintiffs or hospital's agent with plaintiffs' authorization; and that it was duty of defendant and its servants to exercise due care in preparation of water bottles used in treatment of patient and application and use thereof so as not to cause injury.

8. Hospitals ⇐7

It is duty of persons charged with care of patient, lying unconscious in hospital and suffering from toxic condition, to use hot compresses and hot water bottles in such way and keep such watch over them that they will not burn patient.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Walter G. Timbrell and wife against the Suburban Hospital, Inc., and another. From a judgment for plaintiff against defendant hospital, the latter appeals.

Affirmed.

Kidd, Schell & Delamer, of Los Angeles, for appellant.

Arthur J. Speight and H. B. Cornell, both of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiffs, husband and wife, brought suit against defendant hospital and defendant McGovern, a nurse, for injuries received by Mrs. Timbrell while in the hospital following a Cæsarian operation. Hot compresses and hot water bottles had been applied to the patient and resulted in burns, which later required a skin-grafting operation. The jury returned a verdict in favor of defendant McGovern and against defendant hospital. From judgment entered upon the verdict, the latter appeals.

[1, 2] The evidence is such that the jury was justified in concluding that the injuries

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⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 47 P.2d 737.

complained of were caused either by one of the nurses regularly employed by the hospital or by one of two "special" nurses called in by the hospital to care for the patient after the operation. Defendant McGovern, one of the "special" nurses, was the only nurse joined as defendant, and the jury by its verdict absolved her of negligence contributing to the injury. However, since she was not the only nurse caring for the patient during the time within which the burns were received, the verdict in her favor did not exonerate the hospital. The other "special" nurse was called in by the hospital at 7 o'clock in the morning preceding the operation. Neither of the plaintiffs requested or authorized the hospital to employ a special nurse on behalf of Mrs. Timbrell, and plaintiffs' physician merely told the hospital that the patient "ought to" or "must" have special nurses. Appellant suggests that such special nurse was not an employee of the hospital so as to render the latter liable. The facts are so similar to those in the case of McBride v. Clara Barton Hospital, 75 Cal. App. 161, 241 P. 941, as to require us to conclude that the special nurses so engaged were employees of the hospital, and that the latter was responsible for their negligence which proximately contributed to the patient's injuries.

[3] An offer by defendants to prove the custom of hospitals with reference to engagement of special nurses was properly rejected. McBride v. Clara Barton Hospital, supra.

Appellant requested instructions on the question of the physician's actual or ostensible authority to employ special nurses on behalf of plaintiffs so as to absolve the hospital of liability for their acts. Even when viewed in the light most favorable to appellant, the evidence was not such as to justify or require the court to give the instructions requested, under the authority above cited.

[4] The court in its instructions assumed that the patient's injuries were burns. Appellant called an expert witness who testified in response to a hypothetical question that "it is possible that that could have been the herpes condition there." Herpes was described as "a condition involving the nerve." The expert witness did not see the patient. Her physician and attending nurses testified that the injuries were burns. The court had a right to conclude that the injuries were burns, in the absence of evidence of greater substantiality than that offered by appellant, and its instructions in that regard were not erroneous.

[5, 6] The court correctly instructed the jury on the doctrine of res ipsa loquitur. The patient was unconscious during the entire time that the injuries were being inflicted and for several days afterward, and that doctrine was clearly applicable. Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436. Appellant requested an instruction to the effect that the said doctrine does not operate to change the burden of proof, which was refused. The jury was nowhere told that it did shift that burden, and, since it was elsewhere instructed that "it is incumbent on the plaintiffs to prove their case by a preponderance of the evidence," it does not appear that such refused instruction would have clarified the legal principles by which the jury was to decide the case.

[7, 8] The court gave the jury several instructions of which appellant complains because they in effect made the hospital and nurses insurers that the patient would receive the necessary care and that she would not be burned. They are as follows: "[7] I instruct you that it is the duty of a hospital operated for profit such as the defendant, Suburban Hospital, Inc., is in this case, to employ only competent nurses, and employees and to treat all patients with such skill and care as ordinarily obtained in the conduct of such institutions and to protect the patients in manner and with such a degree of care as their condition may render necessary, and such obligation should be in proportion to the physical and mental condition of the patient rendering her unable to look after her own safety. * * * [9] You are instructed that it was the duty of the nurse or nurses of the defendant, Suburban Hospital, Inc., who placed plaintiff Evelyn M. Timbrell on the hot water bottle or other hot instrumentality which burned her, to observe the effect of said hot water bottle or other instrumentality and to properly regulate its heat, just as much as it was their duty to test the temperature of said hot water bottle or other instrumentality and to ascertain if it was in good working order prior to its being used on plaintiff Evelyn M. Timbrell. This duty was a continuous one and for a failure to observe it the defendants must be held liable. * * * [11] I instruct you that the duty of a nurse in a private hospital conducted for gain and as the agent of such a hospital is a continuous duty, and if she is dealing with a patient unable to care for herself it is her duty to observe the effect upon the patient of the application of any remedy such as a hot water bottle or like instrumentality used in applying heat to the body of the patient as much as it was her

duty to test its temperature in the first instance. The power of resistance and the condition of the patient must of necessity have much to do with the application of remedies, either by a physician or nurse, and this duty could only be observed by constant and unremitting care and attention which is just as obligatory on the nurse as is the duty of applying the remedy directed by the physician in charge, and if the nurse fails in this duty and plaintiff is injured thereby, her employer, if such employer was the hospital, is responsible for the negligence. * * * [31] The duty of a nurse is a continuous one. It was as much her duty to observe the effect of the remedy as it was to apply the remedy in the first place, and this duty could only be observed by constant and unremitting care and attention. If you find that the nurse in charge of the plaintiff at the time of the burning did not meet this duty, you will find that her negligence was the cause of the injuries, and the resulting damages, and if you further find that this nurse (regardless of what nurse it was), was not hired by the plaintiffs or either of them, or if you find that the plaintiffs, or either of them, did not authorize anyone acting as agent of the hospital to hire this nurse before the burning occurred, then you will find the hospital liable for the resulting damages to the plaintiffs."

Instructions numbered 9 and 11, supra, and 8 are also complained of because they omitted the requirement that the negligence must be the proximate cause of the injury; and No. 8 is likewise declared to be deficient in not requiring that the acts be done in the scope and course of the servant's employment. That instruction, in referring to "proper" care, is also said to be erroneous as fixing a degree of care beyond that required of a nurse under the authority of Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654. Instruction No. 8 is as follows: "You are hereby instructed that it was the duty of the defendant, Suburban Hospital, Inc., and its agents, servants and employees to exercise due and proper care in the manner in which the water bottle or bottles or other instrumentality or instrumentalities used by it in the treatment and care of the plaintiff Evelyn M. Timbrell were prepared, and in the application and use thereof on the body of said plaintiff, so as not to cause her injury, and if you find that such due and proper care was not exercised and used you shall find for the plaintiffs to such amount as you shall determine they are entitled."

It cannot be said that any or all of the instructions above quoted, when read and considered in the light of the court's entire charge, could have misled or confused the jury on any essential legal principle. When a woman is unconscious in a hospital following the birth of a child, and suffering from a toxic condition as shown by the evidence here, it is obvious that, if those who are charged with her care, knowing her helpless condition, use hot compresses and hot water bottles, they must use them in such a way and keep watch of them so that they will not burn the patient. There is nothing to suggest that there was any efficient intervening cause that contributed to the burns herein referred to, or that any one who was caring for the patient was not acting within the scope and course of her employment.

It does not appear that the other questions raised by appellant require discussion, in the light of the views above expressed.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 238

PARENTE v. STATE BOARD OF EQUALIZATION.

Civ. 5219.

District Court of Appeal, Third District, California.

Oct. 4, 1934.

Hearing Denied by Supreme Court Nov. 30, 1934.

1. Intoxicating liquors ⇐6

Proviso in constitutional liquor amendment permitting serving wine and beer with meals furnished in good faith to patrons of hotels, restaurants, and other public eating places does not limit power previously given to Legislature to regulate sale of wines and beers (Const. art. 20, § 22, as added in 1932).

2. Intoxicating liquors ⇐69

State board of equalization, in passing upon application for "on sale" beer and wine license, has power to determine suitability and fitness of "premises" where sales are proposed to be made, including location of building (Const. art. 20, § 22, as added in 1932).

"Premises" as respects grant of application for "on sale" beer and wine license includes location of structure or building,

irrespective of material of which it may be composed; involving questions affecting peace, safety, and good order of whatever surrounds place where "on sale" is to be made.

[Ed. Note.—For other definitions of "Premises," see Words & Phrases.]

3. Intoxicating liquors ⇐71

Evidence that state board of equalization, in passing on application for "on sale" beer and wine license, acted on police report that operation of places in such location increased police problems or criminal conditions, which was not denied at hearing, *held* to justify denial of license.

4. Constitutional law ⇐73

Where board is authorized to act informally, and has before it sufficient evidence to satisfy conclusions reached, and does not act arbitrarily, courts will not interfere.

Petition for a writ of mandate by Anthony Parente against the State Board of Equalization.

Petition denied.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Wallace Shepard, of Sacramento, and William B. Hornblower, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the application of the above-named petitioner praying that a writ of mandate be directed to the respondent directing and commanding the respondent to issue an "on sale" beer and wine license for premises situate at No. 154 Columbus avenue, in the city of San Francisco.

It appears from the record that on or about the 3d day of April, 1934, the petitioner above named caused to be filed with the state board of equalization an application for an "on sale" beer and wine license, sales to be made at a restaurant conducted by the petitioner at 154 Columbus avenue, San Francisco.

The application was made upon a blank furnished by the respondent, all questions upon the blank appearing to be answered in accordance with the rules and regulations of the respondent applicable to applications for "on sale" beer and wine licenses.

Following the application of the petitioner for an "on sale" beer and wine license, a protest against the issuance thereof was filed by William J. Quinn, chief of police of the city and county of San Francisco. Thereupon the petitioner applied for a hearing, and time for the hearing was set by the respondent, and notice thereof given to all parties interested. At the conclusion of the hearing, the application of the petitioner was denied.

[1, 2] Basing his argument upon section 22 of article 20 of the Constitution, being the amendment adopted November 8, 1932, effective December 5, 1933, and the case of Sandelin v. Collins (Cal. Sup.) 33 P.(2d) 1009, 1011, decided June 26, 1934 petitioner contends that the respondent exceeded its jurisdiction, and had no right or legal authority to deny the issuance of an "on sale" license to the petitioner. In other words, that a petitioner for an "on sale" license, where meals are furnished, has an absolute right to such a license, and that, in determining whether the premises are proper and suitable therefor, the law goes no further than empowering the state board of equalization to determine the construction of the building in which the sales of wine and beer are proposed to be made. This, however, is, we think, a limited and too narrow construction to be given not only to the constitutional provision but also to the State Liquor Control Act and the rules of procedure adopted by the state board of equalization relative to applications for an issuance of "on sale" licenses.

After setting forth in full section 22 of article 20 of the Constitution, the Supreme Court, in the case of Sandelin v. Collins, supra, uses the following language with reference to the provisos therein contained, to wit: "The provisos are included in the constitutional amendment. The effect of each is to place limitations on the power theretofore in the section vested in the lawmaking department of the state. The first proviso is one of prohibition against saloons and other public drinking places and the second is one of assurance against prohibition in specified particulars." The second proviso, however, does not refer to or limit the power given to the state under the constitutional amendment to regulate the sale of wines and beers. It simply reads: "Subject to the above provisions, that in hotels, boarding houses, restaurants, cafés, cafeterias and other public eating places, wines and beer may be served and consumed with meals furnished in good faith to the guests and patrons thereof." Not

a word appears in this proviso, as we have said, limiting the power given to the Legislature to regulate the sale. Reasonable construction, we think, however, in permitting wine and beer to be served and consumed with meals, would necessarily include the right to sell, but that does not alter the fact that the sale must be made in accordance with the acts of the Legislature and the rules and regulations of the state board of equalization adopted in pursuance thereof. This gives to the state board of equalization the power to determine the suitability and the fitness of the premises where the proposed "on sale" is desired to be made. We think the word "premises" includes far more than simply a structure with four walls, a roof, a dance floor, kitchen, and dining room. It is not simply a question of whether the structure is of wood, brick, concrete, weatherproof, properly heated, inviting, or uninviting. The premises include the location of the structure or building, irrespective of the material of which it may be composed. This involves questions affecting the peace, safety, and good order of whatever surrounds the place where the "on sale" is to be made.

[3] This brings us to a consideration of the testimony contained in the record upon which the state board of equalization must be presumed to have acted. It there appears that we have before us a second application of the petitioner for an "on sale" license covering the same premises. In the first application the petitioner desired an "on sale" license, locating the premises as No. 587 Pacific avenue, in a structure known as and called "La Inferno." This application being denied, a second application was presented for the consideration of the board, describing the premises as "No. 154 Columbus Avenue," and the structure as "The Garden," being simply a back entrance reached from Columbus avenue 150 feet distant, and leading to "La Inferno."

We quote from the record the following letters considered by the state board of equalization upon the hearing of the petitioner's application, to wit:

"Sacramento, Calif., April 7, 1934.

"Mr. Wm. J. Quinn, Chief of Police, San Francisco, Calif. Dear Mr. Quinn: Attached is your duplicate license slip concerning an application of Anthony Parente, doing business as, The Garden, 154 Columbus Avenue, San Francisco, Calif.

"According to a report received at this office, this is a back entrance to the old Parente's Place at 543 Pacific Ave.

"May we have your report and recommendation as soon as may be convenient? The license will be held pending your report.

"Very truly yours,

"A. H. Flickinger

"Beverage Tax Supervisor."

"San Francisco, April 10, 1934.

"To: Mr. A. H. Flickinger,

"From: Donald L. Marshall

"Re: Anthony Parente, DBA The Garden 154 Columbus Avenue, San Francisco, California.

"In reply to your letter of April 7th please be advised that this is the same party who applied for a license for the Inferno on Pacific Avenue and as a matter of fact the premises are the same, the exception being that Parente has cut an entrance through from Columbus Avenue instead of using the Pacific Avenue entrance.

"There is no change in the situation other than the address.

"Don Marshall [Signed]

"Chief Investigator, San Francisco District."

"City and County of San Francisco,

"When replying kindly refer to No. 120179

April 12, 1934.

"Your file #29380

"Mr. A. H. Flickinger, Beverage Tax Supervisor, State Board of Equalization, Sacramento, Calif. Dear Sir: In reply to your letter of April 7th relative to the application of Anthony Parente, doing business as The Garden, 154 Columbus Avenue, I am handing you herewith self-explanatory copy of the District Captain's report of investigation with the recommendation that the permit be denied.

"Duplicate copy of the application is also returned.

"Yours very truly,

"Wm. J. Quinn [Signed]

"CC State Bldg., S. F. Wm. J. Quinn, Chief of Police."

"San Francisco, Calif., April 10, 1934.

"To: Wm. J. Quinn, Chief of Police,

"From: Frederick Lemon, Captain of Police.

"Subject: Recommendation in re 'On Sale' Beer and Wine permit for the premises at No. 154 Columbus Ave.

"In re attached communication from State Board of Equalization, relative the advisability of granting an 'On Sale' beer and wine license to Anthony Parente, for the premises at No. 154 Columbus Avenue. I have had this matter investigated, and would advise:

"In view of the fact that the premises to be occupied is the identical one for which an ap-

plication was refused, the address at that time being given as No. 587 Pacific Avenue, I would recommend that the permit be not granted for the following reasons. These places were a continuous police problem with numerous complaints prior to the so-called prohibition era and immediately again became a police problem following repeal.

"Respectfully submitted,

"F. Lemon [Signed] Captain of Police, Star No. 709."

"San Francisco, May 31, 1934.

"To: Mr. Frank M. Keesling, Assistant Secretary, Board of Equalization, Sacramento.

"From: Donald L. Marshall

"Re: Anthony Parente 154 Columbus Avenue, San Francisco, California.

"In reply to your letter of May 29th please be advised that I have had a thorough inspection made of the premises for which this license is desired and find them to comply with the rules and regulations of the State Liquor Control Act in every respect.

"By referring to your files you will note that the address, 154 Columbus Avenue, is merely a back door entrance to La Inferno Cafe at 587 Pacific Avenue. The application of Anthony Parente for 587 Pacific Avenue was denied because of an objection filed by the San Francisco Police Department. An application was then filed giving the address of 154 Columbus Avenue with the idea of cutting through an entrance to La Inferno Cafe.

"As stated above the premises for which this license is desired, to-wit, La Inferno Cafe, comply in every respect with the requirements of the Liquor Control Act and so far as I am advised the applicant is of good moral character. I can see no objection to the granting of this license, other, of course, than the objection which has been raised by the Police as a general blanket objection to all places in the 500 block on Pacific Avenue. There will be no entrance on Pacific St.

"Comparatively speaking this place is better qualified for a beer and wine license under the Liquor Control Act than 75% of the places which have already been granted and are operating under State Licenses.

"Don Marshall [Signed]

"Chief Investigator, San Francisco District."

It thus appears that the respondent board had before it when considering the application of the petitioner for an "on sale" license what was presented to the police department of San Francisco preceding the prohibition era, and also the resumption of the same conditions immediately following repeal, the language being that after repeal the premises involved herein immediately became a "police problem." This language imports, we think, only one meaning, to-wit, that immediately after repeal the premises became, as they had been before prohibition, a criminal problem. A police problem might very readily be interpreted by the board as presenting the difficulty of controlling the lawless, the idle, the dissolute and the criminal element of a city tending to congregate at a designated place, from which would flow almost every form of conduct inimical to the peace, safety, and good order of the vicinity adjacent to the structure involved.

In this particular we may call attention to the absolute lack in the report of Don Marshall as to anything save and except the mere structure now known as 154 Columbus avenue, called "The Garden," and formerly known as No. 187 Pacific avenue called "La Inferno." Nothing appears in his report of the conduct characterizing "La Inferno" immediately preceding the repeal of the Prohibition Act. There is nothing in his report relative to the police problems presented by the occurrences in "La Inferno" following repeal. The report does state "that this place is better qualified for a beer and wine license under the Liquor Control Act than 75 per cent of the places which have already been granted and are operating under State licenses." This is not exactly a recommendation, as it may readily be inferred from the language used that the board has already been too liberal, or, to use a more common expression, too lax in granting "on sale" licenses in the city of San Francisco.

The record before us exhibits clearly that the respondent board has not acted arbitrarily, but upon an investigation which brought to their attention the questionable character of what had taken place in "La Inferno" following repeal, the additional burden cast upon the police department of the city of San Francisco in supervising, controlling, or holding in check the criminal element of the city. That "La Inferno," now called "The Garden," became a police problem, which we think means just what we have stated following repeal, is not controverted by any of the testimony appearing in the record. All there is in the record concerning the premises is to the effect that the petitioner owns a dance hall, a dining room with tables, and a kitchen, and is prepared to serve meals. This is no answer to the police problems or criminal conditions to be augmented or increased by the granting of an "on sale" license.

[4] We do not deem it necessary to cite authorities to the effect that, where a board is authorized to act informally, and has before it sufficient evidence to satisfy the conclusions reached, and does not act arbitrarily, courts will not interfere.

The petition for a writ of mandate is denied.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

1 Cal.App.2d 757

Benny WAGNER, Petitioner, v. The STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, Respondent.

Civ. 5220.

District Court of Appeal, Third District, California.

Oct. 4, 1934.

Hearing Denied by Supreme Court Nov. 30, 1934.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Wallace Shepard, of Sacramento, and William B. Hornblower, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondent.

PER CURIAM.

This cause is before us upon an application of the above-named petitioner praying that a writ of mandamus be issued directed to the above-named respondent, requiring the respondent to issue an "on sale" wine and beer license to the petitioner. The premises described in the petition are located at 574 Pacific avenue, otherwise known as "Spider Kelly's" place.

The record shows that this is an application for a license to sell wine and beer at a place heretofore known as "Spider Kelly's" café, the only change being in the name.

The evidence taken before the respondent board upon the hearing of the application of the petitioner for an "on sale" wine and beer license is practically identical with the testimony introduced in the case of Parente v. State Board of Equalization (Cal. App.) 36 P.(2d) 437, this day decided, to which reference is hereby made.

For the reasons stated in the opinion in the case above mentioned, the application of the petitioner for a writ of mandate must be, and the same is hereby, denied.

1 Cal.App.2d 273

Ex parte CUTLER.*

Cr. 278.

District Court of Appeal, Fourth District, California.

Oct. 6, 1934.

Rehearing Denied Oct. 19, 1934.

Hearing Denied by Supreme Court Nov. 5, 1934.

1. Criminal law ⇐1132

Accused who did not object to hearing of appeal on ground of absence of one of her attorneys was not deprived of constitutional right to be represented by counsel, where such attorney presented written brief considered by court, and appeal was argued orally on behalf of appellant by another attorney.

2. Habeas corpus ⇐27

Function of writ of habeas corpus is to inquire into jurisdiction of court issuing process under which accused is held.

3. Habeas corpus ⇐3

Writ of habeas corpus may not be made vehicle for consideration of alleged errors in conviction where commitment is in due form, nor to subserve office of motion in arrest of judgment.

4. Habeas corpus ⇐25(1)

Writ of habeas corpus may not be utilized as method of considering question of alleged insufficiency of evidence to support conviction.

5. Habeas corpus ⇐92(1)

Affirmance on appeal of conviction operated as final adjudication against accused of all questions raised by assignments of error or which could have been so raised.

6. Habeas corpus ⇐22(1)

Accused who unsuccessfully urged on appeal that judgment of conviction was contrary to evidence could not attack judgment collaterally on same grounds in habeas corpus proceeding.

7. Habeas corpus ⇐55

Where record in habeas corpus proceeding was incomplete because of failure to include exhibits, District Court of Appeal would not examine evidence upon which conviction depended to determine whether conviction was contrary to evidence.

8. Constitutional law ⇐83(1)
Criminal law ⇐13

Statute making it crime to roam about from place to place without any lawful business *held* not unconstitutional as being too broad or indefinite to state public offense, or as infringing upon individual's right of liberty; "roaming" not being equivalent of "idleness" (Pen. Code, § 647, subd. 3).

*Hearing denied by Supreme Court for lack of jurisdiction Nov. 5, 1934.

Proceeding in the matter of the application of Emma Cutler for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

James M. Carter, Harry Wirin, J. Allan Frankel, and David Ziskind, all of Los Angeles, Grover Johnson, of San Bernardino, and Leo Gallagher, of Los Angeles, for petitioner.

Elmer W. Heald, Dist. Atty., of El Centro, for respondent.

JENNINGS, Justice.

Petitioner was convicted in the justice's court of Calexico township in Imperial county by a jury of the offense of vagrancy, as defined in subdivision 3 of section 647 of the Penal Code. As punishment therefor, judgment was pronounced that she be confined in the county jail of said county for a period of six months. From the judgment thus rendered she prosecuted an appeal to the superior court of Imperial county. The appeal was unsuccessful. The judgment of the justice's court was affirmed, and the action was remanded to said court for enforcement of the judgment. She now seeks to be discharged from custody by this proceeding.

In her petition for a writ of habeas corpus petitioner contends that her imprisonment is illegal and unlawful, and that the superior court exceeded its jurisdiction in affirming the judgment of the justice's court for the following reasons: (1) Subdivision 3 of section 647 of the Penal Code is unconstitutional; (2) the evidence which was produced during the trial of the case in the justice's court as disclosed by the record on appeal did not present facts which constitute a public offense, and her conviction is therefore entirely unsupported by the evidence; (3) she was deprived of her constitutional right to be represented by counsel on the hearing of her appeal.

[1] With respect to petitioner's claim that she was deprived of her right to representation by an attorney on the hearing of her appeal, the return shows that she was represented by an attorney at the hearing of the appeal, and that a written brief was filed in her behalf by another attorney, which brief was read and considered by the court. It appears that petitioner contends that she was entitled to the presence of this second counsel on the hearing of her appeal, and that she was deprived of this right by reason of the fact that this particular attorney had been assaulted and beaten by members of a mob of so-called "vigilantes" on the steps of the courthouse at El Centro, Cal., approximately six weeks prior to the hearing of her appeal, for which reason the attorney so assaulted submitted the matter of the appeal without oral argument. The petition however, fails to show that on the hearing of the appeal petitioner insisted on the right to have this second counsel present in court, or that she asked for any continuance of the hearing for the purpose of having him present, or that she objected to the hearing of the appeal because of the absence of this counsel. Inasmuch as the petition fails to show these facts, and it does affirmatively appear that she was represented by counsel who orally argued in her behalf and that the absent attorney filed a written brief for her and submitted the matter without oral argument, her objection that she was deprived of her constitutional right to be represented by counsel is entirely lacking in merit.

[2-6] Petitioner's contention that the evidence produced at her trial in the justice's court was insufficient to show the existence of facts constituting a public offense and to justify her conviction in said court is likewise unmeritorious. The function of the writ of habeas corpus is to inquire into the jurisdiction of the court out of which the process whereby an accused is being held issued. In re Vitalie, 117 Cal. App. 553, 557, 4 P.(2d) 171; In re Martin, 132 Cal. App. 64, 66, 22 P.(2d) 269. It may not be made a vehicle for the consideration of alleged errors where a conviction has been had and the commitment is in due form, nor to subserve the office of a motion in arrest of judgment. In re Stambaugh, 117 Cal. App. 659, 4 P.(2d) 270; In re Martin, supra. Certainly it may not be utilized as a method of considering the question of the alleged insufficiency of the evidence. In re Jacobs, 175 Cal. 661, 166 P. 801; In re Horr, 177 Cal. 721, 171 P. 801; In re Williams, 183 Cal. 11, 190 P. 163; In re Gutierrez, 46 Cal. App. 94, 188 P. 1004; In re Kaster, 52 Cal. App. 454, 198 P. 1029; In re Trauger, 88 Cal. App. 59, 262 P. 780; In re Hall, 88 Cal. App. 212, 263 P. 295; In re Samaha, 130 Cal. App. 116, 19 P.(2d) 839. Finally, it must be remembered that petitioner duly prosecuted an appeal from the judgment of conviction, and was unsuccessful therein. The affirmance of the judgment operated as a final adjudication against the appellant of all questions raised by the assignments of error or which could have been so raised. In re Martin, supra. The petition herein shows that one of the contentions which was presented

by her on appeal as a ground for reversal of the judgment was "that the verdict was contrary to the evidence." Since she has thus directly attacked the judgment whose affirmance necessarily operated as a final adjudication of her contention that the verdict which formed the basis for the judgment was contrary to the evidence, she may not now collaterally attack it in the method which is here attempted, and successfully urge the identical contention which was passed upon and determined adversely to her on her appeal.

Petitioner, however, strenuously contends that there is no evidence whatever to support the verdict, and that for this reason the judgment of conviction which is based upon it was a judgment which was in excess of the jurisdiction of the court. It is therefore urged that since the function of the writ of habeas corpus is to inquire into the jurisdiction of the court which issued the commitment by whose authority petitioner is deprived of her liberty, it follows that this court is justified in examining the record for the purpose of discovering whether or not the justice's court exceeded its jurisdiction in pronouncing the judgment of conviction. In support of this contention petitioner relies upon certain decisions of the courts of this state in cases where writs of habeas corpus have been sought by petitioners who have been adjudged guilty of contempt of court and in cases where writs of review have been sought by petitioners who have endeavored thereby to annul awards of the Industrial Accident Commission of the state. It is pointed out that in each of these classes of decisions the reviewing court has examined the record for the purpose of discovering whether the court or commission had exceeded its jurisdiction in making the order or award attacked by the proceeding.

There is, however, a clear distinction between the situation which obtains in the accident commission cases and in contempt proceedings from that which is here presented. There is no appeal from an order of the Accident Commission granting or refusing an award, and no appeal from an order of court adjudging one to be in contempt. The privilege which is afforded by the remedy of appeal of having the record examined for the purpose of establishing that the court's findings are not supported by the evidence is lacking to the unsuccessful suitor before the Accident Commission and to the individual who has been adjudged guilty of contempt. This privilege was, however, afforded to petitioner in the present proceeding, and she availed herself of it by taking an appeal to the superior court. On this appeal, as heretofore noted, she contended as one ground for reversal of the judgment of conviction that the evidence was insufficient to support the verdict of the jury. Not only are we entitled to assume that the superior court considered the record of the proceedings in the lower court, which was submitted to it on the appeal, but it is specifically recited in the order affirming the judgment that the court had read the lower court's statement on appeal and the documentary evidence submitted therewith. We think that, having taken her appeal from the judgment of conviction and having had the matter of the alleged insufficiency of the evidence adjudicated on her appeal, she is not entitled by this proceeding to have the record again examined on her plea that the evidence placed before the jury was insufficient to sustain the verdict.

Furthermore, with respect to those decisions in contempt proceedings which are relied upon by petitioner as authorities supporting her contention that this court should review the record of the justice's court, another distinction is apparent. It may be conceded that this class of decisions presents a situation that is, to some extent, analogous to the situation of petitioner, in that the person found guilty of contempt has been so adjudged in a proceeding which is essentially criminal in character and has been punished therefor by being deprived of his liberty. By means of the writ of habeas corpus he attacks the court's order of commitment on the ground that the court exceeded its jurisdiction, in that the evidence was insufficient to establish the commission of a contempt. The obvious distinction between this class of cases and that which is here presented is that in the cases involving contempt the record must be scanned for the purpose of discovering whether a contempt was in fact committed. The question of jurisdiction in these cases depends entirely upon the facts which were presented to the court that pronounced the judgment of contempt. No method of discovering whether the court exceeded its jurisdiction in pronouncing the judgment other than a consideration of the evidence which was the sole source of its jurisdiction is afforded. This distinction is clearly pointed out in the case of In re Lake, 65 Cal. App. 420, 224 P. 126. It is there noted that contempt of court is a specific criminal offense, and that the proceeding wherein a judgment of contempt is pronounced is one of a criminal

nature and is summary in character. Finally, it is observed that the judgment in such a matter is final and conclusive, and that one who has been adjudged guilty of contempt has but two remedies, habeas corpus and certiorari, in either of which the scope of inquiry is precisely the same. These matters of differentiation furnish a sufficient reason for making an exception in this class of cases to the usual rule that the writ of habeas corpus may not be used as a means of considering the question of insufficiency of the evidence.

[7] Finally, it may be observed that, even if we were disposed to yield to petitioner's contention and to examine the evidence upon which the judgment of conviction depended, we are entitled to a full and complete record of the proceedings. This we do not have. It appears from the amended statement on appeal, which is attached to her petition and by reference made a part thereof, that, at the time of her trial in the justice's court, the people introduced three exhibits and petitioner introduced nine exhibits. None of these exhibits has been made a part of the record which is here before us, and the failure to include them has precluded us from making that full examination of the evidence which petitioner demands even if we were disposed to do so.

[8] As a final ground for the issuance of the writ herein, petitioner contends that the statute by virtue of whose provisions she was convicted and suffered imprisonment is unconstitutional. This statute is section 647 of the Penal Code. The petition alleges that she was charged with the offense of vagrancy as defined in subdivision 3 of said section 647. This particular subdivision declares that every person who roams about from place to place without any lawful business is a vagrant.

Petitioner's attack upon the constitutionality of the statute is based upon the following grounds: (1) That it is too broad and indefinite to state a public offense; (2) such a statute should be strictly construed in favor of a citizen's liberty; (3) roaming, loafing, and idling are not wrongful acts per se, and the prohibition of such acts seriously infringes upon the individual's right of liberty.

In support of these reasons for attacking the constitutionality of the statute, petitioner cites a number of cases from foreign jurisdictions, and one California case. The California decision is the case of In re McCue, 7 Cal. App. 765, 96 P. 110. From the statement of facts incorporated in the decision it appears that the petitioner for a writ of habeas corpus therein had been convicted of a violation of subdivision 5 of section 647, Penal Code. This subdivision provides that: "Every idle, or lewd, or dissolute person, or associate of known thieves * * * is a vagrant." The court in denying the writ remarked that while it doubted the competency of the Legislature to denounce mere idleness as a crime *without some qualification* (italics ours), the same stricture was not applicable to lewdness or dissoluteness, which were terms indicative of the indulgence in practices whose tendency was to weaken or corrupt the morals of those who followed such practices, and that they were therefore legitimate subjects for regulation or prohibition by the state. It is immediately obvious that the court's comment with respect to the doubt that it entertained as to legislative competency to denounce mere inaction as a crime without qualification had reference solely to the word "idle," which appeared in the particular subdivision which the court was considering. It requires no unusual perspicacity to observe that roaming is not the equivalent of idleness. There is at least something more than a shade of meaning distinguishing the two terms. Furthermore, even though this obvious distinction be ignored, the court's doubt as to the legislative competency to denounce mere inaction as a crime is modified by the phrase "without some qualification." In subdivision 5, the term "idle" contains no qualification. In subdivision 3, roaming is qualified by the language "without any lawful business." As thus qualified, we think that the individual who declares that his right to go and come as he chooses is unduly hampered thereby has small ground of complaint. If he is moved by the demands of some lawful business, he is not amenable to the charge of vagrancy because of his roaming proclivities. We apprehend also that the qualification would not receive too strained a construction. The particular subdivision of the statute which is being here considered was evidently enacted to curb the wandering propensities of individuals who might offer a menace to the peace and well-being of society in any locality whereto they might repair.

In Ex parte Hayden, 12 Cal. App. 145, 106 P. 893, the court declared that it could see nothing in the enactment of section 647 of the Penal Code which in anywise abridged the privileges or immunities of citizens or that it sought to do any more than to protect well-disposed and orderly citizens from the depredations of the idle and vicious.

We think that it is within the legislative power to define vagrancy, and to provide that those who indulge in pointless, useless wandering from place to place within the state, without any excuse for such roaming other than the impulse generated by what is sometimes denominated wanderlust, shall come within the definition, and that such individuals may properly be penalized as the statute ordains.

The writ is therefore discharged, and the petitioner remanded.

We concur: BARNARD, P. J.; MARKS, J.

1 Cal.App.2d 401

Ex parte SCHWARTZ.

Cr. 1344.

District Court of Appeal, Third District, California.

Oct. 13, 1934.

Habeas corpus ⊜50

Petition for writ of habeas corpus by state prison inmate before completion of term for which legally committed on conviction of grand theft must be denied as premature, though information charging prior convictions failed to allege that petitioner served terms therefor (Pen. Code, §§ 489, 644).

Proceeding by Eugene Schwartz for a writ of habeas corpus.

Writ denied.

Eugene Schwartz, in pro. per.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is a petition for a writ of habeas corpus by an inmate of state prison in Folsom.

From the judgment roll it appears that petitioner was, on October 11, 1930, convicted of grand theft. The information also charged petitioner with having suffered three prior convictions but fails to allege that terms were served therefor in any penal institution, as required by section 644 of the Penal Code.

Nevertheless, the petition must be denied as it is at this time premature. Petitioner stands legally charged and convicted of grand theft, the punishment for which is imprisonment in the state prison for not less than one year or more than ten years. Pen. Code, § 489.

It is apparent this petitioner has not served the term for which he has been legally committed. Ex parte Miller, 133 Cal. App. 228, 23 P.(2d) 1034.

Writ denied.

1 Cal.App.2d 166

WILLISTON et al. v. YUBA CITY.

Civ. 5161.

District Court of Appeal, Third District, California.

Sept. 28, 1934.

1. Deeds ⊜200

In determining whether deed was given to city with intention of conveying absolute title, it was immaterial whether attorney to whom grantors gave deed to be delivered to city acted as agent of city or of grantors (Civ. Code, §§ 1054, 1056).

2. Deeds ⊜208(1)

In suit to cancel deed for lack of delivery, evidence supported finding that plaintiffs executed deed and delivered it to attorney with intention of presently parting with title to land and conveying it absolutely to defendant (Civ. Code, §§ 1054, 1056).

3. Deeds ⊜54

Purported conveyance is void unless instrument by means of which title is passed is absolutely delivered by grantors with intention of presently conveying land therein described (Civ. Code, §§ 1054, 1056).

4. Appeal and error ⊜1010(1)

Intention with which grantors of real property execute and deliver deed to grantee or to another person for grantee is ordinarily question of fact for trial court, whose decision will not be disturbed on appeal when supported by substantial evidence (Civ. Code, §§ 1054, 1056).

5. Acknowledgment ⊜4

Deed is not invalid between parties merely because not acknowledged by grantor;

purpose of acknowledgment being evidentiary in character and required to entitle instrument to record or to render it competent evidence without further proof (Civ. Code, § 1161).

6. Acknowledgment ⊂=60

Irregular acknowledgment of deed out of presence of grantors was immaterial except for purpose of determining whether grantors intended presently to convey title to land therein described when deed was handed to grantee's attorney for delivery to grantee (Civ. Code, §§ 1054, 1056, 1161).

Appeal from Superior Court, Sutter County; J. O. Moncur, Judge.

Action by E. S. Williston and another against the City of Yuba City, a municipal corporation. From an adverse judgment, the plaintiffs appeal.

Affirmed.

Ray Manwell and McDaniel & Mahon, all of Marysville, for appellants.

Loyd E. Hewitt, of Yuba City, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

From a judgment which was rendered against the plaintiffs in a suit to cancel a deed on the ground of lack of delivery thereof, this appeal was perfected. The only problem which is involved on this appeal is whether the deed in question was delivered by the grantors with the present intention of conveying title to the real property therein described.

The plaintiffs are husband and wife. It was stipulated the plaintiff E. S. Williston was the owner of the property which is involved in this suit. It consists of a 10-foot strip on the westerly side of lot B of the Williston tract No. 2, in Yuba City, which that city desired to secure for the purpose of widening a street therein. It appears that Mr. Coats, of the law firm of Rich, Weis, Coats & Carlin, was the city attorney of Yuba City. Mr. Weis, of that firm, had previously acted as the attorney for the plaintiffs in other legal transactions. The city proposed to widen a street which required a 10-foot strip from the westerly side of plaintiffs' property. Mr. Coats had previously talked with Mrs. Williston regarding the necessity of acquiring the land, and requested plaintiffs to convey that strip of land as a gift to the city. She refused to do so. About a month later, on January 9, 1932, Mr. Weis brought a deed of the desired 10-foot strip of land to the home of plaintiffs, and talked with Mrs. Williston regarding the proposed conveyance. Mr. Weis told Mrs. Williston that he had been informed that unless the property owners voluntarily deeded to the city the necessary strip of land to widen the street, it would be necessary to institute condemnation proceedings and tax the adjacent land with the cost of improvements, and that the proposed improvement might enhance the value of plaintiffs' property. When Mr. Williston returned home that night he was fully informed by his wife of her conversation with Mr. Weis and the desire of the city to secure a deed of gift to the 10-foot strip of land. The following Monday morning, before Mr. Williston left the house for his work on a farm some distance away, he signed the deed of conveyance, and left it on the bookcase where his wife had placed it. His wife was then absent from the room, and he did not inform her he had signed it. Later Mrs. Williston signed the deed. The following morning Mr. Weis called for the deed, and Mrs. Williston handed him the deed, saying she and her husband had signed it. She testified in that regard: "I guess I told him we signed it, but that was all." Mr. Weis testified in regard to the transaction: "I left the deed there and said 'If you are satisfied this is all right you may sign the deed and I will call for it later.' Q. Did you tell her at the time that you were asking her to sign the deed so you would give it to the city? A. Yes sir." The following day he called for the deed.

Regarding the delivery of the deed, he said:

"Q. Did you call for the deed on Monday? A. Yes sir.

"Q. Did you have a conversation with Mrs. Williston at that time? A. Just a few words. * * * About all there was to it, she had the deed, it is my recollection she signed the deed after I got there. It seems like it bore Mr. Williston's signature, and she * * * passed it over to me and I told her I would attend to the notary work in my office and pass the deed on to Mr. Coats, the city attorney. * * * It was signed by them and I knew their signatures."

Weis took the deed to his office and had his stenographer, who was also a notary public, affix the acknowledgment to the deed, and delivered it to the city attorney. The deed was formally accepted by the city and recorded. Mr. Weis had formerly procured the ac-

knowledgment of instruments signed by Mrs. Williston to be attached thereto out of her presence.

Both plaintiffs freely acknowledge signing the deed with the understanding that it was to convey the 10-foot strip of land to the city. It seems apparent that it was signed as a deed of gift with the impression that the conveyance of the land would ultimately save them costs incident to street improvements. Evidently Mr. Williston, pursuant to his conversation with his wife, signed the deed and left it for her to sign and deliver. He did say that, "I thought it had to be acknowledged before a notary and recorded." But he also testified regarding his intention and purpose in signing the instrument, and his expectation that it would be delivered as a conveyance of the property to the city, that, "He (Mr. Weis) left it there for us to sign.

"Q. What did you sign it for? A. I just signed it. * * * They said that if we didn't sign the deed they would commence a condemnation suit against us. * * *

"Q. You knew Mr. Weis was going to turn it over to the city? A. I supposed he was, yes sir. * * *

"Q. * * * It was your intention it should be delivered to the city so that you would save yourself that money, wasn't that correct Mr. Williston? A. Yes sir. * * *

"Q. You intended that the deed would be given to the city so it wouldn't cost you that much money, is that correct? A. * * * Yes sir. * * *

"Q. Did you sign the deed so it could be handed to Mr. Weis by your wife? A. Yes sir.

"Q. And did you know at that time that Mr. Weis was going to give it to the city of Yuba City? A. I supposed so, I didn't know for sure.

"Q. That was your understanding that he was going to give it to the city of Yuba City? A. Yes, sir."

Regarding the delivery of the deed with the intention of passing title to the land, Mrs. Williston testified:

"Q. Who gave him (Mr. Weis) the deed? A. I did. * * * There was nothing said about it. * * * I guess I told him we signed it, but that was all.

"Q. And he just took the deed in his possession? A. Yes sir.

"Q. And took it away? A. Yes sir. * * *

"Q. You knew he was going to give it to the city? A. I supposed he was. * * *

"Q. You knew he was requesting you to sign the deed so he could deliver it to the city? A. I knew that."

[1-4] Based upon the foregoing evidence the trial court found that the deed to the 10-foot strip of land therein described was executed and delivered by the plaintiffs to the grantee with the intention of conveying absolute title thereto. The court also found that in procuring the deed of conveyance Mr. Weis did not act as the agent of the city. It is immaterial, however, whether he acted as the agent for the grantee or for the grantors. While the record contains some conflict of testimony, we are satisfied there is ample evidence to support the finding that the deed to the land in question was executed by the plaintiffs and delivered to Mr. Weis for the grantee with the intention of presently parting with their title to the land and conveying it absolutely to Yuba City. It is true that a grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor. Section 1054, Civ. Code. It is also true that a purported conveyance is void, and a deed is invalid unless the instrument by means of which the title is passed is absolutely delivered by the grantors with the intention of presently conveying the land therein described. 9 Cal. Jur. 149, § 48; Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703. But the intention with which the grantors of real property execute and deliver a deed of conveyance therefor to the grantee or to another person for the grantee is ordinarily a question of fact to be determined by the trial court, and its solution of that problem will not be disturbed on appeal when there is substantial evidence to support its conclusions in that regard. Merritt v. Rey, 104 Cal. App. 700, 286 P. 510.

It is immaterial in the present case that the deed of conveyance was executed by the grantors to avoid additional costs. There is no evidence in the record that it is not true the statement made to the plaintiffs to the effect that additional costs for property improvements would be incurred by them in the event condemnation proceedings were required to be instituted by the city. While fraud in procuring the execution of the deed was charged, that issue was abandoned by the plaintiffs on appeal. It is not contended the findings of the court favorable to the defendant on the issue of fraud are not justified by the record.

[5, 6] The deed of conveyance was not invalid between the parties thereto merely be-

cause it was not acknowledged by the grantors. The purpose of an acknowledgment to a deed is evidentiary in character and is required so as to entitle the instrument to be recorded or to render it competent evidence without further proof. 9 Cal. Jur. 113, § 18; Gordon v. City of San Diego, 108 Cal. 264, 41 P. 301; Knaugh v. Baender, 84 Cal. App. 142, 257 P. 606; section 1161, Civ. Code. The fact that the deed in this case was irregularly acknowledged out of the presence of the grantors is immaterial except for the purpose of determining whether the grantors intended to presently convey their title to the land therein described when the deed was handed to Mr. Weis for the purpose of delivering it to the grantee. There is sufficient evidence in the record to support the finding of the court to the effect that the deed was delivered by the grantors for the purpose of conveying title to the property without any condition or contingency attached thereto, and that the delivery of the deed was absolute. A grant of real property may not be delivered conditionally. Delivery of a deed to the grantee, or to his agent for that purpose, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery may be made. Section 1056 Civ. Code; Lewis v. Brown, 22 Cal. App. 38, 133 P. 331. In this case the deed was signed and handed to Weis for delivery to the grantee as requested by the grantors. It was formally received and accepted by the grantee by resolution duly adopted. In our judgment the deed was duly delivered and is valid and binding upon the grantors as a conveyance of the title to the land therein described to the city of Yuba City.

The judgment is affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.

1 Cal.App.2d 305

McLENNAN v. HOLDER.

Civ. 1109.

District Court of Appeal, Fourth District, California.

Oct. 9, 1934.

Rehearing Denied Nov. 3, 1934.

Hearing Denied by Supreme Court Dec. 6, 1934.

1. Limitation of actions ⇐127(5)

Amendment of complaint in action against surgeon for negligence in leaving sponge in plaintiff's body after operation by inserting words "lost and left and" between words "carelessly" and "caused and permitted to be left in plaintiff's body material and dressing" *held* not to set up separate or new cause of action barred by limitations.

2. Appeal and error ⇐232(2)

Objection, not made in trial court, to admission of evidence, cannot be urged on appeal.

3. Appeal and error ⇐1050(1)

Error, if any, in overruling objections to hypothetical questions asked expert witness, *held* not sufficiently prejudicial to require reversal of judgment, where much the same evidence as that obtained in reply to such questions was subsequently admitted without objection.

4. Physicians and surgeons ⇐14(3)

In absence of express contract, physician or surgeon does not warrant cure, but represents by taking case that he possesses ordinary training and skill of physicians and surgeons practicing in same or similar communities and will employ such training, care, and skill in treatment of patient.

5. Physicians and surgeons ⇐14(4)

One holding himself out as specialist in treatment of certain organ, injury, or disease is bound to bring to aid of one employing him for such treatment degree of skill and knowledge ordinarily possessed by such specialists in same general locality, considering state of scientific knowledge at time.

6. Evidence ⇐571(3)

Testimony of experienced surgeon that good practice in certain city and vicinity required surgeon performing abdominal operation to retain manual control of sponges used or bring attached tape outside patient's body and attach metal ring or surgical instrument to tape *held* sufficient to support finding of negligence of surgeon admittedly failing to use such methods.

7. Appeal and error ⇐993

Case cannot be decided in appellate court on numerical strength of witnesses.

8. Appeal and error ⇐1011(1)

Judgment, supported by competent and material evidence in record, cannot be reversed on appeal; conflicts in evidence being settled in trial court.

9. Physicians and surgeons ⇐18(8)

Evidence of things which could have been, but were not, done by surgeon to relieve operative shock, so as to permit continuance of search for lost sponge in patient's pelvic cavity, *held* not to support judgment

against surgeon in malpractice suit; patient's serious condition presenting great emergency, in which surgeon had to rely on his own skill, knowledge, and best judgment.

10. Physicians and surgeons ⇐18(11)

Award of $7,500 damages against surgeon to patient suffering frequent high temperatures, nausea, stoppage of bowels, great bodily and mental pain, nervous shock, and permanent injury because of failure to remove sponge from her pelvic cavity after operation *held* not excessive.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Ethol M. McLennan against Hall G. Holder. Judgment for plaintiff, and defendant appeals.

Affirmed.

Wright, Monroe, Thomas & Glenn, of San Diego, for appellant.

A. R. Honnold, of Escondido, for respondent.

MARKS, Justice.

This is an appeal from a judgment in the sum of $7,500 rendered by the court sitting without a jury against defendant for negligently losing and leaving a gauze sponge in the pelvic cavity of plaintiff upon whom he performed an operation in a hospital in La Jolla, in the city of San Diego, on March 22, 1932, for the removal of a badly infected tumor.

Plaintiff was a young married woman of large stature. So far as she knew, she had been in good health until about six weeks before the operation. Besides herself, her household consisted of her husband and two stepchildren. She cared for the members of the family, did all of the housework, including the family washing, took care of some chickens, and assisted her husband in the care of some stock. About two weeks before the operation, she consulted Dr. Larzalere, a physician of Escondido, who discovered she was suffering from some growth in her pelvic cavity. She was put to bed, given treatments to which she did not respond, and the doctor decided that an operation was necessary. Acting for Mrs. McLennan and her husband, he engaged the defendant to perform the operation and give the post-operative care and made arrangements with a hospital to receive her.

The defendant was a well qualified, successful, and very busy physician who specialized in abdominal operations. His skill and qualifications are admitted, and it is not questioned that the operation was skillfully performed, other than the losing of the sponge and allowing it to remain in the pelvic cavity of his patient. The hospital at which the operation was performed was one of the best equipped and efficient in California. The sole question of negligence presented on this appeal is the losing of the sponge and leaving it within the operative field.

Plaintiff was taken to the hospital the day before the operation and prepared for it. The operation started at about 11:35 o'clock in the forenoon and the patient was removed from the operating room at about 1:15 o'clock in the afternoon.

The operation and the unfortunate occurrence which gave rise to this suit may be thus briefly described:

There were present in the operating room besides plaintiff, Dr. Larzalere, who assisted in the operation, the anesthetist, experienced, skillful, and successful in his profession, the defendant, and two or more trained nurses. Plaintiff was placed on the operating table, which was inclined so that her legs and lower body were elevated above her head. This was done so that the bowels would recede into the upper abdominal cavity and leave the pelvic cavity, which was the operative field, as free and clear as possible. A medial line incision was made extending from the umbilicus to the pubes, which exposed the pelvic cavity and a large tumor which involved both Fallopian tubes and was adherent to the bowels and other organs. The tumor was filled with pus. The bowels were walled off from the pelvic cavity with from three to five large gauze retractor pads. The lower edges of the pads were placed on the floor of the cavity and were drawn upward across the face of the bowels. These pads had attached to them pieces of tape about fourteen inches long, which were drawn up and left outside of the body and surgical instruments attached to them. The operation was performed by a method known as "blunt dissection," in which the surgeon separated the tumor from the other portions of the body to which it had adhered by the use of his gloved hands. This caused capillary oozing of a considerable quantity of blood. This was stopped by the use of gauze pads similar to the retractor pads, although some of them might have been smaller in

size. Each of these pads had sewed onto it a piece of tape fourteen inches long. For want of a better name, we will call these pads sponges. When the bleeding became excessive at the spot where the surgeon was working, he would stop it by wadding up sponges and placing them against the bleeding tissue. The tape was wadded up with the rest of the sponge and did not protrude to the outside of the patient's body. The surgeon would then work on another side of the tumor, and, when the bleeding became excessive, the tissues were packed with the sponges. When the surgeon returned to work at a place which had been packed with sponges, he would remove them. Sponges were also used to mop up pus that had escaped from the tumor. The used sponges would go into the possession of one known as the "dirty nurse." At about the time the tumor was ready for removal, or was removed from the body, the anesthetist warned the defendant that he had better complete the operation as soon as he could, as the condition of the patient was not very good, she showing signs of shock. Defendant replied that he was through, and proceeded to finish the operation. The position of the patient was changed from inclined to level, the retractor pads were removed, the operative field cleaned, and defendant proceeded to suture the incision. He had completed the suturing of the peritoneum when the nurse informed him that the count of sponges showed that one was missing. The surgeon immediately removed the sutures and for about five minutes made an intensive search for the sponge in the abdominal and pelvic cavities of the patient. The anesthetist informed him that the condition of the patient was bad and she was showing signs of severe shock and should be removed from the operating table as soon as possible. The surgeon ended his search for the missing sponge, packed the operative field with gauze and closed the incision, leaving a gauze and a rubber drain to take care of pus and other fluids in the operative field.

The patient was removed from the operating room to her bed, and treatment was given to revive her from the operative shock. Her condition for three days was very serious, and showed the correctness of the opinion of the anesthetist that she was suffering from severe shock, and as a consequence the search for the lost sponge could not be continued.

Between ten days and two weeks after the operation a fecal fistula developed and fecal matter drained through the incision until about August 1, 1932. Such a happening is not unusual in operative cases of this kind where the tumor and bowels adhere. The separation of these adhesions causes a traumatic injury to the walls of the bowels which so weakens them that a fecal fistula often follows.

Plaintiff remained in the hospital about five weeks, when she returned to her home in Escondido, remaining there under the care of a nurse. Dr. Larzalere took over her care. Defendant did not visit her, but received several telephone reports of her progress from Dr. Larzalere. Just before June 8, 1932, the condition of plaintiff was so serious that it was thought best to have her return to the hospital with the probabilities of an exploratory operation by defendant. However, on June 8, she passed the missing sponge through her bowels. The pad as passed was about four and one-half inches long with its other dimensions between two and two and one-half inches in one direction and between one and one and one-half inches in the other. When spread it was found to be four and one-half inches wide and twenty-two inches long with a double tape seven inches long attached. The pad was made of doubled thicknesses of gauze. After the sponge passed from her body plaintiff slowly recovered. The fecal fistula closed about August 1, 1932, and the drainage of pus stopped about January 1, 1933.

The pads and sponges were all furnished by the hospital and each had tape attached to it. They were counted and brought into the operating room in a sterile condition and handed to defendant for use as he required them. After being used, they went into the possession of the "dirty nurse," whose duty it was to count them and check her count against the number brought into the operating room, reporting the results to the surgeon. In this manner the loss of one of the sponges was first discovered. This seems to be the general practice prevailing in all well-regulated hospitals. The surgeon does not attempt to count the pads or sponges, but relies upon the count given him by the nurses. The surgeon attempts to bear in mind the points in the operative field in which the sponges are placed. In the operation on plaintiff thirty or more pads or sponges were used, owing to excessive bleeding. This is greatly in excess of the number usually required in a similar operation.

Appellant presents the following grounds for reversal of the judgment: (1) Error of the trial judge in permitting an amendment of the complaint at the close of plaintiff's

case; (2) errors in ruling on objections to questions propounded to plaintiff's witnesses; (3) that the findings and judgment are not supported by, and are contrary to, the evidence; (4) that the damages awarded are excessive. We will consider these assignments of error in the order here stated.

[1] The trial judge permitted plaintiff to amend her complaint, over the objection of defendant, by inserting the italicized words in the following paragraph: "Plaintiff alleges that in the course of said operation, and after the opening of plaintiff's abdominal cavity by said defendant, the defendant negligently and carelessly *lost and left and* caused and permitted to be left in plaintiff's body material and dressing consisting of a large piece or roll of gauze, and did close the incision in the abdomen of plaintiff with the said roll or piece of gauze still remaining in plaintiff's abdomen; that in performing said incision the bowels and intestines of this plaintiff were not cut or opened; that on or about June 8, 1932, this plaintiff passed from her rectum said piece or roll of gauze so negligently and carelessly permitted by defendant to remain in the body of plaintiff."

Defendant urges that permitting this amendment was prejudicial error, as the statute of limitations had run at the time the amendment was made, and that it set up a separate and independent act of negligence not originally pleaded which constituted a new cause of action. We cannot agree with this contention. The action was to recover damages for the negligent act of defendant in the course of the operation. These damages were caused by the sponge being left in plaintiff's body. Had it been lost, found, and removed, no injury would have followed. It is our opinion that the italicized words constitute an explanation of how defendant "caused and permitted to be left in plaintiff's body material and dressing," and do not set up a separate or new cause of action.

[2, 3] During the course of the examination in chief of a physician and surgeon testifying for plaintiff, a long hypothetical question was asked him which concluded as follows: "Doctor, assuming the facts stated in Hypothetical question No. 1 as amended, would, in your opinion, the happening of the loss of the pad in the abdomen of the patient occurred if the surgeon performing the operation had exercised that degree of skill, care, knowledge and attention ordinarily possessed and exercised by surgeons in good standing, in San Diego and vicinity?"

Counsel for appellant made, and the trial court overruled, the following objection: "* * * It calls for an opinion on the ultimate issue and invades the province of the court, that no sufficient foundation has been laid, that it is immaterial, and a variance from the causes of action set forth in the pleadings."

Counsel for defendant now urges that the question permitted the witness to usurp the function of the court and express an opinion on the ultimate issue to be decided by the court; namely, that a cause of action for negligence has or has not been established.

We have been cited to no California case in which the precise question has been decided. A somewhat similar question was presented by the defendant in the case of Kershaw v. Tilbury, 214 Cal. 679, at page 693, 8 P.(2d) 109. While it was not there discussed at length by the court, a judgment in favor of the plaintiff was sustained. In Patterson v. Marcus, 203 Cal. 550, 265 P. 222, 223, it is said: "It has been held in this state that the implied contract on the part of the physician is that he possesses that reasonable degree of learning and skill possessed by others of his profession, and that he will exercise reasonable and ordinary care and skill in the application of that learning to accomplish the purpose for which he is employed. Houghton v. Dickson, 29 Cal. App. 321, 155 P. 128. As to what is or is not the proper practice is uniformly a question for experts, and can be established only by their testimony."

In Perkins v. Trueblood, 180 Cal. 437, 181 P. 642, 644, the court said: "In McGraw v. Kerr, 23 Colo. App. 163, 128 P. 870, 873, it is said: 'Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done.' Quoting further from the same case: 'The authorities are practically uniform in holding * * * that as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony.' "

In National Automobile Ins. Co. v. Industrial Accident Commission, 132 Cal. App. 373, 22 P.(2d) 568, 569, we find the following: "The rule has been declared that what is or what is not proper practice or the usual practice in treatment are questions for experts and can be established only by their testimony. * * * Ingamells v. Goodfellow,

109 Cal. App. 62, 292 P. 162; Roberts v. Parker, 121 Cal. App. 264, 8 P.(2d) 908."

In Priestley v. Stafford, 30 Cal. App. 523, 158 P. 776, 777, it is said: "And since it must be conceded upon the evidence that the condition of the boy's hand and arm was due to undue pressure caused by the fact that the splints were adjusted in a manner which did not allow for the usual swelling accompanying such cases, the question as to whether such omission constituted negligence was one for expert testimony."

The objection which we have quoted was made to but two hypothetical questions asked by counsel for plaintiff. He later in the trial asked numerous others which involved the expression of the same or a somewhat similar opinion on the part of the witness testifying without the objection now urged having been made in the court below. As to these later questions, the transcript contains the following:

"Mr. Monroe: May it be understood that all questions asked of this witness, hypothetical questions calling for his opinion as to the degree of knowledge and skill possessed by surgeons in the vicinity of San Diego, are subject to the objection which I have already made as to his competency to answer the question.

"The Court: I would not ordinarily acquiesce, but I think I am willing to do that, that you may have reserved to you the general objection that the witness has not shown himself competent to express an opinion.

"Mr. Monroe: Yes.

"The Court: Yes, you may have that general objection reserved."

An objection to the admission of evidence not made in the trial court cannot be urged on appeal for the first time. Even though we assume, but without holding, that the objections made to the two earlier hypothetical questions should have been sustained, we cannot hold the error, if any, sufficiently prejudicial to require a reversal of the judgment because much the same evidence as that obtained in reply to the two earlier questions was admitted later in the trial, without the objection now urged being made.

[4] In discussing the sufficiency of the evidence to sustain the judgment, it is not out of place to state the rule prevailing in California governing the physician or surgeon in the practice of his profession as to the skill required to be used. In the absence of an express contract, the physician or surgeon does not warrant cures. By taking a case he represents that he possesses the ordinary training and skill possessed by physicians and surgeons practicing in the same or similar communities, and that he will employ such training, care, and skill in the treatment of his patients. Patterson v. Marcus, supra; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654, 655; Houghton v. Dickson, supra; Priestley v. Stafford, supra; McCollum v. Barr, 38 Cal. App. 411, 176 P. 463.

[5] "The rule concerning the degree of care required of the defendant as a specialist in his branch of dentistry is correctly set forth by counsel for respondent in their quotation from Ann. Cas. 1915D, 1124 note, where it is said: 'One who holds himself out as a specialist in the treatment of a certain organ, injury or disease, is bound to bring to the aid of one so employing him, that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time.'" Hopkins v. Heller, 59 Cal. App. 447, 210 P. 975, 976.

The inference is clear that defendant was a specialist in abdominal operations.

[6] A physician and surgeon of long experience, testifying for the plaintiff, said that good practice in San Diego and vicinity required the surgeon to retain manual control of pads or sponges used to stay bleeding in the abdominal or pelvic cavities in operations such as here involved, or to bring the tape attached to the pad or sponge outside the patient's body and have there attached to it a metal ring or surgical instrument so that the pad could be traced through the means of the tape and would not be lost. It is admitted that the defendant did not use this method in his operation on plaintiff, but, with the sponges used to stop bleeding, he wadded the gauze and tape together and placed the wad entirely within the patient's body. This evidence in itself is sufficient to support the finding of negligence, as it is evidence that in this one respect defendant did not use the care and skill used by surgeons performing similar operations in the same or similar communities, according to the testimony to which we have just referred.

Defendant earnestly urges that the evidence of the expert testifying for plaintiff was given in connection with pads used for the purpose of retraction only and not as

to sponges used to stop bleeding, and that the evidence is clear that the tape attached to each retractor pad used by defendant was brought to the outside of plaintiff's body and surgical instruments there attached. It is true that a considerable portion of the testimony of this witness was directed to the use of retractor pads. He did make the statement to which we have referred as to the use of other pads or sponges, as is shown by the following quotation: "By the Court: Q. Would that be particularly true where the tape is attached to the pad and placed in the abdominal cavity? A. Naturally, sir."

[7, 8] It is true that the number of experts testifying for the defendant exceeded those testifying for plaintiff. Defendant insists that the evidence as to the correctness of the methods employed by him in performing the operation so greatly preponderates in his favor as to completely overcome the evidence of the plaintiff on this question. A case cannot be decided in an appellate court on the numerical strength of witnesses. Conflicts in the evidence are settled in the trial court, and a judgment cannot be reversed where there is competent and material evidence in the record supporting it.

[9] Plaintiff suggests that her evidence discloses that there were numerous things that could have been done, which were not done, to relieve the operative shock so that the search for the lost sponge could have been continued until it was found and removed. We are not particularly impressed with this argument. Defendant was confronted with a condition of great emergency during the search for the lost sponge. His patient was in a very serious condition, where her life was in danger, and the element of time was most important. Under such circumstances, he had to rely upon his own skill, knowledge, and best judgment in choosing the course to pursue. In Hesler v. California Hospital Co., supra, quoting from Leighton v. Sargent, 27 N. H. 474, 59 Am. Dec. 388, it is said: "It is never enough to show that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required, because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible."

The judgment is supported by the evidence because of the use of the method of placing the sponges completely within the pelvic cavity of plaintiff without the tapes being drawn outside her body so that each sponge could be traced and removed, rather than in the methods used to find the sponge after it was lost.

We are of the opinion that the findings and judgment are supported by the evidence. We have been assisted in reaching this conclusion by the following cases, all involving the loss of sponges during abdominal operations: Samuels v. Willis, 133 Ky. 459, 118 S. W. 339, 19 Ann. Cas. 188; Barnett's Administrator v. Brand, 165 Ky. 616, 177 S. W. 461; Rayburn v. Day, 126 Or. 135, 268 P. 1002, 59 A. L. R. 1062; Jackson v. Hansard, 45 Wyo. 201, 17 P.(2d) 659; Spears v. McKinnon, 168 Ark. 357, 270 S. W. 524; Moore v. Ivey (Tex. Civ. App.) 264 S. W. 283; Akridge v. Noble, 114 Ga. 949, 41 S. E. 78; Ault v. Hall, 119 Ohio St. 422, 164 N. E. 518, 60 A. L. R. 128; Cassingham v. Berry, 67 Okl. 134, 150 P. 139, 168 P. 1020; Brown v. Bennett, 157 Mich. 654, 122 N. W. 305.

[10] On the question of the amount of damages awarded, the trial court found that, because of the loss of and the failure to remove the sponge, "plaintiff suffered frequent high temperatures, nausea, vomiting, stoppage of the bowels, and terrific pains in the bowels and abdomen," and "suffered great bodily and mental pain, anguish, humiliation, nervous shock and permanent injury. * * *" These findings are all supported by the evidence. A physician and surgeon testifying for plaintiff was of the opinion that her period of recovery was prolonged three times by the presence of the sponge in her body. With this evidence and the findings before us, we cannot conclude that the $7,500 damages awarded are excessive.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.2d 572

CITY OF LOS ANGELES v. ALLEN et al.

L. A. 14730.

Supreme Court of California.

Oct. 2, 1934.

1. Eminent domain ⇐240

Referees' valuation of 33-foot wide strip, taken by city from 38-acre tract with 800 feet frontage on widened street and depth of 2,000 feet, on basis of average square foot value of entire tract, as determined by adding value of portion 107 feet deep nearest street and lesser value of remaining portion, *held* not erroneous as assessing benefit by charging against owner increased value of new frontage on widened street (Gen. Laws 1931, Act 8198, § 10).

2. Eminent domain ⇐96

Landowner, conceding that city's taking of strip from tract for widening street caused no damage to remaining portion and not showing that lots of same depth as those into which land next to tract were subdivided could not be laid out and sold after severance as well as before or that any natural barrier shortened depth available for city lots, could not claim severance damage.

3. Eminent domain ⇐96

Landowner *held* not entitled to award of potential value of strip of land, taken by city to widen street, for city lot purposes, in absence of damage to remaining portion of tract because of severance (Gen. Laws 1931, Act 8198, § 10).

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Condemnation proceeding by the City of Los Angeles against Walter Allen, the Harold Lloyd Corporation, and others. From an unsatisfactory interlocutory judgment in its favor, second named defendant appeals.

Affirmed.

Prior opinion, 29 P.(2d) 418.

R. C. Gortner, of Beverly Hills, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur W. Nordstrom, Deputy City Atty., all of Los Angeles, for respondent.

SHENK, Justice.

A petition for hearing in this case was granted in order that further consideration

be given to the appellant's contention that the referees, in fixing the amount of damages to be awarded to the appellant, incorrectly computed the value of the strip of land to be taken for the purpose of widening Santa Monica boulevard. Upon such further consideration of the facts and the arguments of counsel, we are satisfied that the opinion of the District Court of Appeal, Second Appellate District, Division 1, prepared by Mr. Presiding Justice Conrey, correctly disposes of the main questions presented on the appeal, and we adopt the same as a portion of the opinion of this court as follows:

"This is a condemnation proceeding in which plaintiff proposes to take from appellant a strip of land for the purpose of widening Santa Monica boulevard, under the Street Opening Act of 1903 (St. 1903, p. 376, as amended). The court approved the award of the referees to appellant of $8,614, and entered interlocutory judgment accordingly. Defendant appeals from said interlocutory judgment upon the ground that the amount of the award was not in conformity with the statute, which requires that the court shall find separately 'the value of each parcel of property sought to be condemned,' and that the law entitles the owner to that value."

[1] Appellant owns approximately 38.6 acres of land, bounded on the south by Santa Monica boulevard, and about 800 feet in length along that highway, and extending about 2,000 feet to the north. The width of the strip of land which is to be taken varies from 33.50 feet at the west end to 33.58 at the east end of the strip. There appears to be no direct evidence of the value which this parcel would have if separately owned, and thus unconnected with the remainder of the tract. This results from the tacit assumption on both sides that a piece of land of such slight depth could not be put to any very valuable use. It seems to be conceded that, since the strip to be taken is part of a larger tract under a single ownership, the market value of the strip in question must be ascertained under the operation of some reasonable process whereby its value when considered as part of the entire tract may be ascertained. According to the testimony of witnesses, the tract does not derive its value equally from all parts thereof. The acreage remote from Santa Monica boulevard is of less value than that which is nearer to the boulevard frontage. The land west of this tract (separated therefrom by Selby avenue) has been subdivided into lots having a depth of about 107 feet and running to an alley. Appellant's tract of land is susceptible of similar subdivision. Taking these facts into consideration, and as an aid toward establishment of a valuation for the entire tract, the witnesses, duly qualified as experts on value, gave to the area included in the 800-foot frontage with a depth of 107 feet, an estimated value of $1.64 per square foot. To the remainder of the tract they gave a value of $11,000 per acre, or approximately 25 cents per square foot. Apparently the referees added together the values thus estimated, and thus determined the value of the entire tract, reduced first to a valuation per acre and then to a valuation per square foot. In this manner their valuation of the strip to be taken was made by considering it as part of the entire 38-acre tract, without giving a controlling force to the value given to the strip when considered as part of the imagined separate parcel having a depth of only 107 feet, and likewise without considering it as an independent wholly separate parcel. Having arrived at their conclusion in the manner above indicated, the witnesses Butterworth and Crippen (who were two of the three referees) testified that the amount of the award as recommended by them is the fair and reasonable value of the property taken.

"When private property is taken by condemnation for a public use, the owner is entitled to receive 'just compensation.' The statute requires that there be found separately "the value of each parcel of property sought to be condemned." Street Opening Act of 1903, § 10, as amended, Deering's Gen. Laws, 1931 Ed., Act 8198. It is contended by appellant that the method adopted by the referees and by the court for ascertaining the value of the parcel to be taken is unsound, and that the value thereof has not been ascertained in accordance with the requirements of the law. The gist of the argument seems to be that, as an element of their computation, the referees have charged against the owner the increased value of the new frontage of appellant's property on the street when widened. This, appellant claims, was an assessment of benefits, which the law does not authorize. But we think that this argument is itself unsound. The line between the two portions of the tract was arbitrarily chosen. This was a purely mental operation, used by the witnesses for the purpose of analysis of their problem. The ultimate question before them, and the only question which they were authorized to answer, was: What is the value of this parcel of land, as it lies before us, being part of an undivided tract under single ownership? We have their answer,

which was accepted by the trial court. It does not appear that any rule or principle of law has been violated by the finding of the court, or by the referees and witnesses in the method by which they made their estimate and formed their judgment concerning the value of the property."

It is the contention of the appellant that the referees applied a different rule of valuation in the case of the strip taken from the appellant's 38-acre tract than was applied in the case of the lots of 107-foot depth on the other side of Selby avenue. This, however, is not the case.

[2] Severance damage was not claimed by the appellant. On the contrary, it is conceded that there is no damage to the remaining portion of the 38-acre tract by reason of the taking of the 33-foot strip, and that the portion remaining will have the same value that it had before the severance. It is not shown that lots 107 feet deep could not be subdivided and sold from the tract after the severance as well as before. No showing is made that any natural barrier or obstacle exists to shorten the depth available for city lots after the severance. Under the facts, as well as from the concession, no severance damage could be claimed.

[3] The appellant relies upon evidence, the admissibility of which is not attacked, that the potential value of the 107-foot depth fronting on Santa Monica boulevard, if considered separately as city lots, is $1.64 per square foot. It does not question the evidence that the value of the area back of the front 107 feet, if considered alone, is 25 cents per square foot, and that the value of the portion remaining, after the severance, averaged 32 cents per square foot, which is the average value of the entire tract found by the referees and applied by the court in the award of compensation. But the appellant does contend that it is entitled to be awarded the potential value of the strip taken, that is, its value for city lot purposes and not as part of the entire acreage. To comply with the appellant's request would be to award indirectly to it severance damage when in fact no severance damage exists. Pursuant to the concession and the fact that no severance damage resulted, the portion of the property retained after the severance has the same value that it had before the taking. The appellant after the severance possesses that value. Assume the aggregate value of the land as an entire tract before the taking computed at 32 cents per square foot to be $500,000, after the taking the appellant retains acreage of the value of $491,386, plus $8,614, the damages awarded, which together make it whole. That is, after the taking the appellant still has the equivalent of $500,000. Should the appellant prevail in its contention that it is entitled to $43,952, instead of $8,614, it would have the value of the retained portion, or $491,386, plus $43,952, which would leave it in possession of $35,339 more than it had originally. Its receipt of the additional sum of $35,338 could be justified only if damage resulting to the remaining portion by the severance reduced its value to that extent. Inasmuch as no damage occurred by reason of the severance, the result would then be unduly to enrich the appellant at the expense of the other property owners in the district.

The appellant presents no case in this state approving the requested method of computing the value of a portion of a larger tract. In condemnation proceedings in other jurisdictions the method advocated has been rejected. In re Westchester Ave. in City of New York, 126 App. Div. 839, 111 N. Y. S. 351, 353; In re Fourth Ave. in Borough of Manhattan, City of New York, 221 App. Div. 458, 223 N. Y. S. 525, affirmed 247 N. Y. 569, 161 N. E. 186; City of Grand Rapids v. Barth, 248 Mich. 13, 226 N. W. 690, 64 A. L. R. 1507.

By the award of compensation made herein, the appellant has received all the benefit to which it is entitled on account of the element of value arising from the potential use of the 33-foot strip as part of city lots fronting on Santa Monica boulevard.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

1 Cal.2d 607

ALLEN v. PAYNE, Auditor.

S. F. 15171.

Supreme Court of California.

Oct. 8, 1934.

Grand Jury ⇐26

Grand jury is without power to employ persons to investigate crime and make their compensation a charge on county (Pen. Code, § 922).

WASTE, C. J., and PRESTON, J., dissenting.

In Bank.

Original petition by L. M. Allen for a writ of mandate to be directed to H. A. Payne, as County Auditor of the County of Los Angeles, to approve a claim for compensation for services.

Alternative writ discharged, and peremptory writ denied.

Louis W. Myers, Allen W. Ashburn, James L. Beebe and Laurence W. Beilenson, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondent.

LANGDON, Justice.

This is a petition for a writ of mandate to compel respondent, auditor of the county of Los Angeles, to approve a claim for compensation for services. The board of supervisors of said county appropriated a sum of money for the specific purpose of employment of special investigators by the grand jury. Acting on information given by one of its members, the grand jury employed petitioner at ten dollars a day for one day, to investigate the alleged commission of a certain crime. Petitioner performed the services and presented his claim to the board of supervisors. This body approved it, but respondent auditor did not.

The facts are undisputed, and the only question is one of law, whether the grand jury has the power to employ persons to investigate crime, and make the compensation of the investigators a charge upon the county. Petitioner contends that the power exists by implication from the character of our grand jury, as provided for in the Constitution. It is argued that since the nature of the grand jury is not specifically defined in the Constitution, it is the body as known to the common law, with the same powers, including the power to institute its own investigations. See Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652. Section 922 of the Penal Code, also relied upon, provides: "If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow-jurors, who must thereupon investigate the same."

From the time of the adoption of our Constitution to the present, the accepted practice has been to leave the detection of crime in the hands of sheriffs and district attorneys, and in our opinion the departure from that practice finds no support in authority or legislative policy. The ferreting out of evidence of crime is a statutory duty expressly imposed upon certain officers, having the equipment and qualified personnel to perform it. This being so, there is no reason to resort to the very vague justification of "inherent" or "implied" powers. The existence of the power in other competent agencies tends to negative an implied power in the grand jury, which is obviously not equipped to exercise it. The grand jury's function of "investigating" crime may be readily distinguished from detection

This conclusion is reinforced by an examination of the legislative history of the grand jury in this state, in the light of established rules of statutory construction. That examination reveals a practice of defining and delimiting its powers in relation to employment, by express statutory grant. In the Statutes of 1871–72, p. 540, is found an express grant of power to the grand jury to employ and compensate for interpreters; in 1880, Penal Code § 928 (Amendments to the Penal Code 1880, p. 928) first authorized the employment of auditors; in 1897 (St. 1897, p. 204), section 925 of said Code was amended to provide for a stenographic reporter when requested by the district attorney; and in 1927 (St. 1927, p. 1156) section 925 was amended to permit the attorney general, upon request by the grand jury, to employ special counsel and investigators. It seems clear from these instances that the Legislature has considered the employment of persons by the grand jury a matter to be governed by statute. In none of these cases would there have been any necessity for a grant of authority if there existed the implied power which is claimed for the body by petitioner.

There seems to be no case directly in point, but several expressions in the decisions support the views above stated. Woody v. Peairs, 35 Cal. App. 553, 170 P. 660; Burns Int. Detective Agency v. Doyle, 46 Nev. 91, 208 P.

427, 26 A. L. R. 600; see Dession & Cohen, The Inquisitorial Functions of Grand Juries, 41 Yale L. J. 686.

It follows that petitioner's claim is improper, and that respondent was justified in refusing to approve the same.

The alternative writ is discharged, and the peremptory writ denied.

We concur: SEAWELL, J.; CURTIS, J.; SHENK, J.; SPENCE, Justice pro tem.

WASTE, Chief Justice (dissenting).

I dissent.

The grand jury is a body of citizens provided for and created by the Constitution (article 1, § 8), impaneled and sworn to inquire of public offenses committed or triable within the county. Code Civ. Proc., § 192. It was imported into California jurisprudence by the Constitution of 1849 (article 1, § 8). There is in the section no definition of the term "grand jury." Therefore, it follows that the reference necessarily recognized an existing institution with certain accepted characteristics and prerogatives—in other words, the grand jury known to the common law. At common law, and at the time of the adoption of the Constitution of the United States, the grand jury was a body with power of investigation, independent of the prosecuting officers. Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652; Blaney v. State, 74 Md. 153, 21 A. 547. The Legislature could not take this power away from the constitutionally created body having such common-law prerogatives. In fact, it has bestowed upon it greater inquisitorial power than has ever been bestowed upon it in those states which proceed with it according to the common law. Pen. Code, § 915 et seq., relating to the powers and duties of a grand jury. In this connection, see Edwards on The Grand Jury, p. 44, and the charge of Mr. Justice Field in Charge to Grand Jury, 30 Fed. Cas. 992, No. 18,255, 2 Sawy. 667.

As our Code sections on the subject of the power of the grand jury are, in some instances, copied from, and in other instances similar to, the provisions in the New York Criminal Code, it may be here noted that the courts of that state adhere to the doctrine of the independence of the grand jury in making investigations other than those instigated by prosecuting officers. See People ex rel. Livingston v. Wyatt, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159, 9 Ann. Cas. 972, and People v. Davy, 105 App. Div. 598, 94 N. Y. S. 1037.

The respondent takes the position that it has been the generally accepted practice in this state to leave the duty of detecting crime in the hands of sheriffs and district attorneys, and that because the Legislature has from time to time enacted certain express statutes charging those officers with the duty of detecting crime in their counties, such granting of express powers to one set of officials denies the existence of an implied power in others. Such a rule has been applied to cases of employment of special counsel in instances where it was the official duty of district attorneys to perform specified services (Merriam v. Barnum, 116 Cal. 619, 622, 48 P. 727); and to cases where the services of the city attorney were available to a city commission (Rafael v. Boyle, 31 Cal. App. 623, 161 P. 126). But we have been cited to no case, and I have found none, in which it has been held that such rule applies to a grand jury with the inherent powers vested by the Constitution and with the authority of the scope expressly delegated by the Legislature by enactment of section 192 of the Code of Civil Procedure, supra, and the pertinent sections of the Penal Code. On the point of inherent powers vested by the Constitution, see Millholen v. Riley, 211 Cal. 29, 293 P. 69; and as to implied powers necessary for the due and efficient exercise of the powers expressly granted, see Lewis v. Colgan, 115 Cal. 529, 47 P. 357.

None of the cases relied on by respondent sustain him on this point. In Burns, etc., v. Holt, 138 Minn. 165, 164 N. W. 590, the court held that the grand jurors should not in their private capacities agree to pay detectives for making investigations. In Burns, etc., v. Doyle, 46 Nev. 91, 208 P. 427, 26 A. L. R. 600, a contract to the same effect was held to be against public policy. Stone v. Bell, 35 Nev. 240, 129 P. 458, seems to definitely imply that in certain cases requiring an investigation the grand jury may employ assistance and order the payment for the amount of the services. The decisions of California courts cited by respondent concern boards created by statute, and officers having no duties except through the means provided by statute, and require no special reference thereto.

Section 4307, subd. 3, of the Political Code, provides that the "expenses necessarily incurred * * * for * * * services in relation to criminal proceedings for which no specific compensation is prescribed by law" are county charges. The employment of investigators is a necessary and important step in any criminal investigation or proceeding.

Such investigation may be conducted, and usually is, through the district attorney's office. I know of no reason why the grand jury should not have the same power. To hold otherwise would be to seriously impair the efficiency of the inquisitorial body and, in some instances, to destroy its usefulness to the community.

I am of the view that the petitioner is legally entitled to be paid for the services rendered.

I concur: PRESTON, J.

1 Cal.2d 670

MASON et al. v. SAN-VAL OIL & WATER CO., Limited, et al.

L. A. 13846.

Supreme Court of California.

Oct. 19, 1934.

1. Appeal and error ⇐770(1)

Appeal was ordered submitted on transcript and appellants' opening brief where respondents had not filed brief and had failed to make return to order of Supreme Court directing them to show cause why order appealed from should not be reversed (Rules for Supreme Court and District Courts of Appeals, rule 5, § 1).

2. Corporations ⇐557(2)

Allegations, in stockholders' complaint based upon information and belief, of failure of consideration for issuance of stock by corporation and misappropriation of funds, fraud, and conspiracy to defraud, without allegations of facts purporting to substantiate charges, *held* insufficient to authorize appointment of receiver pendente lite.

3. Corporations ⇐557(2)

Stockholders' affidavits in support of appointment of receiver pendente lite, which were merely declarations that stockholders were dissatisfied with corporate management, that they were familiar with allegations of complaint and desired to join in prayer for appointment of receiver, *held* insufficient to supplement complaint for purpose of supplying its deficiencies in failure to substantiate general charges of fraud and misappropriation of funds.

4. Corporations ⇐553(8)

Appointment of receiver pendente lite for corporation could not be justified on ground that suit was brought for purpose of removing directors on ground of fraud and dishonesty, where plaintiffs owned only 3 per cent. or less of stock of corporation (Civ. Code, § 310, subd. 3).

5. Corporations ⇐553(3)

Appointment of receiver pendente lite for corporation, at instance of stockholders, could not be justified on ground that corporation was in imminent danger of insolvency, where corporation appeared to be a going and prosperous concern, since imminent danger of insolvency does not authorize appointment of receiver for corporation at suit of private person (Code Civ. Proc. § 564, subd. 5).

6. Corporations ⇐557(5)

Appointment of receiver pendente lite for corporation could not be justified on theory that action was brought on behalf of corporation to have certain stock canceled on ground that it was not issued in compliance with corporation commissioner's permit or because of failure of consideration, where no showing was made that ancillary relief by appointment of receiver was necessary or desirable to insure to plaintiffs, standing in shoes of corporation, fruits of equitable relief to which corporation might become entitled.

In Bank.

Appeal from Superior Court, City and County of Los Angeles; Walter S. Gates, Judge.

Suit by G. Allen Mason against the San-Val Oil & Water Company, Limited, and others. From an order appointing a receiver pendente lite, named defendant and others appeal.

Reversed.

Rollinson & Phister, of Los Angeles, for appellants.

Adams, McCarthy, Hebbert & Clifton, of Hollywood, for respondents.

PER CURIAM.

This is an appeal from an order appointing a receiver pendente lite.

[1] The order was entered on May 24, 1932. The appeal is presented by a bill of exceptions. The appellants filed their opening brief on November 10, 1932. The respondents have not filed a brief and have failed to make any return to an order of this court directing them to show cause why the order appealed from should not be reversed. Accordingly, the appeal has been ordered submitted on the tran-

script and the appellants' opening brief. Rule 5, § 1, 204 Cal. xlvii.

The order appealed from was made on the application of the plaintiffs, pursuant to notice and a hearing. The documents and evidence considered on the hearing consisted of the verified complaint on file and affidavits, reports, and other documents introduced on behalf of the respective parties. The contention of the appellants is that the court improperly appointed a receiver on the showing made, and that the order should be reversed. We are satisfied from the record presented that the contention must be upheld.

[2, 3] The plaintiffs, as stockholders of San-Val Oil & Water Company, Limited, in April, 1932, sued said corporation, its directors, officers, and other shareholders. They sought an accounting of all of the corporate transactions from the date of incorporation, cancellation of stock issued to the defendant shareholders, removal of the defendant directors and a declaration that their offices are vacant, and the appointment of a receiver. It appears from the complaint that pursuant to an agreement made in October, 1930, the corporation's predecessor, San-Val Oil Company Limited, purchased certain oil leases from some of the defendants and other persons in exchange for shares of the corporate stock issued under a permit of the corporation commissioner. The company attempted to drill for oil, but without success. During the operations the source of a mineral water supply was discovered. The company gave up its drilling operations and commenced the business of bottling and marketing the mineral water. For this purpose it obtained additional leases, and in May, 1931, changed the corporate name to its present form and doubled its capitalization. Then follows in the complaint a series of some forty or more paragraphs devoted to allegations, based upon information and belief, of failure of consideration for the issuance of stock to said defendant shareholders, and misappropriation of funds, fraud, and conspiracy to defraud on the part of the defendants as directors and otherwise. The allegations are replete with generalities and conclusions of the pleaders, without any allegations of fact substantiating or purporting to substantiate the charges. The allegations in such form without more cannot be considered sufficient allegations of the charges made. Fox v. Hale & Norcross, etc., Min. Co., 5 Cal. Unrep. 980, 989, 53 P. 32, 169; Willis v. Lauridson, 161 Cal. 106, 108, 118 P. 530; Dowling v. Spring Valley Water Co., 174 Cal. 218, 221, 162 P. 894; Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 683, 200 P. 601. The affidavits introduced in support of the appointment of a receiver add nothing to the complaint. In fact, nearly all of them are merely declarations of the affiant stockholders that they are dissatisfied with the corporate management, that they are familiar with the allegations of the complaint and desire to join in the prayer for the appointment of a receiver. Such generalities contained in the affidavits cannot be deemed sufficient to supplement the complaint for the purpose of supplying its deficiencies in the respect noted. Lewis v. Shaw, 77 Cal. App. 99, 103, 246 P. 86.

The plaintiffs purport to allege facts showing that the corporation is "in imminent danger of insolvency." The uncontroverted showing on the hearing was that since the discovery and exploitation of the mineral waters the corporation has conducted a business amounting to between $2,000 and $6,500 a month and appeared to be a going and prosperous concern.

[4] Further mention of specific allegations of the complaint or description of the evidence introduced on the hearing need not be made to illustrate that it is difficult to ascertain upon what theory the action was brought or is maintainable, or the appointment of a receiver authorized. If the suit was brought for the purpose of removing directors on the ground of fraud and dishonesty pursuant to section 310, subd. 3, of the Civil Code, and for the ancillary relief by appointment of a receiver such as was the case in Boyle v. Superior Court, 176 Cal. 671, 170 P. 1140, L. R. A. 1918D, 226 (see, also, 6a Cal. Jur. p. 1531), the answer is that there is no allegation or showing that the plaintiffs own at least 10 per cent. of the outstanding shares of stock of the defendant corporation, as required by that section. On the contrary, the showing is that the plaintiffs own 3 per cent. or less of such stock.

[5] The allegation that the corporation is "in imminent danger of insolvency" suggests that the action was brought pursuant to section 564, subd. 5, of the Code of Civil Procedure, for the appointment of a receiver. It has been settled since the French Bank Case, 53 Cal. 495, that said section does not authorize the appointment of a receiver for a corporation on the ground stated at the suit of a private person. Murray v. Superior Court, 129 Cal. 628, 62 P. 191; Elliott v. Superior Court, 168 Cal. 727, 730, 145 P. 101; Hobson v. Pac. States Merc. Co., 5 Cal. App. 94, 101, 89 P. 866; 6a Cal. Jur. 1524 et seq.

[6] Finally, if the action be on behalf of the corporation to have stock issued to certain defendants declared void and canceled on the ground that it was not issued in compliance with the corporation commissioner's permit or because of failure of consideration, assuming such an action could be brought by the plaintiffs or by the corporation, no showing is made that it is such an action in which the ancillary relief by appointment of a receiver is necessary or desirable to insure to the plaintiffs, standing in the shoes of the corporation, the fruits of the equitable relief to which the corporation might become entitled. See Loney v. Consolidated Water Co., 122 Cal. App. 350, 353, 9 P.(2d) 888.

The foregoing comments, without entering into a more extended discussion, sufficiently support the conclusion that there was no proper basis for the order appointing a receiver of the defendant corporation.

The order is reversed.

1 Cal.2d 625

SPECK et ux. v. WYLIE et al.
L. A. 13205.

Supreme Court of California.
Oct. 10, 1934.

Rehearing Denied Nov. 7, 1934.

Principal and agent ⇐148(4)

One induced to enter into contract by untrue material representations of other party's agent may rescind it and recover consideration paid from principal, though latter was innocent and party deceived knew or had reason to know that agent's statements were not authorized, but cannot sue for fraud and deceit.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Harry A. Speck and wife against Oliver Wylie, Sarah E. Wylie, individually and as executrix of the estate of Oliver Wylie, deceased, and others. Judgment for plaintiffs, and defendant Sarah E. Wylie appeals.

Affirmed.

Prior opinion, 29 P.(2d) 312.

Rehearing denied; THOMPSON, J., dissenting.

Gibson, Dunn & Crutcher, H. F. Prince, Walter H. Hewicker, and William B. Neeley, all of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel), for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondents.

PRESTON, Justice.

This suit is by purchasers of certain real property in Los Angeles county under an installment contract to recover from the sellers thereof the several amounts paid thereon, following timely notice of rescission and offer of restoration. Under the findings it must be taken as proved that the purchase was induced by material misrepresentations fraudulently made by the agent of the sellers who was in charge of the negotiations. Plaintiffs had judgment as prayed, and defendants have appealed therefrom.

The contract was in writing and contained the following clause: "It is understood and agreed that this contract contains all the covenants, stipulations and provisions agreed upon by the parties hereto and no agent of either party to this contract has authority to alter or change the terms hereof and neither party is or shall be bound by any statement or representation not in conformity herewith. It is understood and agreed that said property above described has been inspected by said purchaser, or the purchaser's duly authorized agent; that the same is and has been purchased by the purchaser as a result of said inspection and not upon representations made by the sellers or any selling agent, and that the purchaser hereby expressly waives any and all claims for damages or for cancellation of this contract because of any representation made by any selling agent or person whatsoever other than as contained in this agreement; and the sellers will not be responsible for or liable on account of any inducements, promises, representations, or agreements not set forth herein."

The appeal thus presents anew the vexing question as to what rights, if any, should be accorded a purchaser who has been defrauded, against a seller who is innocent, where such purchaser knows that the negotiating agent of the seller has been acting in excess of his authority in making the representations complained of.

It is due the learned District Court of Appeal to say that we transferred this cause to this court for decision, not because of any misinterpretation as to the existing rule gov-

erning the subject, but rather to give consideration to the question of relaxing to some extent the rule heretofore laid down in the case of Gridley v. Tilson, 202 Cal. 748, 262 P. 322, where, after restating the general rule that fraud inducing the execution of a contract may be shown by parol testimony, it was further said: "A well-settled exception, however, is the case where the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make representations. Therefore a principal is bound only by the representations embodied in the written contract, where a provision in the contract notified the prospective purchaser that the agent's authority went no further. (Citing cases.)" Gridley v. Tilson, supra, page 751 of 202 Cal., 262 P. 322, 323.

We feel warranted in taking this step for at least two reasons: First, the principal, though innocent, should not be allowed to retain a consideration which the purchaser has parted with by reason of the fraud where such defrauded party rescinds promptly and the parties can be restored without substantial injury to their former status; second, because this subject has had thorough consideration by law collaborators as shown by the recent product of the American Law Institute, styled, "Restatement of the Law—Agency," where the rule suggested is as follows: Section 259. "A transaction into which one is induced to enter by reliance upon untrue and material representations as to the subject-matter, made by an agent entrusted with its preliminary or final negotiations, is subject to rescission at the election of the person deceived. * * * Comment: b. * * * The rule stated in this section applies although the other party knows or has reason to know that the agent is not authorized to make the statement. By contract with the principal, however, he may agree that the principal is not to be liable because of unauthorized statements of an agent, as stated in section 260. * * * Sec. 260. * * * (1) A principal may, by contract with another, relieve himself of liability in deceit for prior or subsequent frauds of an agent to such other. (2) A contract obtained by an agent through fraudulent misrepresentations of facts may be rescinded by the other party although it provides that it shall not be affected by representations not contained therein."

Without attempting further elaboration we therefore announce that we are in accord with the above statements of the rule which will, all other things being favorable to the complaining party, allow him to rescind and to pursue the principal far enough to secure a return of the consideration paid. But an action for fraud and deceit will not be allowed him under such conditions. The doctrine of Gridley v. Tilson, supra, and such appellate court cases as may have followed it, should be limited in its application by the exception hereinabove set forth.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; IRA F. THOMPSON, J.

SHENK, Justice.

I concur. The general rule that fraud in the inducement of a contract may be shown is recognized in Gridley v. Tilson, 202 Cal. 748, 262 P. 322. An exception to the general rule is also noted therein and is still effective, subject to the limitation stated in section 260 of the Restatement of the Law of Agency, now approved. As I understand this rule, it is that an innocent principal so contracting with another may relieve himself from liability for the fraud of his agent, but he is nevertheless subject to rescission on the part of the defrauded party. The rule proceeds upon the theory that an innocent principal so contracting may not be permitted to enrich himself by reason of his agent's fraud, and that any property received by such principal is held by him as a constructive trustee for the person defrauded. I am satisfied that the restatement of the law of agency as contained in §§ 256 to 264, inclusive, of the final draft, should be followed.

LANGDON, Justice.

I concur in the judgment reached, and am fully in accord with the sound and reasonable rule laid down in the Restatement of the Law of Agency, and established by the foregoing opinion as the law in this jurisdiction. I think it is desirable, however, to mention briefly some of the cases which are followed, overruled, or disapproved by it.

The so-called "doctrine of Gridley v. Tilson" was expressed in a case wherein the point might well have been considered dictum, for a separate and sufficient ground for the holding appears therein. See 16 Cal. L. Rev. 234. Assuming, however, as subsequent cases have done, that Gridley v. Tilson constitutes a direct holding on the point, the prior decision of this court in Mooney v. Cyriaks, 185 Cal. 70, 195 P. 922, was directly contrary thereto. The case of Munn v. Earl C. Anthony, Inc., 36 Cal. App. 312, 171 P. 1082,

which was cited with approval in Gridley v. Tilson, was disapproved in Mooney v. Cyriaks, supra. The Mooney Case was followed in Whiting v. Squeglia, 70 Cal. App. 108, 232 P. 986, in which case this court denied a hearing. Nevertheless, a great many cases were decided in the District Courts of Appeal in the last few years, which follow the principle supposed to have been adopted in Gridley v. Tilson. Among these are Warner v. Taft Land & Dev. Co., 113 Cal. App. 71, 297 P. 969; Campbell v. Title Guarantee & Trust Co., 121 Cal. App. 374, 9 P.(2d) 264; W. J. Latchford Co. v. Southern Cal. Gas Co., 125 Cal. App. 112, 13 P.(2d) 871; Clancy v. Becker-Arbuckle-Wright Corp., 137 Cal. App. 43, 29 P.(2d) 868; Curby v. Title Guarantee & Trust Co. (Cal. App.) 32 P.(2d) 151. In the recent case of Simmons v. Ratterree Land Co., 217 Cal. 201, 17 P.(2d) 727, though we held that under the peculiar circumstances the rule of Gridley v. Tilson was inapplicable, we approved it as a correct statement of the law. Also, in Humphrey v. Harry H. Culver & Co., 32 P.(2d) 630, we merely distinguished and did not disapprove Gridley v. Tilson.

It is now clear that this rule is unsound in principle, and that it is contrary to the better authorities, as evidenced by the restatement on agency. See, also, 16 Cal. L. Rev. 234, supra. In refusing to follow it further, we are now overruling the many decisions set forth above, and are returning to the position formerly taken by us in Mooney v. Cyriaks, supra.

1 Cal.2d 666

LOZIER et ux. v. JANSS INV. CO. et al.

L. A. 13857.

Supreme Court of California.

Oct. 13, 1934.

Rehearing Denied Nov. 8, 1934.

1. Appeal and error ⇐893(1), 1008(1)

Supreme Court does not sit as triers of fact de novo and cannot disturb judgment rendered pursuant to trial court's fact findings.

2. Principal and agent ⇐148(4)

Purchasers, rescinding contracts to purchase realty because of fraudulent representations by vendor's agents, may sue for return of consideration paid, though contracts provide that representations not contained therein shall not bind seller.

3. Vendor and purchaser ⇐120, 341(1½)

Joinder of person, secured by purchasers of realty to take interest in contracts, in notice of rescission for fraudulent representations by vendor's agents and complaint in action for return of consideration paid, *held* unnecessary to state cause of action.

4. Principal and agent ⇐197

Judgment for return of money paid by purchasers, rescinding contracts to purchase realty for fraudulent representations by vendor's agents, *held* proper as against vendor only.

5. Principal and agent ⇐197

Ordinarily, judgment for purchasers of realty in damages for fraud and deceit of vendor's agents is proper as against agents only.

6. Principal and agent ⇐197

Purchasers rescinding contracts to purchase realty for fraudulent representations by vendor's agents could recover only consideration paid from vendor, and were not entitled to judgment against agents in damages for fraud and deceit.

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Howard W. Lozier and wife against the Janss Investment Company, Dell Ellis, John Germann and another. From a judgment against named defendants, they appeal.

Reversed in part, and affirmed in part.

Prior opinion, 29 P.(2d) 470.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel) for appellants.

Bernard Potter, of Los Angeles, for respondent.

PRESTON, Justice.

As to defendant Janss Investment Company, this is an action for the return of the consideration paid by plaintiffs on contracts to purchase certain real property in Los Angeles county, following a unilateral rescission accomplished prior to commencement of the action, upon a written notice and offer of restoration. As to defendants Ellis and Germann, it is an action for damages for fraud and deceit, as these defendants did not re-

ceive the consideration paid, but did make the fraudulent representations complained of.

The facts are that plaintiffs executed five contracts of purchase with defendant investment company, each covering a separate lot in Westwood, Los Angeles county; the interest therein contracted for being 68.5 per cent. One Saidee Benson, at the instance of defendants, was a purchaser with plaintiffs to the extent of the remaining 31.5 per cent. interest in said properties; however, having refused to join with plaintiffs in this action, she became a defendant herein by order of court.

The court made findings in accord with the allegations of the complaint, and judgment was entered accordingly against the three above-mentioned defendants, investment company, Ellis, and Germann, for the amount of the consideration paid with lawful interest thereon from the date of payment. Each of said three defendants has appealed.

The complaint, proof, and findings are substantially to the same effect. The contracts were executed on September 23, 1927. The combined purchase price of the several lots was to be $27,000. The aggregate of the initial payments made was $6,506.40 by plaintiffs and $3,000 by said Saidee Benson. Future payments were to begin on March 23, 1929. However, no other payments were ever made. The negotiations were conducted by two salesmen of defendant investment company, to wit, said defendants Ellis and Germann. These salesmen represented to plaintiffs that they were acquainted with the values of property in the vicinity; that the value of the property here involved was in excess of $27,000; that during the period of eighteen months elapsing between the initial payments and the next payments to be made on the contracts, they would guarantee to resell the property at a profit to be divided between plaintiffs and said Saidee Benson, according to their respective interests, and they further represented to plaintiffs that they would never be required to make any further payments on said contracts; also that they knew then of some persons who would buy two of the lots. These promises were renewed from time to time by said salesmen, both before and after the expiration of said eighteen months' period. While plaintiffs knew that the promises of the agents were at variance with the contracts, nevertheless the evidence shows that said agents, by their repeated assurances, prevented plaintiffs from taking the matter up directly with the investment company; that the agents actually requested plaintiffs not to take it up with their principal.

The court found that these assurances of resale were made without intent of carrying them to execution, and that they, and all other of said misrepresentations, were made to defraud plaintiffs; that plaintiffs believed and relied upon said misrepresentations, being ignorant of the value of said lots and of their salability; further, that by reason of the continued misrepresentations of said agents and by reason of the fact that they were at all times agents of the investment company, plaintiffs were not guilty of laches in waiting until May 14, 1930, before serving notice of rescission on defendant investment company. The court further found that said repeated assurances of said agents were a sufficient excuse for the failure to make the payments which were to begin on March 23, 1929, under said contracts.

[1-3] In the face of these findings of fact this court is powerless to disturb the judgment. This court does not sit as triers of fact de novo. It is also true that the contracts contained the following clause: "The Buyer is urged to read the terms of this contract before signing it, as no statement, settlement, agreement, understanding or representation orally made, or written and not contained herein, will be binding on the Seller." But under the decision reached by this court in the case of Speck v. Wylie, 36 P.(2d) 618, determined October 10, 1934, plaintiffs may maintain this action to secure the fruits of the rescission of the contracts made by them. We do not give weight to the contention that Saidee Benson should have joined in the notice of rescission or the complaint in order to state a cause of action. She was not acting in joint relationship with plaintiffs at all, but was a person secured by defendants themselves to take the remaining 31.5 per cent. interest in the contracts; therefore, to all intents and purposes plaintiffs engaged in a single transaction and not in a joint one with said Saidee Benson.

[4-6] The judgment for a return of the money with interest as upon a rescission is proper as against the investment company alone. So likewise, ordinarily, would be a judgment against the other two defendants in damages for fraud and deceit in the same amount. But the two judgments are inconsistent. We know of no rule that will authorize a judgment as against both sets of defendants under these circumstances. Plaintiffs having re-

scinded, this limits their recovery to a return of the consideration paid, with interest from date of payment, and it forbids a judgment against the other two defendants for the identical item, based upon fraud and deceit, which presupposes an affirmation of the contract that has instead been rescinded.

The judgment as to defendants Dell Ellis and John Germann is reversed; the judgment as to defendant Janss Investment Company, a California corporation, is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

1 Cal.2d 674

PIONEER CLEANERS & DYERS v. MILLER et al.

L. A. 14772.

Supreme Court of California.

Oct. 22, 1934.

Appeal and error ⇐345(1)

Where notice of appeal was not filed and no appeal was taken within sixty days after entry of judgment, subsequent filing of notice of intention to move for new trial did not extend time for filing notice of appeal, and appeal must be dismissed (Code Civ. Proc. § 939, as amended by St. 1933, p. 306, § 6, and § 12a, as added by St. 1933, p. 304, § 1).

In Bank.

Appeal from Superior Court, Los Angeles County.

Action by Pioneer Cleaners & Dyers against Louis Miller and another. From a judgment for defendants, plaintiff appeals. On respondents' motion to dismiss appeal.

Appeal dismissed.

A. Brigham Rose, of Los Angeles, for appellant.

Loucks & Phister, of San Pedro, for respondents.

PER CURIAM.

Motion to dismiss the appeal on the ground that the notice of appeal was filed too late.

The judgment was entered on October 9, 1933. The sixty-day period, provided by section 939 of the Code of Civil Procedure, as amended by St. 1933, p. 306, § 6, for filing notice of appeal, expired December 8, 1933, and no appeal was taken within that time. No proceedings on motion for a new trial were pending during said sixty-day period. The filing of a notice of intention to move for a new trial on December 20, 1933, was ineffectual to extend the time, and the situation here presented is not affected by section 12a of the Code of Civil Procedure, as added by St. 1933, p. 304, § 1. The motion must be granted on the authority of Lawson v. Guild, 215 Cal. 378, 10 P.(2d) 459.

The appeal is dismissed.

1 Cal.2d 546

LIVINGSTONE v. MacGILLIVRAY et al.

L. A. 13908.

Supreme Court of California.

Oct. 1, 1934.

1. Evidence ⇐83(2)

Good faith of water commissioners in abolishing position was judicial question and court could not indulge legal presumptions or intendments to uphold order of civil service board reinstating employee on ground that water commissioners in abolishing employee's position acted in bad faith.

2. Municipal corporations ⇐149(2), 217(6)

Tenure of office of officers and employees of municipality whose scheme of government is established by freeholders' charter is controlled exclusively by charter (Const. art. 20, § 16).

3. Municipal corporations ⇐218(6)

Civil service board *held* without power to determine whether position was properly abolished, since such power was not necessarily implied from grant of power to hear appeals by employees who were suspended, reduced in rank, or "discharged" (St. 1925, pp. 1194, 1196, §§ 163, 255, 256).

"Abolition" of office or position is not synonymous with "discharge" from employment as regards jurisdiction of civil service board, although effect on individual who loses employment is exactly the same, since in case of "abolition" duties are ei-

ther absorbed by other persons or entirely discontinued, while in case of "discharge" the duties remain unchanged, but some individual other than discharged employee is selected to perform them.

[Ed. Note.—For other definitions of "Abolish" and "Discharge," see Words & Phrases.]

4. Municipal corporations ⇐216(2)

Civil service commission derives power from charter creating it and may not exercise any power not expressly conferred or necessarily implied from prerogatives so conferred.

5. Municipal corporations ⇐218(6)

Findings and order of civil service board *held* not conclusive on question whether action of board of water commissioners of city of San Bernardino in abolishing civil service position was taken in good faith.

6. Mandamus ⇐167

In mandamus proceeding by former civil service employee to secure salary warrants, evidence to show motive of water commissioners in abolishing petitioner's position *held* properly excluded where bad faith was not pleaded.

7. Mandamus ⇐168(3)

Proof of extraneous facts to show improper motive of water commissioners in abolishing civil service position would not be allowable in absence of some showing on face of resolution of abolition that it was adopted from improper motives.

8. Evidence ⇐417(3)

In mandamus proceeding by former civil service employee to secure salary warrants, testimony as to whether motion of water commissioners to abolish petitioner's position included more than was included in minutes of commissioners *held* properly excluded where there was no showing that records inadvertently failed to include matter to which reference was made.

9. Evidence ⇐471(2)

In mandamus proceeding by former civil service employee, to secure salary warrants, testimony as to reason for refusing to pay salary *held* properly excluded as calling for conclusion.

In Bank.

Appeal from Superior Court, San Bernardino County; George R. Freeman, Judge.

Application for writ of mandate to compel execution and delivery of salary warrants brought by Bard Livingstone against R. W. MacGillivray and others, as members of the Board of Water Commissioners of the City of San Bernardino. From judgment denying the application, petitioner appeals.

Affirmed.

Prior opinion, 28 P.(2d) 424.

Grant Holcomb, of San Bernardino, for appellant.

Fred A. Wilson, of San Bernardino, for respondents.

PER CURIAM.

The petitioner sued to compel the payment of his salary as assistant superintendent and foreman, a position he had held in the classified civil service of the water department of the city of San Bernardino. He propounds the following question as the issue involved on his appeal from the order of the trial court denying his petition: "Does the civil service board under the San Bernardino city charter under the power to hear appeals of employees who have been discharged, suspended or reduced in rank, have the incidental power to find and determine that a purported order of abolition of the employment of petitioner was in fact a discharge of petitioner and was passed for political reasons and that another continued to do his work?"

[1] The resolution of the board of water commissioners on its face abolished for purposes of economy the position in said department held by the petitioner. No new position involving the same duties or otherwise was created, and the duties theretofore performed by the petitioner were assigned to another employee in the department. The petitioner claims that the civil service board had jurisdiction to determine that the action of the board of water commissioners was taken for political reasons and in bad faith and that the finding of the civil service board to that effect was binding on the trial court and is binding on this court of appeal. If the position occupied by the petitioner was in fact abolished, he has no standing. If it was not abolished, it was because of the bad faith amounting to fraud inherent in the action of the water board. The civil service board assumed to try and determine this issue of fraud. The city charter does not confer upon the board such jurisdiction. The power of the board being special and limited, no legal presumptions or intendments may be indulged to uphold its order. Garvin v. Chambers, 195 Cal. 212, 223, 232 P. 696. The issue attempted to be determined by the civil service board was a judicial question. It was not specific-

ally tendered in the petition for the writ but was attempted to be presented at the trial in the superior court; consequently, the court made findings thereon and in favor of the respondents. The findings are supported by sufficient evidence.

This is not a case such as Winslow v. Bull, 97 Cal. App. 516, 275 P. 974, in which the civil service employee was "laid off" and a subordinate assigned to discharge his duties. The position there was not abolished. Nor is it such a case as Powers v. Board of Public Works, 216 Cal. 546, 15 P.(2d) 156, in which practically the same situation existed. Nor is the case of Barry v. Jackson, 30 Cal. App. 165, 157 P. 828, in point. There the old positions were abolished and new positions created involving the same duties and it was held that the civil service board could determine whether the duties under the old and new ordinances were the same, and, if so, protect the right of the employee to continue in service. The civil service board deals with positions in existence. Otherwise that board would have the power to determine the number of positions of employment which another co-ordinate board should create and maintain. The issue of whether the position of the petitioner was or was not abolished was submitted to a court having jurisdiction in the matter. The decision was against him on sufficient evidence and we perceive no error in the judgment.

For a more detailed discussion of the facts and the law we refer to and adopt the opinion of the District Court of Appeal, prepared by Mr. Justice Jennings, as the opinion of this court. It is as follows:

Plaintiff instituted this action in mandamus in the superior court of San Bernardino county to compel the defendants, as members of the board of water commissioners of the city of San Bernardino, to execute and deliver to him warrants drawn upon the city treasury in the amount of his monthly salary as an employee of the water department of said city for the months of November and December, 1930. From a judgment denying his petition for the writ of mandate, plaintiff has prosecuted this appeal.

The record presents the following facts pertinent to the questions here involved: On October 28, 1930, and for many years prior thereto, petitioner was an employee of the water department of the city of San Bernardino. On the above-mentioned date he held the position of assistant superintendent and foreman of said department. This position was one that was included in the classified civil service of said city. At a meeting of the board of water commissioners on October 28, 1930, the said board adopted the following resolution:

"As a preliminary economy measure, motion was made by Commr. Ham that the following classified civil service positions be abolished, effective immediately, and that communication be forwarded to the Civil Service Board, advising such action:

"Sanitary Patrolmen, Lytle Creek,

"Meter Inspector,

"Pipe Line Foreman,

"Foreman,

"Plumbers and meter men,

"Plumbers and pipe fitter Gr. 1,

"Plumbers and pipe fitter Gr. 2,

"Plumbers and pipe fitter Gr. 3,

"Acetylene Welder,

"Assistant Superintendent and foreman,

"Assistant Superintendent.

"Motion seconded by Commr. MacGillivray. Unanimously carried."

On October 29, 1930, the superintendent of the water department informed petitioner that his position as an employee of the department had been abolished and that he was no longer employed by said department. On October 30, 1930, petitioner filed an appeal with the civil service board of the city of San Bernardino wherein he set forth the adoption of the above-mentioned resolution abolishing certain positions and alleged that said resolution was in effect an order discharging him from further employment with the city and that his discharge had been effected without the presentation of any reasons therefor and that thereby he had been foreclosed of any opportunity to be heard in his own defense. Thereafter, the civil service board of said city fixed a date for hearing the appeal and notified petitioner and the board of water commissioners of the time and place of such hearing. Subpœnas were thereupon issued by the civil service board directed to the three members of the board of water commissioners requiring their attendance at such hearing. Two members of the board of water commissioners ignored the subpœnas and did not attend the hearing. The third member was present. Upon the conclusion of the hearing, the civil service board made an order in which it was declared that the order of the board of water commissioners made on October 28, 1930, was not made in good faith and was in fact a mere pretext and subterfuge made with the intent and purpose of dis-

charging petitioner from his employment with the water department of said city. It was accordingly ordered that petitioner be reinstated and restored to his former position and that he be compensated at his former rate of pay from November 1, 1930, until the date of his reinstatement. A copy of this order was served upon the three members of the board of water commissioners. Thereafter the petitioner reported to the board of water commissioners and to the superintendent of the water department that he was ready to perform the duties of an employee of said water department but was not permitted to resume his employment. Demand was then made by petitioner upon the board of water commissioners that they execute and deliver to him warrants drawn upon the city treasurer for compensation at the rate of pay which he drew at the time the order of abolition of October 28, 1930, was made. This demand was refused. The proceeding in mandamus was thereupon instituted.

[2] The petition for the writ was evidently drawn on the theory that the civil service board of the city of San Bernardino had complete jurisdiction of the appeal which was taken from the order of the board of water commissioners abolishing the position of foreman and assistant superintendent and that the order of the civil service board reinstating appellant in his former position was final and conclusive. This is likewise the chief contention advanced by appellant upon this appeal. The correctness or incorrectness of this contention depends in the final analysis upon the provisions of the freeholders' charter under which the municipality operated. This must be true because it is settled in California that the tenure of office of officers and employees of municipalities whose scheme of government is established by such a charter is controlled exclusively by the provisions of the charter. Const. Cal., art. 20, § 16; Craig v. Superior Court, 157 Cal. 481, 108 P. 310; Dinan v. Superior Court, 6 Cal. App. 221, 91 P. 806. It becomes necessary, therefore, to examine those provisions of the charter of the city of San Bernardino which are pertinent to the problem under consideration.

Such examination discloses that the original charter conferred upon the board of water commissioners the power "to employ and discharge at will such help as the necessities of the water service may demand." St. 1905, p. 966, § 163. The section of the charter which enumerated the powers of the board of water commissioners and from which the above-quoted language is taken was amended in 1925 (St. 1925, p. 1196, § 163) to read as follows: "To employ such help as the necessity of the water service may demand." In other words, the power to discharge employees at will was thereby taken from the board of water commissioners. In the same year the charter of the municipality was further amended by the addition of new sections which established a system of civil service regulating the employment, promotion, and discharge of municipal employees. It will be necessary for the purposes of this opinion to set forth the provisions of only one of such sections. Section 255 (St. 1925, p. 1194) is in the following language: "Any employee of any department in the city in the classified service who is suspended, reduced in rank, or dismissed from a department by the head of that department, may appeal from the decision of such officer to the civil service board, and such board shall define the manner, time, and place by which such appeal shall be heard. The judgment of such board shall be final; Provided, that the provisions of this Section are at all times subject and subordinate to the provisions of Section 256." Section 256 (St. 1925, p. 1194), to which reference is made in the preceding section, provides for dismissal by the mayor upon the vote of two-thirds of the council and has no application to the question under consideration. It is appellant's contention that, so far as he is concerned, the order of the board of water commissioners abolishing the position which he occupied constituted a discharge from employment entitling him to appeal to the civil service board and that having taken such appeal and the appeal having been heard, the order of reinstatement constituted a final adjudication of the matter. If it may fairly be declared that the order of the board of water commissioners abolishing the position amounted to an order of discharge appellant's contention is meritorious. However, in order to justify such a declaration it must appear that the order of the board of water commissioners abolishing the position which appellant held was not what on its face it purports to be but that in fact it was a mere pretext adopted merely for the purpose of effecting appellant's discharge from employment.

[3, 4] It must, we think, be conceded that abolition of an office or position is not synonymous with discharge from employment although the effect upon the individual who loses employment is precisely the same. In the former instance the duties of the position are either absorbed by other persons or they are entirely discontinued while in the latter case the duties remain unchanged but some

individual other than the discharged employee is selected to perform them. It must also be conceded that the power to abolish a position may not be tortured into a mere instrumentality to effect the discharge of an employee protected by the salutary provisions of civil service regulations.

Since abolition of position is not intrinsically equivalent to discharge from employment, can it fairly be declared that, under the provisions of the charter of the city of San Bernardino, the civil service board had jurisdiction of the appeal taken by an employee whose position was abolished and has the order of the civil service board such conclusiveness that nothing remains except to carry it into effect?

The charter does not by its terms confer upon the civil service board jurisdiction to entertain an appeal by a municipal employee whose position has been abolished. It does expressly confer upon it jurisdiction to hear appeals by employees who are suspended, reduced in rank, or dismissed from a department by the head of the department. It is settled that a civil service commission derives its power from the charter creating it and that it may not exercise any power which is not expressly conferred or necessarily implied from the prerogatives so conferred. Cook v. Civil Service Comm., 160 Cal. 598, 117 P. 662; Petersen v. Civil Service Board, 67 Cal. App. 70, 227 P. 238; Haub v. Tuttle, 80 Cal. App. 561, 251 P. 925. We entertain the opinion that the power to determine whether or not a position in the classified service has been properly abolished is not necessarily implied from the express grant of power to hear appeals by municipal employees who have been suspended, reduced in rank or discharged.

Appellant places much reliance upon the decision in Barry v. Jackson, 30 Cal. App. 165, 157 P. 828, 830. This was an appeal by the commissioner of public health and safety of the city of Oakland from a judgment ordering a writ of mandate to issue directing appellant to reinstate respondents to certain positions in the city health department in conformity with the findings and decision of the civil service board of said city. The city of Oakland was governed by a freeholders' charter which contained provisions establishing a civil service system. Following a municipal election at which appellant was selected as one of the new city commissioners, the city council adopted a new ordinance which repealed a former ordinance and abolished many former positions in the health department and created new ones, the final result being a reduction in the number of employees in the health department from 34 to 33 and accomplishing a saving in expense to the city of $600 per annum. The new ordinance created two positions of deputy sanitary and plumbing inspectors at a salary of $1,500 per year and two positions of deputy sanitary and plumbing inspectors at a salary of $1,200 per year. Prior to the passage of the new ordinance, two of the respondents were deputy plumbing inspectors and the third respondent was an assistant sanitary inspector. These were positions in the classified civil service. Immediately after the passage of the new ordinance appellant notified respondents that their positions were abolished and that their employment had terminated. He then advised the civil service board of the passage of the new ordinance and of the notice given to respondents terminating their employment and acting upon the theory that there was no eligible list for positions created by the new ordinance requested approval of the civil service board of temporary appointments made by him of three men without civil service standing. For the purpose of determining whether there was any eligible list applicable to the places of employment provided for in the new ordinance and further to determine whether the temporary appointees were qualified, the civil service board conducted an investigation and determined that the duties attached to the positions created by the new ordinance were identical with those of the positions held by respondents under the former ordinance. Thereupon respondents availing themselves of a charter provision prosecuted an appeal before the civil service board claiming to have been wrongfully discharged. The board again found that the duties under both ordinances were identical and that the respondents were entitled to reinstatement. In its opinion affirming the judgment ordering the issuance of the writ, the appellate court pointed out that no evidence was introduced at the trial which showed that the conclusions reached by the civil service board were not sustained by sufficient evidence and that therefore the reviewing court as well as the trial court was bound by the conclusions of the civil service board. The opinion concludes with the following language:

"The appellant also claims that under the provisions of the charter the civil service board has authority to hear an appeal only when an employee has been discharged, and not in a case where his position has been abolished. The board, on the investigation

made by it for the purpose of classifying the places provided for by the new ordinance, found that the positions of the petitioners had not been abolished. But even if it can be said that in repealing the old ordinance the old positions were, technically at least, abolished, and hence that the board had no jurisdiction to hear the appeal, still it is not questioned that the civil service board, when it made its investigation for the purpose of classification, determined that the places of employment were the same under the new ordinance as under the old, from which it follows that the petitioners were entitled to be restored to the position from which they were removed."

It is apparent from the above-quoted language that the decision is not authority for the proposition that the civil service board of a city operating under a freeholders' charter which confers upon such board jurisdiction to entertain appeals by municipal employees who have been discharged from their positions possesses jurisdiction to entertain similar appeals by employees whose positions have been abolished. Still less is it authority for appellant's contention that the order of such a board reinstating municipal employees whose positions have been abolished possesses a finality which renders it conclusive upon a court which is considering the propriety of issuing a writ of mandate sought by a municipal employee whose position has been abolished.

It is our opinion that the case of O'Neill v. Williams, 53 Cal. App. 1, 199 P. 870, 871, is much more in point upon the problem which is here under consideration. In this case the petitioner for the writ of mandate was a corporal in the police department of the city of Oakland. The city council of said city, proceeding in accordance with charter provisions, had created 14 positions of corporal of police, one of which was held by the petitioner. He was suspended from the police department for alleged cause. The suspension continued until it was annulled by the civil service board on an appeal to that body by the suspended employee. Pending the appeal to the civil service board the city council enacted ordinances whose effect was to reduce the number of corporals in the police department from 14 to 7. In his application for a writ of mandate to compel the city auditor to issue his warrant for salary which was claimed to be due for his services as corporal, petitioner contended that the effect of the resolution of the civil service board was not only to restore him to membership in the police department but also to reinstate him as a corporal in said department and to entitle him to receive the salary attached to that position during the period of suspension. This contention did not prevail in the trial court, which rendered judgment in defendant's favor, denying the issuance of the writ. The judgment was affirmed on appeal. The appellate court held that an office or position created by ordinance may be abolished by ordinance, in which case the incumbent ceases to be an officer and that "even when an officer, by reason of having been appointed for a definite term, or by special statutory provision, cannot be lawfully removed except for cause after a full hearing, his office may be summarily abolished whenever the municipal authorities deem it advisable." It is also said that "it is equally well established by the decisions of the courts of many states that provisions restricting the power of removal, similar to those found in the civil service provision of the Oakland city charter, refer to removals for lapse of duty and the like, and are not a restriction upon the power of the council to abolish as many of the places or offices once provided for as it chooses, by abolishing the offices or places themselves, provided such action be taken in good faith."

[5] It is our opinion that the latter of the two cases above discussed correctly states the legal principles which are here applicable. We understand that it is not disputed by appellant in the present action that the board of water commissioners of the city of San Bernardino had the power under the city charter to abolish the position held by appellant provided that its action in so doing was in good faith. It was pointed out in the O'Neill Case that bad faith on the part of the city council was not pleaded and that it did not appear in the record that the council's action in abolishing the position was a mere pretext or device adopted to effect the plaintiff's discharge from employment. It is likewise true in the instant action that bad faith on the part of the board of water commissioners was not pleaded. It must be conceded that evidence was presented to the trial court which tended to show that the abolition of the position which appellant held in the water department was a mere subterfuge to effect his discharge. On the other hand, ample evidence was presented tending to show that the action of the water board in abolishing the position was taken in good faith. Unless, therefore, it can be said that the findings and order of the civil service board which declare that the abolition of the position was a mere pretext and therefore actuated by bad faith were final and conclusive

upon the trial court the general rule binding upon a reviewing court that the judgment must be affirmed if the record contains any evidence to support it is applicable. We have heretofore indicated that it is our opinion that the findings and order of the civil service board are not, in this instance, conclusive upon the question of whether or not the action of the board of water commissioners in abolishing appellant's position was taken in good faith. It follows, therefore, that we are impelled to declare that appellant's principal contention is unsound.

[6, 7] Complaint is voiced that the trial court excluded certain evidence offered by appellant which it is said related to the motives actuating the board of water commissioners in abolishing appellant's position and to the political nature of the controversy. Three specifications of such alleged errors are noted. The first specification relates to the testimony of a witness who was asked to relate a conversation which he had with respondent MacGillivray in the spring of 1929, some two weeks prior to a municipal election. It was declared that the purpose of introducing this evidence was to show motive. The trial court sustained an objection to the question, remarking that he considered that it was not pleaded with sufficient certainty in the petition to constitute an issue. Inasmuch as bad faith of the board of water commissioners in abolishing appellant's position was not pleaded, the court's action in sustaining the objection was manifestly correct. Furthermore, even if bad faith had been pleaded, proof of extraneous facts for the purpose of showing motive was not allowable in the absence of some showing on the face of the resolution of abolition that it was adopted from improper motives. Odd Fellows' Cemetery Association v. City & County of San Francisco, 140 Cal. 226, 235, 73 P. 987.

[8] A second specification is noted in the court's action in sustaining an objection to a question propounded of respondent, A. M. Ham. This witness, who was a member of the board of water commissioners when appellant's position was abolished, was asked if he had not included something in his motion to abolish the position which was not included in the minutes of the board of water commissioners. The court's action in sustaining the objection to the question was correct. There was no showing that the records inadvertently failed to include the matter to which reference was made in the inquiry. Furthermore, if the question had been permitted to be answered and the witness had given the reply which was apparently sought to the effect that appellant was to remain as a laborer in the water department and was not to be discharged no different result could have been attained. The action of the board of water commissioners is evidenced by the motion which was adopted and this motion contained no reference to the retention of appellant as a laborer.

[9] The third specification of error in rejection of evidence consists of the court's action in sustaining an objection to the following question propounded to the witness A. M. Ham: "Is there any other reason, or is there any reason outside of the reason set up as a defense in the pleadings by the defendants in this proceeding, for refusing to pay the salary of Mr. Bard Livingstone?" The court's action in sustaining the objection was correct. The inquiry called for the expression of a pure conclusion on the part of the witness and was therefore clearly improper.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

1 Cal.2d 559

PEOPLE v. RAMIREZ.

Cr. 3735.

Supreme Court of California.

Oct. 1, 1934.

1. Homicide ⇐244(1)

Evidence sustained conviction for first degree murder, as against plea of self-defense.

2. Criminal law ⇐1160

Credibility of witnesses was, in first instance, for jury, and subsequently for trial judge on motion for new trial.

3. Homicide ⇐332(2, 4)

Evidence being sufficient to sustain conviction for first degree murder, it was not province of Supreme Court on appeal to weigh evidence, nor pass on credibility of witnesses.

4. Criminal law ⇐808½

Instruction in statutory language on second degree murder *held* correct (Pen. Code, § 189).

5. Criminal law ⇐823(17)

Instruction that killing with specific intent to take life would be first degree murder *held* not prejudicial, in view of other instructions, because omitting elements of deliberation and premeditation (Pen. Code, § 189).

Jury was instructed on question of second degree murder in language of Penal Code, § 189, and was also instructed that in dividing murder into degrees the test might be stated as whether the killing was willful, deliberate, and premeditated, and, if it were, the killing was first degree murder, and, if not, second degree murder.

6. Criminal law ⇐723(1)

District attorney's argument, in pleading for verdict of guilty of first degree murder without recommendation, that it was common knowledge that average man spent few years in penitentiary when life imprisonment was recommended, although constituting misconduct, was not reversible error, in view of record.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Justo Ramirez was convicted of first degree murder, and he appeals.

Affirmed.

G. A. Benedict and Edward L. Davin, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CURTIS, Justice.

The defendant, Justo Ramirez, was convicted in the superior court of the county of Los Angeles of first degree murder. The verdict being without recommendation, the court below entered judgment imposing the death penalty. Defendant appeals from the judgment and from the order denying his motion for a new trial.

[1-3] The first ground urged for a reversal is that the homicide was committed in self-defense, and that the verdict of the jury that the homicide was not justifiable is contrary to the evidence. In order to uphold this contention, it would be necessary for this court to wholly ignore the testimony of five witnesses for the prosecution who were eyewitnesses to the shooting of the deceased by defendant, and accept as true the testimony of the defendant, which in many of its details was inherently improbable.

The facts of the case, as shown by the evidence adduced by the prosecution, are substantially as follows: Luis Flores, a young man of Mexican nationality, married and the father of two small children, was living with his family near Van Nuys in the San Fernando valley in the community known as Canoga Park. On May 5, 1931, which was a Mexican national holiday, defendant and deceased had had a fight. Two months thereafter, and on July 5, 1931, which fell on Monday and was a holiday because the 4th of July fell on Sunday, between the hours of 1 and 2 o'clock in the afternoon, a fist fight was in progress in the alley near the vicinity of the Flores home. Some fifteen or more Mexicans were spectators, and there was considerable excitement and confusion in the neighborhood. The combatants were Manuel Ybarra and Manuel Bracamonte. These participants had no connection with either the deceased or the defendant. The brother of Manuel Ybarra was endeavoring to separate the combatants, and there is some evidence that the deceased Flores was also endeavoring to separate them. During the progress of the fight and during the confusion and commotion, the defendant arrived on the scene in an automobile accompanied by one or more of his brothers and another person. The defendant parked his car some distance up the alley and proceeded to the scene of the fight. There, according to the testimony of five eyewitnesses, he shot Flores with a pistol without any warning. The first shot took effect in Flores' arm near the elbow. Flores grabbed his elbow and turned toward the defendant, who then fired a second shot, which struck Flores in the neck passing through the right carotid artery and severing the spinal cord. Flores died an hour later in the Van Nuys Receiving Hospital. Immediately after firing the second shot, defendant walked over to the automobile and drove away, and immediately fled from Los Angeles county. He was apprehended two years later at Sacramento. When arrested he denied that he was Justo Rameriz, the defendant wanted for murder, and insisted that he was his brother. Later, upon being positively identified by the wife of the deceased and by another person as Justo Ramirez, he admitted his identity.

The account of the homicide, as testified to by defendant, is as follows: He testified that he was driving around on the day in question when his attention was attracted by the fight; that he and Flores, despite their former bad blood, had become friends,

and that he tried to induce Flores to leave the scene of the fight because he was afraid Flores might get hurt; that Flores resented his interference and pulled an empty whisky bottle from his right hip pocket and hit him, the defendant, on the forehead, breaking the bottle and causing his head to bleed slightly; that Flores then pulled out of the same hip pocket a gun and tried to shoot defendant; that defendant struggled with Flores for possession of the gun; that he managed to gain possession of the gun and started to run away, but was pursued by Flores who had pulled an open knife out of his left hip pocket and started to pursue him; that then, in self-defense he turned and shot Flores with Flores' own gun. It should be noted in connection with defendant's testimony that the testimony of the police officer who investigated the homicide, and who arrived at the scene very soon after the shooting, was to the effect that there was no blood other than at the place where Flores' body lay, that Flores had nothing in his hands, and that no knife was found at or about his body or on the premises; that there were no fragments of a broken whisky bottle; and that when they searched Flores' body as they placed him on the stretcher, they found no weapons of any kind or character upon him.

It is true that evidence in behalf of the prosecution is not free from some uncertainties, and particularly in regard to the discrepancies between the testimony of the wife of Flores and that of the surgeon who performed the autopsy. The latter testified that the shot in the deceased's arm entered the fore part of the arm, and that the exit wound was at the back of the arm, indicating that the deceased was facing the defendant at the time the first shot was fired. Mrs. Flores testified that the defendant shot the deceased while the deceased's back was toward him. While this discrepancy might indicate that the defendant shot the deceased while the deceased was facing him, it does not lessen to any extent the fact that five eyewitnesses all testified that defendant, without any provocation whatever, approached the deceased firing upon him with fatal result.

The defendant's testimony was corroborated by a witness for the defense, but it is quite apparent that the jury entirely discredited the testimony of both the defendant and his corroborating witness. The jury accepted as true the testimony of the five eyewitnesses for the prosecution, and in view of the fact that the defendant's explanation was wholly discredited by a failure on the part of the police officer to find any knife, broken glass, or weapon of any kind at the scene of the homicide, we feel that the jury was amply justified in reaching the verdict which it did. "The credibility of the witnesses was, in the first instance, a matter solely for the jury to determine; and finally, upon the hearing of the defendant's motion for a new trial, it was the right and duty of the trial judge, in weighing the sufficiency of the evidence upon which the verdict was had, to consider the credibility of the witnesses. The trial judge's determination of the question of such credibility is conclusive upon us." People v. Martin, 19 Cal. App. 295, 299, 125 P. 919, 920; People v. Kawamoto, 216 Cal. 531, 534, 15 P.(2d) 153. There is an abundance of substantial evidence justifying the verdict of the jury in the instant case. All conflicts in the evidence having been resolved against the defendant by the jury in the first instance, and by the trial court upon its denial of the motion for a new trial, and such evidence being sufficient to support the verdict, it is not the province or the privilege of this court to weigh the evidence, nor to pass upon the credibility of the witnesses. People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389; People v. Kawamoto, supra.

The second ground urged for reversal, that as a matter of law the facts proved do not support a verdict of murder in the first degree, is, we think, completely answered by a mere recital of the facts testified to by the five witnesses for the prosecution. Their testimony shows that the defendant deliberately drew his gun and shot the deceased without warning, and that after the first shot took effect in the elbow of deceased, defendant fired the second shot, which was fatal. The facts and circumstances surrounding the shooting indicated a deliberate and malicious intent to take human life. If defendant was guilty at all, he was guilty of murder in the first degree.

[4, 5] There is no merit in the third objection, that the substantial rights of the defendant were prejudiced by the failure of the court to instruct the jury on murder in the second degree. It appears that the jury was instructed on the question of second degree murder in the language of section 189 of the Penal Code. This instruction must be accepted as correct. The following instruction was also given: "In dividing murder into degrees the test may be stated: Is the killing willful (that is to say, intentional), deliberate and premeditated? If it is the case falls within the first; if not, within the sec-

ond degree." Complaint is made by appellant that another instruction defining second degree murder was erroneous in that it ignored the elements of premeditation and deliberation which were necessary elements of murder of the first degree, and instructed the jury that if a specific intent existed in the mind of the slayer to take life, the offense committed would be murder in the first degree. This same identical instruction was given in People v. Leddy, 95 Cal. App. 659, 670, 671, 273 P. 110, 115, and the same objections thereto were made. The court there held that: "the court in its other instructions fully defines murder of the first and second degree, and manslaughter, and the elements constituting those offenses. Therefore, read in connection with the other instructions, the instruction complained of constituted a correct statement of the law." In view of the other instructions in this case, we are satisfied that the defendant's rights were not prejudicially affected by the instruction complained of.

[6] The most serious objection made by appellant is that the district attorney was guilty of prejudicial misconduct in his address to the jury when, in his plea for a verdict of guilty of first degree murder without recommendation, he stated that: "It is a matter of common knowledge as to what length of time this life imprisonment is in California." He further stated: "It is a matter of common knowledge, and there are statistics compiled which show the appalling few years that the average man spends in the penitentiary for first degree murder when life in the penitentiary is recommended." This was cited as misconduct by counsel for the defense, but the court refused to instruct the jury to disregard the statements, saying: "I will not so instruct the jury, that matter has been discussed in a case by the Supreme Court." It is indeed unfortunate if the language of any decision heretofore rendered by this court erroneously gave the impression that such statement was permissible, or that the district attorney was within his right in making such statement. In both cases of People v. Reilly, 208 Cal. 385, 281 P. 606, and People v. La Verne, 212 Cal. 29, 31, 297 P. 561, it was pointed out that expressions of this kind should be avoided by overzealous prosecuting officers. In view of the record in both of those cases, it was held by the court that the verdict would have undoubtedly been the same, and such statement was, therefore, held not to be reversible error. Because of the record here, we are constrained to hold likewise, that such statement is not reversible error. In so holding, however, we feel that it should be definitely understood that such statements are not approved by this court, and that under a different state of facts serious error may be predicated upon such misconduct.

The judgment and the order denying a new trial are affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.

1 Cal.2d 615

PEOPLE v. ROGAN.

Cr. 3752.

Supreme Court of California.

Oct. 9, 1934.

Rehearing Denied Nov. 7, 1934.

1. Homicide ⇨250

Evidence sustained conviction for murder (Pen. Code, § 189).

2. Criminal law ⇨730(14)

In murder prosecution, prosecuting attorney's arguments attributing recent lynchings to laxity of juries, urging jurors convinced of appropriateness of death penalty not to agree to lesser penalty merely for sake of compromise, stating that average man spent but few years in penitentiary under life sentence, and unauthorizedly referring to deceased's good qualities, *held* not reversible error, where final charge instructed jury to disregard all expressions or remarks which tended to prejudice accused and which had no support in evidence.

3. Witnesses ⇨372(2)

In murder prosecution, failure to allow cross-examination as to alleged statement of third party advising witness not to say that he had told witness to say anything and to say that accused killed deceased *held* not error, where there was no claim that witness assented to or was influenced by such statement, since proof of statement would not impeach witness.

4. Homicide ⇨238

In murder prosecution, evidence authorized finding that accused was not so intoxicated as to be incapable of forming criminal intent.

3. Homicide ⇐268
Robbery ⇐26

In prosecution for robbery and murder committed in course of robbery, whether accused and his confederate intended only to retake amount which they allegedly had previously lost by trick of dealer in gambling at place where robbery was committed *held* for jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

James Sydney Rogan was convicted of first degree murder and of first degree robbery, and he appeals.

Affirmed.

Vincent W. Hallinan and William F. Herron, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

SEAWELL, Justice.

The defendant was accused by an indictment returned against him by the grand jury of the county of Los Angeles with the commission of four separate crimes, to wit, murder of the first degree, robbery, and two separate assaults with a deadly weapon with the intent to commit murder. Said accusations were set out in four counts, numbered 1, 2, 3, and 4, in the order above named. During the course of the trial, upon motion of the defendant, the two counts charging assault with a deadly weapon with intent to commit murder were dismissed. The jury returned a verdict of guilty of murder, without recommendation that the defendant be relieved of the death penalty, and it also found him guilty of first degree robbery, under the robbery count. The court thereupon pronounced its judgment, which imposed the death penalty upon said defendant, and also entered judgment upon the conviction of robbery, as provided by law. Defendant has appealed from both judgments of conviction.

In his statement of questions involved on the appeal, appellant presents and argues three, to wit: Prejudicial misconduct on the part of the district attorney and the trial judge; insufficiency of the evidence to justify the verdict; and the refusal of the court to permit appellant's counsel to cross-examine certain witnesses called by the prosecution upon subjects which counsel characterizes as the most vital points in the testimony. The refusal of the court to rebuke opposing counsel upon each breach of orderly procedure committed by him, and the alleged indulgence of the trial court in adverse comment upon the procedure of counsel for the appellant, are also assigned and urged as grounds upon which a new trial should have been ordered, but which the trial court denied.

[1] The crime was committed at an early hour on the morning of November 11, 1932, in a resort variously referred to in the testimony as a "night club," "gambling place," or "speak-easy," located at 2610½ West Seventh street, city of Los Angeles. The place was conducted by Harvey Loren Crosby. Glen Fullmer was employed as a piano player; Homer Washburn was the bartender; and Mrs. Evelyn Daughney was the entertainer. Henry B. Minstrot, who had left the premises before the homicide was committed, conducted a black-jack game in a room of the establishment, and divided the proceeds with the proprietor, Crosby.

At about the hour of 10 o'clock, on the night of November 10th, one R. D. McAllister, who was engaged in the illicit sale of liquor, and the defendant, Rogan, his companion, appeared at the door and sought admission into said clubrooms. Admission, in case the visitor was not personally known to the habitués of the club, seems to have been by card, which assured the man at the door that the party seeking admission was a person acceptable to the proprietor of the gaming house. Some slight delay was caused by investigating the identity of said McAllister and Rogan, but the matter was soon cleared up by the use of the phone, and both were duly admitted. Rudolph G. Vejar, a deputy sheriff of the county of Los Angeles, was also among the persons present when the defendant and his companion, neither wearing coats, entered. McAllister immediately went into the gaming room and began gambling. Rogan played but a few hands, spending some time at the bar, where he consumed a number of drinks, principally beer. They left between 12 and 1 o'clock and returned at about 2 o'clock, wearing coats. At the time they entered, Crosby and Washburn were seated at a card table in the gambling room, while Vejar, the deputy sheriff, was watching them play. Mrs. Daughney, who, a short time before the defendant and McAllister entered the second time, had returned to the club to regain her purse, which she had forgotten, was also present. As the two men entered the second time, one of them asked, "Where has the game gone?" They were informed that the game had closed, but that the bar was open. It is a fact that the dealer of the

black-jack game, Minstrot, had prior thereto left the club and taken the proceeds of the game with him. Upon being told that the game had closed, two shots were fired, and McAllister and Rogan, with drawn weapons, entered the card room, giving the command: "Stick them up; we mean business." Vejar, Washburn, and Crosby immediately obeyed the command. McAllister walked over to Crosby and, uttering an abusive term, struck him upon the face. He walked over to Vejar, whom he evidently knew to be an officer, and struck him on the chin, and said: "You bastard, I know you, how do you like being on the other end of it?" Every one was then made to stand with his back to the wall, searched, and all the money taken from their persons by McAllister was thrown on the poker table, defendant Rogan holding the company at bay with a drawn pistol in each hand, while the search was conducted by his companion. Having taken some $65 from his victims, McAllister asked Crosby where the rest of the money was, and, upon being told that his partner (Minstrot) had taken the money and that the only money he had left was a dollar which he carried in his shoe for luck, Crosby was ordered to lie down on the floor and take off his shoes and socks, which he did. Thereupon McAllister placed Crosby's leg under his arm and proceeded to apply lighted matches to the bottoms of his feet, at the same time saying, "Come through with the money." Crosby cried out in great pain and protested that he had no other money in his custody or under his control. McAllister then struck him on the jaw with his gun. He then commanded the other occupants to lie down and take off their shoes. After he had burned the feet of Crosby, he approached Vejar and said, "You are next." Vejar then drew a gun from his shoulder holster and simultaneously several shots were fired by McAllister, Rogan, and Vejar. When the shooting ceased, McAllister lay dead, with six bullet wounds in his body, and Vejar, who had received a mortal wound, from a bullet which entered near the corner of his mouth and plowed its way through the neck and finally lodged in his right shoulder lay near him. Vejar was upon his back and requested that some one turn him over, so that the blood would flow from his mouth. Washburn asked permission of Rogan to comply with this request, but Rogan, with drawn revolver, refused the request. Mrs. Daughney attempted to place a pillow under his head, but was halted by defendant Rogan and ordered by him to sit down. Vejar died soon thereafter. Rogan received a minor bullet wound in one of his legs. During the time the occupants of the clubroom were being searched by McAllister, Rogan held a pistol in a threatening manner in each hand, commanding obedience to the orders given by McAllister or himself. The .45 automatic in the possession of Rogan was given over to McAllister before the firing commenced. McAllister, shortly before the shooting, had taunted Vejar, as he lay upon the floor, with questions as to how a deputy sheriff liked being "on the other end of it." He had struck him with his fists before ordering him to the floor. A number of tantalizing terms were applied by McAllister both to Vejar and Crosby. Vejar, while on the floor shortly before death, said: "You got me, you bastards, but I got you both."

After the shooting defendant Rogan gathered up the loot that he had taken from the persons whom he had assisted in robbing, took his companion's automatic .45 pistol, and entered a taxicab, which he had ordered Washburn to call, admonishing him at the time to be "God damned careful to call a taxicab and not the police department." Rogan, according to his own story, made his way to San Francisco and remained at his mother's home in that city for two days, and then went to the mines located in the Siskiyou Mountains, Northern California. Some six months thereafter he boarded a tuna fishing boat bound for Lower California. He next shipped on a boat plying off the coast of Mazatlan, Mexico, which was engaged in the rumrunning trade. When in San Francisco on a visit to his mother's home, approximately one year after the homicide, he was apprehended and placed under arrest. The bullet which killed Vejar was undoubtedly fired from the revolver held in the hands of Rogan. The ballistic expert testified that it was of .38 caliber, which fitted the revolver that he used, while the weapon used by McAllister was a .45 automatic pistol. Besides, there is direct evidence that Rogan fired the shot which took Vejar's life. But, if it be a fact that McAllister fired the fatal shot, that circumstance would not relieve the appellant of his responsibility for the homicide if he, together with his associate, was engaged in the perpetration of robbery. The evidence is amply sufficient to sustain the jury's verdict upon the theory that the defendant and McAllister were confederates in the commission of a robbery at the time the homicide was committed and, under that state of facts, it would matter not which one fired the fatal shot, as each would be equally guilty under the provisions of section 189, Penal Code.

[2, 3] Appellant has very earnestly attacked the conduct of the district attorney and the

trial judge, which he claims prejudiced the appellant's right to a fair and impartial trial. Many of the assignments are very similar in substance to complaints which are frequently presented to this court for review in death penalty cases. By affidavit, appellant sets out the greater part of the district attorney's opening argument to the jury and vitalizes, as well as written words are capable of doing so, the vehement manner and the vociferousness of voice in which it was delivered. While we cannot approve all the alleged acts of misconduct complained against by appellant, and feel that the prosecuting officer went beyond the limits of legitimate argument in two or three instances, we cannot say that his utterances in that respect acted so powerfully upon the minds of the jury as to have held its reason and its inherent sense of justice captive during the balance of the proceeding, to the extent that the admonition of the court to disregard all improper allusions of counsel, as set forth in the final charge, fell upon minds rendered incapable of giving full effect and consideration to the evidence and legal regard to the rights of the defendant, by reason of said improper utterances. While many of the specifications of misconduct were, strictly speaking, properly taken, such matters were, nevertheless, matters of common knowledge or notoriety and were, beyond doubt, within the minds of all persons of average intelligence. The recent hangings in this state of two young men, without trial, to which reference was made by the prosecuting officer, furnish an apt example of the references made by counsel from which the inference was drawn that the laxity of juries, in returning verdicts which prevent the law from imposing penalties in criminal cases adequate to the enormity of the offenses committed was responsible for the upheaval of public indignation as illustrated by said lynchings. The prosecuting officer, being no doubt convinced that the instant case properly called for the imposition of the death penalty, in his effort to awaken in the minds of the jurors the importance of maintaining a proper respect and regard for law enforcement, earnestly called upon the members of the jury, who should be likewise convinced, not to surrender their convictions by way of compromise and agree to a verdict carrying a lesser penalty, merely for the sake of reaching an agreement. The prosecuting officer, in his zeal to secure a verdict imposing the extreme penalty of the law, stated in argument that the average man spends but a few years in the penitentiary under a sentence for life, and that the system of parole offered an easy way for guilty persons to escape adequate and just punishment. Such expressions should be avoided; but in view of the record of this case, such error cannot be held to be reversible error. People v. Reilly, 208 Cal. 385, 281 P. 606; People v. La Verne, 212 Cal. 29, 297 P. 561; People v. Ramirez, 36 P.(2d) 628, decided by this court October 1, 1934. Said officer also improperly made reference in the argument to his personal knowledge of the good qualities of the deceased, notwithstanding the fact that there was no evidence in the record bearing upon his character, and which appellant assigns as reversible error.

It is true that the assistant district attorney was rather vehement and at times indulged in verbal thrusts and, upon one or two occasions, characterized the defendant as a "racketeer" and an associate of the underworld gentry. The habits and character of the defendant, as revealed by his own admissions, showed that he had led a checkered life, which was by no means free from lawless tendencies. We cannot say that the prosecution's characterization of the defendant was entirely unwarranted.

Other instances of misconduct are assigned as prejudicial error, but we have examined all of the assignments and are of the opinion that none separately, or all considered together, would justify a reversal. Upon occasions the court did, at the moment objection was made to conduct which the court deemed improper, admonish counsel and instruct the jury to disregard the same. Upon two or more occasions it remained silent. But, upon the final charge, the jury was instructed in proper form and language to disregard all expressions or remarks which tended to prejudice the defendant, and which had no support in the evidence. We have also examined the assignment of the court's alleged misconduct, which arose in a discussion between the court and counsel for the defendant, and we cannot believe that the subject-matter was of sufficient gravity to have impressed the jury. We feel that there is no merit in the assignment that the court refused to permit what counsel terms an impeachment question asked witness Mrs. Daughney. It appears that after the witness (Mrs. Daughney) had been cross-examined for some time, a recess was taken, during which E. R. Vejar, a brother of the deceased officer, and a third person, whose identity was not disclosed, had a short conversation with witness Daughney. It was claimed that this conversation was overheard by Ruth Rogan, a sister of the defendant. Appellant offered to show that said conversation was in substance that witness Daughney, who had been addressed during recess by Vejar,

replied to whatever remark Vejar made to her as follows: "I am scared but I am not afraid." Whereupon, Vejar advised her not to say that he had told her to say anything, and it did not matter what she said so long as she would say that Rogan killed Vejar. This question was objected to on the ground that the proper foundation was not laid by failure to name or identify the third person in whose hearing and presence the above remark was alleged to have been made. The witness Daughney had made answer to a previous question that she had not discussed her testimony with Vejar. The third party was not produced or identified, and neither Ruth Rogan nor any one else was called to prove the alleged conversation. At most, nothing appears which tends to show more than that an improper remark was made in the presence of the witness by Vejar. No claim is made that the witness assented to or was influenced by the alleged suggestion made by Vejar. It may have been a proper matter to have brought to the court's attention in a contempt proceeding. The mere remark of Vejar could not be regarded as an impeachment of the witness, who made no assent to the suggestion of Vejar. Besides, the witness had already testified fully as to the shooting of Vejar by Rogan.

[4] Appellant contends that he was intoxicated to the degree that he was incapable of forming a criminal intent, and that therefore, he is not guilty of first degree murder. It is true that there was evidence that he did partake of intoxicating liquor prior to the homicide, but, on the other hand, there is evidence that he held himself sufficiently in hand to have successfully carried out a robbery, made away with the loot, and escaped from the scene. He certainly gave evidence of coordination in the execution of the crime.

[5] Appellant makes the further defense that McAllister, who had lost a sum of money at the gaming table, had been cheated by the employment of trick and device by the dealer of the game and, therefore, it was not robbery for him to retake, by force of arms, the money he had thus lost. Appellant, of course, claims to have been acting with McAllister in the recapture of his lost stakes. That McAllister and defendant Rogan armed themselves preparatory to making a return visit to the club, with the intent to take by force moneys found in the possession of any and all the occupants of said clubrooms, is fully supported by their subsequent acts. They did not confine or limit their demands for money to the proprietor of the club, but robbed all persons present in said establishment, several of whom had no connection with Minstrot, the dealer, who had previously left the premises with the proceeds of the gambling table. The question as to whether or not McAllister and Rogan had the intent to limit their lawless act to the retaking of the amount lost by McAllister in the manner above referred to was indisputably a question of fact for the jury's determination, and there is an abundance of evidence to support their finding. The robbery was, in fact, general and without discrimination as to persons present. Vejar was undoubtedly killed in its perpetration by a pistol shot fired by defendant Rogan. This is shown by the testimony of several eyewitnesses. The only evidence that in any way tends to mitigate the killing is given by the defendant, which is highly, if not inherently, improbable. This being the state of the record, we are unable to grant the appellant any relief from the judgments appealed from.

The judgments and orders appealed from are therefore affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.

1 Cal.2d 512

PHILPOTT v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 14359.

Supreme Court of California.

Oct. 1, 1934.

1. Action ⇐32

In California, though there is but one form of action, courts, in applying relief allowable, must adhere to distinctions commonly accepted as existing between actions at law and in equity.

2. Common law ⇐12

Common law of England is, except where modified by Constitution or statute, rule of decision in California (Pol. Code, § 4468).

3. Fraud ⇐31

Law as well as equity courts have jurisdiction to give relief in specified cases of fraud.

4. Courts ⇐472(6)

Under complaint, consisting of count alleging plaintiff's rescission of purchase of worthless bank stock for fraud of defendants and praying return of $625 paid, and for such further relief as was just and equitable, and common count in indebitatus assumpsit for money had and received, cause *held* not one in equity, but action at law in assumpsit on promise implied in law, giving municipal court exclusive jurisdiction (Civ. Code, §§ 1688–1691, 1712).

5. Assumpsit, action of ⇐19

Special count in assumpsit and common count in indebitatus assumpsit may be united in same action.

6. Assumpsit, action of ⇐8

Where plaintiff has rescinded contract in statutory manner, plaintiff need not resort to equity but may come into law court for all relief court is competent to give, and where he merely asks for return of consideration parted with because of fraud, mistake, failure of consideration, or other facts authorizing rescission, he is entitled to action of assumpsit (Civ. Code, §§ 1688–1691, 1712, 3406–3408).

7. Action ⇐28

Defrauded contracting party may waive the tort and sue in indebitatus assumpsit for money consideration parted with, or where personal goods have been converted, he may sue in claim and delivery or on quantum valebant count (Civ. Code, §§ 1688–1691, 1712).

8. Money received ⇐1

Action in indebitatus assumpsit for return, because of fraud, of money paid by plaintiff under contract is now fully ex contractu, though it sounded in tort under original common law.

9. Courts ⇐170

Where, after superior court judge had signified intention to hold that action was at law and hence within exclusive jurisdiction of municipal court because only $625 was involved, plaintiff offered to amend by claiming punitive damages in sum of $1,500, which would have brought cause within superior court's jurisdiction, refusal to permit amendment because mere attempt to retain cause in superior court *held* not error.

CURTIS and SHENK, JJ., dissenting.

In Bank.

Proceeding in prohibition by Jeanette P. Philpott, as administratrix of the estate of John Philpott, deceased, against the Superior Court of the State of California, in and for the county of Los Angeles, and the Honorable William Lester Roth, Judge thereof.

Alternative writ heretofore issued discharged.

Edwin J. Miller, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

PRESTON, Justice.

By this proceeding in prohibition we are required to declare the nature of the two causes of action pleaded in the case of John Philpott, Plaintiff, v. Broadway State Bank et al., Defendants, No. 292646, now pending in the superior court of the county of Los Angeles. Petitioner asserts that the cause is one in equity of which the superior court alone has jurisdiction, and that, unless it is restrained by this writ, said superior court will attempt to divest itself of jurisdiction of the cause by holding that the action is one at law, involving a sum less than $2,000, to wit, $625, cognizable alone by the municipal court of said county.

The far-reaching importance of this inquiry is seen when it is remembered that the jurisdiction of both the appellate and the trial courts is directly affected by the answer thereto. The right of trial by jury and, to a certain extent, the right of attachment may also be affected.

[1] It is almost superfluous to preface this discussion with the statement that although we have but one form of action, and practically but one forum, under our system of state jurisprudence, yet in applying the relief allowable we must adhere to the distinctions commonly accepted as existing between actions at law and actions in equity. In De Witt v. Hays, 2 Cal. 463, 468, 56 Am. Dec. 352, the court uses this language: "The Legislature, in providing that 'there shall be but one form of civil action,' cannot be supposed to have intended, at one fell stroke, to abolish all distinction between law and equity, as to actions. Such a construction would lead to infinite perplexities and endless difficulties. The innovation extends only to the form of action and the pleadings, while the technicalities of pleading have been dispensed with; and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trespass, or ejectment, without regard to the ancient forms; still the distinction between those actions has

not been abolished, but remains the same. So cases legal and equitable have not been consolidated; and though there is no difference between the form of a bill in Chancery, and a common law declaration, under our system, where all relief is sought in the same way from the said tribunal, the distinction between law and equity is as naked and broad as ever. To entitle the plaintiff to the equitable interposition of the Court, he must show a proper case for the interference of a Court of Chancery, and one in which he has no adequate or complete relief at law."

[2] See, to the same effect, Hallidie v. Enginger, 175 Cal. 505, 506, 166 P. 1, where the court said: "The next general consideration is that Legislatures in establishing the simplified code pleading and in thus abolishing the forms of common-law actions did not destroy, and even if they had desired could not destroy, the essential characteristics of those actions so long as the common law remains the basis of our jurisprudence." In this connection we should repeat also that the common law of England is, except where modified by Constitution or statute, the rule of decision in this state. Pol. Code, § 4468; Martin v. Superior Court, 176 Cal. 289, 168 P. 135, L. R. A. 1918B, 313.

We are thus brought to consider the criteria by which we may distinguish between an action at law and one in equity. The forum, form of action, and mode of proof are no longer factors in view of the already noted court system and procedure. In reality the distinction between the two classes of remedies is more or less arbitrary and groundless. It is well said also that the courts of equity are reaching into new fields of operation, and the courts of law are encroaching upon the former territory of the courts of equity. This thought was expressed by Lord Redesdale, as quoted in the case of Spect v. Spect, 88 Cal. 437, 442, 26 P. 203, 205, 13 L. R. A. 137, 22 Am. St. Rep. 314, as follows: "The distinction between strict law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining ground upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." See Spect v. Spect, supra, and Barbour v. Flick, 126 Cal. 628, 634, 59 P. 122.

We must therefore find the distinction between the two forms of action in their history and development rather than in their intrinsic differences in theory or philosophy. The two forums were set up under the English system to complement each other in the field of remedial justice; actions at law occupying a portion of the field, and actions in equity, supplying the defects in the legal system, occupied the remainder of the field. In its last analysis, therefore, the difference between the two actions lies largely in the mode of relief granted, and to determine whether the action is of one type or another one must of necessity resort to the apposite English law on the subject. Mr. Blackstone (Cooley's Blackstone (4th Ed.) vol. II, pp. 1181, 1182, § 436), in this connection, says: "The rules of decision are in both courts equally apposite to the subjects of which they take cognizance. * * * The difference between courts of law and equity.—Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. * * *" Therefore, to give a proper classification to a cause of action we should seek to find its counterpart in the history of the English law in the light of such modifications thereof as have taken place under our own system.

This brings us to the counts of the complaint here in question. They are two. Count one declares that plaintiff paid to the defendants $625 on account of a contract to purchase stock of defendant bank to be thereafter issued by it; that plaintiff later discovered that the stock, if and when issued, would be worthless, and that the financial condition of the bank and other material facts and circumstances had been fraudulently represented to him, giving in detail the nature of the misrepresentations made, and closing with the allegation that said fraudulent representations were the sole inducing cause of the agreement to purchase and the payment of said sum; finally pleading that plaintiff had rescinded said transaction in the manner provided by the Code. The second count is merely one of the common counts for money had and received, to wit, indebitatus assumpsit. The prayer is for return of the $625 to plaintiff, with interest and costs, "and for such other and further relief as may be just and equitable."

[3, 4] Count 1, of course, contains allegations of fraud, but courts of law, as well as courts of equity, have jurisdiction to give relief in certain specified cases of fraud. Fish v. Benson, 71 Cal. 428, 435, 12 P. 454. Under

the peculiar facts in this case, a judgment for plaintiff in the sum of $625, with interest and costs, would fully satisfy his demands. In short, he asks no relief that a court of law may not in all respects give him. This, of itself, would seem sufficient to deny plaintiff a place in a court of equity. In Morrison v. Land, 169 Cal. 580, 586, 587, 147 P. 259, 261, the court said: "Passing without discussion other requisites, it is elementary that where, as here, the primary right of a party is legal in its nature, as distinguished from equitable, and one for which the law affords some remedy, as here damages by way of compensation for breach of contract, a proper exercise of the equitable jurisdiction will not give equitable relief in any case where the legal remedy is full and adequate and does complete justice. No principle of equitable jurisprudence is more firmly established than this. * * * In so far as cases of the character of the one before us are concerned, the very basis of the granting of equitable relief is the conclusion in view of the circumstances of the particular case that full and adequate compensation cannot be had at law. Certainly no case has been cited to us, and we know of none, in which such relief has been given where it was apparent that full and adequate compensation can be given at law." See, also, 10 Cal. Jur., p. 465, § 7. A judgment of rescission in this cause would be entirely superfluous. Prewitt v. Sunnymead Orchard Co., 189 Cal. 723, 732, 209 P. 995.

If the action is not one in equity, it follows, of course, that it is an action at law. It seems material, however, at this time to determine under what common-law species of action this complaint should be classified. It is not a case of express promise, as an action in debt, although it is for a sum certain, for it lacks the element of an express promise to pay. Neither is it an action in which there is in fact an implied promise to pay, for there is no privity of contract from which to imply such a promise. In reality, it is an action in which the law, in order to prevent the unjust enrichment of defendants from the property of plaintiff, itself implies a promise to repay the sum demanded. In other words, it is an action in assumpsit upon a promise implied by law; that is, it is a case where the plaintiff has not elected to sue for damages, general or special or both, which he may have suffered from the tort inflicted upon him by defendants; likewise it is not a case where the plaintiff is seeking the application of equitable remedies to redress his grievances. All these elements, which may have been shown by appropriate allegations for such relief, are conspicuously absent. Plaintiff apparently is content to merely seek a return from defendants of money given them, with interest, forgetting and foregoing all other elements of injury. Is it not plain, therefore, that he has waived the tort of defendants and has come into court relying solely upon the promise created by law to return to him the consideration paid upon the contract?

[5] Count 2 is one of the common counts for money had and received, commonly styled indebitatus assumpsit. We then have two actions for assumpsit; one on a special count and one on a common count. These counts may properly be united in the same action. 5 C. J. 1399. A case where a special and a common count in assumpsit for fraud were united in one action is First National Bank v. Steel, 136 Mich. 588, 99 N. W. 786.

The action of assumpsit, in its development, had an interesting but stormy career at the common law. Although in existence for some years previous to that time, it came into prominence following the decision in Slade's Case in 1603 (Coke's Rep., vol. 2, p. 505; 2 Harvard Law Review, p. 16). It gradually gained prominence and widened in scope until 1760, when Lord Mansfield, in the case of Moses v. Macfarlan (2 Burr. 1005, English Reports, Full Reprint, King's Bench Book 26, vol. 97, p. 676), described its function as follows: "This kind of equitable action to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex æquo et bono, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

Quoting the above, Mr. Holdsworth in his work on the History of English Law, vol. 8, p. 97, uses this language: "It was thus in the action of indebitatus assumpsit that the larger part of our modern law of quasi-contract has originated."

See, also, Cooley's Blackstone (4th Ed.) vol. II, p. 975, § 162, where it is said: "It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation." Also, see I Chitty on Pleading, § 100.

Clark on Contracts (4th Ed.) Hornbook Series, pp. 699, 700, dealing with the subject of quasi contracts, uses the following language: "A frequent illustration of a quasi-contractual obligation of this kind arises where a person obtains another's money by wrongful or fraudulent means. Where one person has wrongfully taken another's money, or has taken his property and converted it into money, the latter has a right of action ex delicto for the wrong done to him, as by an action of trespass or trover, or by an action on the case for the fraud. He is not always restricted, however, to an action ex delicto for the specific wrong, but may in general waive the tort, and sue in assumpsit for the money as for money received for his use. * * * Where a person steals another's money or property, or obtains it by false pretenses, the fact that a crime has been committed will not prevent a civil action by the person injured. He may sue the thief in tort, or he may elect to sue in assumpsit as for money received for his use. The same is true in any case in which one person, by means of trespass, fraud, or other tortious means, obtains another's money."

This doctrine is also expressly indorsed in Hallidie v. Enginger, supra, 175 Cal. at page 508, 166 P. 1, 2: "In some instances the action on implied contract does not in truth rest upon contract at all. In others, the contract may lie at the base of the wrong or may have enabled the perpetrator to have accomplished his wrong. Thus, where A. delivers goods to B. at B.'s request, even though B. never meant to pay for them, the law erects the legal fiction that he promised to pay, and he will not be heard to deny it in the action for quantum valebant in assumpsit. But, upon the other hand, if B. steal A.'s watch, A. could treat the theft as a contract of sale and sue in like manner ex contractu, though in fact there was no foundation whatsoever for the fiction other than the need of broadening A.'s remedies. Downs v. City of Baltimore, 111 Md. 674, 76 A. 861, 41 L. R. A. (N. S.) 255, 19 Ann. Cas. 644. Or again, if B. in the employ of A. misappropriates his money or property, while A. could sue ex delicto for the wrong, he could, on the other hand, waive the tort and sue, again depending upon the nature of the property converted, either for the value, for goods sold and delivered, or for money had and received. (Citing cases.)"

See Page on Contracts, vol. 3, p. 2510, § 1473; also pages 2671–2673, § 1548, where it is said: "If money has been paid under such contract, the right of the party defrauded to waive the tort and recover such payment on the theory of an implied contract, in general assumpsit, is very generally recognized. It is not necessary that the fraud should be the sole cause of the payment. It is sufficient if the payment would not have been made if it were not for such fraud. * * * The right to recover in assumpsit assumes that on discovering the fraud the party defrauded elects to disaffirm the express contract. * * *"

Authorities in support of the prevalent use of this form of action in the courts of the common law could be multiplied indefinitely, but we will close this branch of the discussion by a quotation from Professor Ames in volume 2 of the Harvard Law Review, p. 69: "The main outlines of the history of assumpsit have now been indicated. In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded Debt, became concurrent with Account, with Case upon a bailment, a warranty, and bills of exchange, and competed with Equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment. Surely it would be hard to find a better illustration of the flexibility and power of self-development of the Common Law."

Considerable confusion now exists among the bench and bar as to the proper classification of this cause of action, due to the fact that the courts of law administering this relief apply equitable principles, and to the further fact that certain expressions found in court opinions and text-books, on first impression, might seem to classify it as an action in equity. But from what has been said it is clearly one of a special class of cases limited

to a specific set of facts which could by supplementary allegations be made an out and out action in equity or else an action ex delicto at law. Such words as "equitable relief" and "equitable action," found in court opinions, have added to this confusion. For example, in the case of Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 778, 77 A. L. R. 743, is found this statement referring to the complaint, that it "* * * clearly and unmistakably set forth a cause of action for equitable relief. * * *"

The following authority would seem to effectually dispel all doubt in this connection: "Money Had and Received; General nature of right. If A receives money which belongs to B, under circumstances which give A no right thereto, but which bind A on principles of justice and fairness to repay such money to B, the common law allowed B to sue as on contract, although there was no express contract and no real implied contract, in order to prevent A's unjust enrichment at B's expense. This principle has survived in our law, and an action as upon contract will lie for money had and received wherever one person has received money which belongs to another, and which in 'equity and good conscience,' or in other words, in justice and right, should be returned. Since the contract alleged in the plaintiff's complaint is often purely fictitious, the plaintiff's right to recover in a contract does not depend upon any principles of privity of contract between the plaintiff and the defendant, and no privity is necessary. The plaintiff's right to recover is governed by principles of equity, although the action is one at law." Page on Contracts, supra, vol. 3, pp. 2510–2512, § 1473.

In the case of Chapman v. Forbes, 123 N. Y. 532, 26 N. E. 3, 4, decided in 1890, the question at issue was whether the action for money had and received was one in equity or one at law. Holding that it was an action at law, the court said: "* * * The action has been frequently stated to be an 'equitable one'; that is, one depending upon general principles of equity for the maintenance of the plaintiff's claim to the money. * * * But, although the action may be generally described as one of an equitable character, it never was in any aspect a suit in equity. * * * That an action is of an equitable nature does not make it an action in equity. When, in an action for money had and received, all the facts show that the plaintiff is ex æquo et bono entitled to recover, his right to recover is a legal one, and maintainable in a court of law. * * *"

In Davison v. West Oxford Land Co., 126 N. C. 704, 709, 36 S. E. 162, 163, the court said: "* * * And, where one party has received money to which another is entitled, the law presumes a contract if it is necessary to do so to enable the party entitled to recover the same. Board of Education v. Town of Henderson, 126 N. C. 689, 36 S. E. 158. This entitles the party having the right to the money to an action of debt, indebitatus assumpsit, which, though an action at law, was equitable in its nature. It has been styled 'an equitable action on the law side of the docket.' But it arises only where the money was received and held under such circumstances that the law will imply the contract. Where it would be inequitable and unconscionable for the party receiving the money to hold it, amounting to a moral fraud to do so, it will usually be so held. Where one person receives money belonging to another, and wrongfully refuses to pay it over, the action will lie."

In Steuerwald v. Richter, 158 Wis. 597, 149 N. W. 692, 694, it was said: "The complaint is for money had and received. The action though legal in form, the right to recover is in its nature equitable, and can only be enforced where the defendant has received money which in equity and good conscience he ought to pay to the plaintiff."

In Board of Highway Commissioners v. City of Bloomington, 253 Ill. 164, 174, 97 N. E. 280, 284, Ann. Cas. 1913A, 471, the Supreme Court of Illinois said: "The action of assumpsit, under the common counts for money had and received, is an appropriate remedy to enforce the equitable obligation arising from the receipt of money by one person which belongs to another, and which in equity and justice should be returned. Gaines v. Miller, 111 U. S. 395, 4 S. Ct. 426, 28 L. Ed. 466; Pauly v. Pauly, 107 Cal. 8, 40 P. 29, 48 Am. St. Rep. 98; Brown v. Woodward, 75 Conn. 254, 53 A. 112; Wilson v. Turner, 164 Ill. 398, 45 N. E. 820. The action is in form ex contractu; but, the alleged contract being purely fictitious, the right to recover does not depend upon any principles of privity of contract between the plaintiff and the defendant, and no privity is necessary. 2 Page on Contracts, § 789, and cases there cited. The right to recover is governed by principles of equity, although the action is at law. The action is maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it, and which, ex æquo et bono, belongs to another. Jackson v. Hough, 38 W. Va. 236, 18 S. E.

575; Merchants' & Miners' Nat. Bank v. Barnes, 18 Mont. 335, 45 P. 218, 47 L. R. A. 737, 56 Am. St. Rep. 586."

[6] Confusion has also arisen respecting the form of action under count 1 in that there are found therein allegations of a rescission of the agreement by the party injured and notice thereof given to the defendant by the plaintiff himself pursuant to sections of the Civil Code of this state on that subject. It is undoubtedly true that a litigant may invoke the power of a court of equity to effect a rescission which has not theretofore been made. This is especially provided for by Civil Code, sections 3406–3408, inclusive. But where the plaintiff himself has pursued the method provided by sections 1688–1691 of the Civil Code to effect a rescission of the contract he may come into a court of law for all the relief that court is competent to give, and in the instance where he merely asks for a return of the consideration parted with by reason of the fraud, mistake, failure of consideration, or any other set of facts authorizing rescission, he is entitled to the action of assumpsit. Indeed, section 1712 of said Code seems to provide for a legal action in a case such as we have here under consideration. The rule that it is not necessary to ask the aid of a court of equity to effect the rescission where the rescinding party has followed the statutory procedure finds abundant support in California decisions.

[7] In this connection we approve the opinion of Judge Bishop in the case of Jensen v. Harry H. Culver & Co., 127 Cal. App. (Supp.) 783, 785, 786, 15 P.(2d) 907, 908, where many of the authorities are cited as follows: "There can be no doubt that one having a right to rescind need not turn to the courts to have the rescission accomplished; he may effect it by his own action. Prewitt v. Sunnymead Orchard Co. (1922) 189 Cal. 723, 209 P. 995; McNeese v. McNeese (1923) 190 Cal. 402, 213 P. 36; Maxwell v. Jimeno (1928) 89 Cal. App. 612, 265 P. 885, and Ito v. Watanabe (1931) 213 Cal. 487, 2 P.(2d) 799. The reluctant response of him as to whom the contract was rescinded may require the help of a court to secure to him, who rescinded, the relief to which he has become entitled. This relief may be such that only a court of equity can furnish it. For examples, see Mesenburg v. Dunn (1899) 125 Cal. 222, 57 P. 887, and Rocha v. Rocha (1925) 197 Cal. 396, 240 P. 1010. The relief sought may, however, be the return of personal property. In such case the action commonly known as claim and delivery is appropriate. McNeese v. McNeese, supra. This, of course, is an action at law. See Faulkner v. First Nat. Bank (1900) 130 Cal. 258, 62 P. 463. If money alone has been transferred by the rescinding party, upon the rescission, the law implies a promise to return it, which becomes the basis for a common-law action of money had and received. Rand v. Columbian Realty Co. (1910) 13 Cal. App. 444, 110 P. 322; Winkler v. Jerrue (1912) 20 Cal. App. 555, 129 P. 804; Fontaine v. Lacassie (1918) 36 Cal. App. 175, 171 P. 812; Bridges v. Fisk (1921) 53 Cal. App. 117, 200 P. 71; Firpo v. Pacific Mut. Life Ins. Co. (1926) 80 Cal. App. 122, 251 P. 657." See, also, Hull v. Ray, 211 Cal. 164, 167, 294 P. 700.

To the above should be added the further statement that the plaintiff may not only waive the tort and sue in indebitatus assumpsit for the money consideration parted with but, where personal goods have been thus converted, he may also have the common-law writ (quantum valebant) for the value of the goods so converted. Bechtel v. Chase, 156 Cal. 707, 711, 106 P. 81, citing Roberts v. Evans, 43 Cal. 380; Lehmann v. Schmidt, 87 Cal. 15, 25 P. 161, and Chittenden v. Pratt, 89 Cal. 178, 26 P. 626. Indeed, under the facts here present, no rescission would seem to be required other than the initiation of the action itself, as plaintiff has received nothing of value belonging to the defendants (S. C. V. Peat Fuel Co. v. Tuck, 53 Cal. 304; Richter v. Union Land & Stock Co., 129 Cal. 367, 62 P. 39), and, moreover, the common-law action of debt might lie also in such case.

[8] The above discussion disposes of all the material elements of the subject under review, except the question whether or not such a cause of action sounds in contract or in tort. It would seem clear, however, from what has already been pointed out, that it is a cause of action, which, although originally sounding in tort, has now become fully ex contractu by a process of slow but steady development. Quoting from Holdsworth's History of English Law, vol. 7, p. 441: "The earliest of these actions of the case to acquire a distinct character was the action of assumpsit. We have seen that it became the contractual action of the common law; and that its clear separation from the delictual actions was marked by the decision, arrived at in the sixteenth century, that the maxim actio personalis moritur cum persona did not, as a rule, apply to it. On the other hand, we have seen that it could be and was used as an action in tort. And we shall see that its extension, at the end of the seventeenth century, to cover a part of the sphere occupied by

trover; and its extension, at the end of the eighteenth century, to enforce the repayment of money where it was equitable that money should be repaid, created the law of quasi-contract, and thus gave it in many cases a semi-proprietary character. But though assumpsit thus retained certain of its delictual characteristics, though in its application to the law of quasi-contract it acquired certain proprietary characteristics, its contractual quality was always its most distinct feature. Of all the actions on the case it departed the most markedly from its delictual origin."

Quoting also from Holdsworth's History of English Law, vol. 3, p. 451: "It was Slade's Case which fixed the character of the action of assumpsit; for, as we have seen, it enabled it to absorb the greater part of the sphere occupied by the action of debt, and to become a remedy for the breach of purely executory contracts. From henceforward it was the contractual action of the common law. * * *"

We therefore hold this action to be one at law and one, by reason of the amount involved, of which the municipal court alone has jurisdiction.

[9] The only further matter requiring discussion is that in the court below when the trial judge had signified his intention to hold that the action was one in law and not properly within the jurisdiction of the superior court, but within the jurisdiction of the municipal court, the petitioner offered to amend his complaint to show the case was one where plaintiff should be given punitive damages in the sum of $1,500, which amendment, if allowed, would have increased the ad damnum clause to a sum in excess of $2,000, and the cause would then be within the jurisdiction of the superior court, regardless of the nature of the action. The court, in the exercise of its discretion, denied the application to amend in this particular. On the face of the proffered amendment, which asked nearly three times the amount in suit, the court was justified in holding it was clearly an attempt to retain the cause in the superior court without regard to the substantiality of the amendment. In this ruling the court did not err.

The alternative writ of prohibition is discharged.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; SPENCE, Justice pro tem.

We dissent: CURTIS, J.; SHENK, J.

1 Cal.2d 527

McCALL v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY.

L. A. 14531.

Supreme Court of California.

Oct. 1, 1934.

1. Action ⇐28

Where party to executory contract parts with money or goods through material fraudulent representations, he may waive tort, rescind contract, and sue in assumpsit on promise implied by law for return of consideration, and where he has received nothing of value, he may sue on common count of indebitatus assumpsit or quantum valebant in assumpsit (Civ. Code, §§ 1688–1691).

2. Attachment ⇐6

Statute allowing attachment in "action upon contract, express or implied, for direct payment of money" embraces promise implied by law which gives rise to quasi contract, so that person suing for return of consideration paid because of fraud, and who has received nothing of value, may have the writ of attachment (Code Civ. Proc. § 537).

[Ed. Note.—For other definitions of "Action on Contract," "Express Contract" and "Implied Contract," see Words & Phrases.]

3. Attachment ⇐6

That plaintiff, in addition to money judgment, prays for equitable relief will not prevent issuance of attachment as to so much of the action as discloses contract, express or implied, for direct payment of money, where plaintiff sues for return of consideration paid and action is based on promise implied by law because of fraud (Code Civ. Proc. § 537).

4. Attachment ⇐6

Where plaintiffs, alleging rescission of land purchase contract in pais, sought return of money paid by them because of alleged fraud and partial failure of consideration, case *held* "action upon contract, express or implied, for direct payment of money" within attachment statute, though plaintiffs also prayed for injunction and cancellation of instruments, but plaintiffs were not entitled to attachment in absence of showing that their equitable lien arising out of fraud was or had become valueless (Civ. Code, § 3050).

5. Vendor and purchaser ⇐337

Where purchaser, because of fraud or partial failure of consideration, has rescinded realty purchase, rules of equity give purchaser lien on the realty for payments made on the purchase, and such lien is supplementary to statutory lien for failure of consideration (Civ. Code, § 3050).

6. Contracts ⇐98

In case of rescission of contract in pais because of fraud, the law supplies, after notice and offer to restore, a promise of repayment, while in case of rescission in equity right to repayment follows decree in equity which for the first time creates duty to refund (Civ. Code, §§ 1688–1691, 3406–3408).

7. Cancellation of Instruments ⇐24(1)

In California, rule as to tendering restoration before court action applies both in case of rescission in pais and rescission in equity for fraud (Civ. Code, §§ 1688–1691, 3406–3408).

8. Action ⇐23

Court of law as well as court of equity applies equitable principles.

9. Assumpsit, action of ⇐19

While common count is sufficient where contract is executory or action is merely to procure return of consideration because of fraud in case where party rescinding has received nothing of value, one who has received something of value and seeks to rescind, or enforce a rescission effected under statute, must allege facts showing good right to rescind and cause of rescission, or rescission by consent, and same rule controls where rescission is averred as defense (Civ. Code, §§ 1688–1691, 3406–3408).

SHENK and CURTIS, JJ., dissenting.

In Bank.

Proceeding in mandate by Thaddeus D. McCall against the Superior Court of the State of California in and for the County of Imperial to compel respondent to discharge an attachment levied on property of defendant in an action by Harry E. Griffin and wife against Thaddeus D. McCall and others.

Peremptory writ issued directing the dissolution of the attachment, unless plaintiffs in the action should justify the attachment by showing that security held by them was or has become valueless.

Prior opinion, 24 P.(2d) 922.

M. W. Conkling, of San Diego, for petitioner.

Harry W. Horton and S. L. McCrory, both of El Centro, for respondent.

PRESTON, Justice.

By this proceeding we are required to redeclare the distinction between an action to secure the beneficial results which arise from a unilateral rescission of a contract already accomplished (rescission in pais) and an action in equity to compel a rescission and to secure an award by decree of the benefits resulting therefrom. We are also required to declare whether or not, under the law of attachment (section 537 of the Code of Civil Procedure), a suit for return of the consideration paid upon a contract, after a rescission in pais for fraud, is an action upon a contract, express or implied, for the direct payment of money.

In the case of Harry E. Griffin et ux., Plaintiffs, v. Thaddeus D. McCall et al., Defendants, No. 13573, the superior court of the state of California, in and for the county of Imperial, on February 24, 1933, gave its decree in favor of plaintiffs for a restoration to them by defendants of the consideration paid for the purchase of a tract of real property, a grapefruit grove of 6.12 acres, to wit, the sum of $6,381.40, with interest and costs. This followed a confirmation by said decree of a recission of the contract, accomplished by plaintiffs on February 1, 1930, in the manner provided by law, which rescission was based upon fraudulent representations on material matters inducing the purchase. As a further provision of its decree, the court enjoined defendants from attempting to further enforce the obligations of plaintiffs found in a promissory note executed by them to defendants, secured by deed of trust upon the real property in suit. A still further provision of the decree purported to reinvest defendants with the title to said real property and to restore to them all other things of value received from them by plaintiffs as part of the transaction.

The original complaint was filed on April 22, 1930. It was cast in three counts. The first count declared upon the fraudulent representations inducing the contract and upon rescission of it on February 1, 1930, as aforesaid, and set up in detail how the rescission was made, including notice to defendants and a plenary offer to restore. The second count declared upon a failure of consideration in that defendants failed to honor certain covenants respecting the planting, cultivating, and caring for said grove of grapefruit trees planted by defendants on said land during the time it was held under lease by them as a part of the original transaction. The third was a common count for money had and received, indebitatus assumpsit. The prayer of the complaint was for return of the money paid on account of said purchase, with interest and costs, and for equitable relief in the cancellation of vari-

ous written instruments, contracts, and obligations between the parties as a part of the transaction here in question. The complaint was amended in certain respects, and defendants made answer thereto. These pleadings are not in the record before us. It does appear, however, that an appeal has been taken from said decree and lodged in this court.

Upon initiation of said action a writ of attachment for the amount paid on the purchase price of said property was procured upon an affidavit regular in form, setting up the transaction as a contract for the direct payment of money, and said attachment was levied upon certain property of the defendants. Although a dispute exists between the parties as to some of the steps which have been taken in the court below, looking to a discharge of said attachment, the fact remains that it is still in force.

Following said judgment, and perhaps following the appeal therefrom, to wit, on May 18, 1933, one of the above-mentioned defendants, Thaddeus D. McCall, instituted the present proceeding in mandate to compel said superior court to discharge the said attachment. Whether or not this relief should be granted is the ultimate question for our solution here.

[1] The discussion that follows should be construed as a continuation of that found in the case of Philpott v. Superior Court (Cal. Sup.) 36 P.(2d) 635, this day decided. From that action it is concluded that where a party to an executory contract parts with his money or goods as the result of fraudulent representations as to material elements of the transaction, he has an election of remedies, one of which is to waive the tort, rescind the contract, and sue in assumpsit, upon the promise implied by law, for a return of the consideration paid, and where the defrauded party parts with his money or with his goods under such fraudulent inducements and has received nothing of value therefor, he may sue on the common counts of indebitatus assumpsit or quantum valebant in assumpsit, as the case may suggest.

[2] This brings us to inquire whether or not the language of section 537 of the Code of Civil Procedure, allowing attachment "* * * in an action upon a contract, express or implied, for the direct payment of money * * *" embraces within its terms an implied promise supplied by law of the character above described. In other words, there are at least three classes of promises to pay; an express promise to pay, a promise implied from the facts of the case, and a promise implied by law. Does the chapter of said Code on attachments allow a writ where the promise is supplied by law?

We have seen that the implied promise supplied by law is ex contractu in its nature. Philpott v. Superior Court, supra. With this in mind we are unable to see any distinction between the three classes of promises so far as said chapter of the Code is concerned, or why all are not included in the section allowing attachment. In the case of Nevada Co. v. Farnsworth, 89 F. 164, 165, 166, an early case before the United States Circuit Court, this identical subject is treated as follows: "The statutes of Utah only permit of an attachment in an action upon a judgment, or upon a contract, express or implied; and it is urged with much force that, treating the action as in assumpsit, it is based upon a quasi contract, which it is a misnomer to call an implied contract, wanting, as it is, in most of the elements of a true contract. The whole theory of contracts implied in law was originated for the purpose of giving a remedy ex contractu for certain wrongs, and it does not promote clear thinking to embrace in one classification two things so essentially different as an obligation based on the consent of the parties and one imposed by law, from motives of public policy, frequently against the intention of the parties. But, however unscientific such a classification is, simple implied contracts are usually subdivided into contracts implied in fact and contracts implied in law. The first, it is needless to say, is a true contract, the agreement of the parties being inferred from the circumstances; the latter but a duty imposed by law, and treated as a contract for the purposes of a remedy only. This classification of implied contracts makes it difficult to interpret a statute where the term is used. In each case it becomes a question whether the general meaning, or the more limited, if more accurate, meaning, was, by the legislature, intended. This legislative intent must be sought in the particular statute in question, but, in the absence of any light thrown thereon by the language or object of the statute, or of other statutes in pari materia, it must be held, I think, that the legislature intended that meaning which is commonly assigned to the words, even if such definition be less accurate or scientific. * * * There is a plain reason why attachments were not permitted in actions sounding in damages, for, if allowed in such actions, property of the defendant might be incumbered in an amount altogether out of

proportion to the sum finally recovered. But in assumpsit, where the tort is waived, the sum sued for is the benefit unjustly retained by the defendant; not the damage to the plaintiff, usually more uncertain in amount. Keener, Quasi Cont. 160. There is nothing in the wording of the statute which would warrant a holding that the legislature used the term 'implied contract' in other than its usual meaning, or that contracts implied in law were not intended to be included. The weight of authority supports this conclusion. (Reviewing authorities.)" Other cases to the same effect are May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001; Lipscomb v. Citizens' Bank, 66 Kan. 243, 71 P. 583; Turner v. Schwartz, 140 Md. 465, 117 A. 904, 24 A. L. R. 444; Farmers' Nat. Bk. v. Fonda, 65 Mich. 533, 32 N. W. 664; State ex rel. American Piano Co. v. Superior Court, 105 Wash. 676, 178 P. 827; Western Assurance Co. v. Towle, 65 Wis. 247, 26 N. W. 104.

The above authority was followed in the case of Aronson & Co. v. Pearson, 199 Cal. 286, 249 P. 188, 51 A. L. R. 1380, where it was expressly held that the stockholders' liability, under the constitutional and statutory provisions relating thereto, was an implied contract within the meaning of said section 537 of the Code of Civil Procedure, and the right to a writ of attachment was confirmed. There was in such case no privity of contract whatsoever. In fact, there is little, if any, difference between the promise implied by law in the case before us, where the transaction was induced by fraud, and a case of total failure of consideration such as S. C. V. Peat Fuel Co. v. Tuck, 53 Cal. 304; Mahony v. Standard Gas Engine Co., 187 Cal. 399, 405, 202 P. 146; Bennett v. Superior Court, 218 Cal. 153, 21 P.(2d) 946.

The action in assumpsit in such cases is not upon the failure of consideration or upon the fraud practiced, but upon the promise or obligation set up by the law to afford the injured party additional relief. Failure of consideration, duress, fraud, or mistake, are elements only in the sense that they furnish a foundation upon which to rest the rescission from which flows the promise or obligation. We therefore conclude that in such cases when suing for the consideration paid, the injured party may, where he has received nothing of value, have the writ of attachment.

[3] But this observation does not dispose of all questions raised by this proceeding. It appears that in asking for injunctive relief, plaintiffs included in their complaint both legal and equitable issues, and it might well be held that the equitable issues predominate and that a court of equity, having taken hold of the subject-matter of the litigation, should administer both equitable and legal relief. This however, does not prevent the issuance of an attachment as to so much of the action as discloses a contract, express or implied, for the direct payment of money. The prayer for equitable relief, therefore, has no bearing upon the issuance of an attachment in a proper case. This subject was thoroughly considered in the recent case of Bennett v. Superior Court, supra. See, also Hallidie v. Enginger, 175 Cal. 505, 166 P. 1; DeLeonis v. Etchepare, 120 Cal. 407, 52 P. 718, and Kohler v. Agassiz, 99 Cal. 9, 33 P. 741.

In Stanford Hotel v. M. Schwind Co., 180 Cal. 348, 181 P. 780, 782, one of the reasons assigned as ground for discharging the attachment was that it was an action in equity. There the prayer of the complaint was for a temporary restraining order enjoining defendants from selling or otherwise disposing of the property involved in the bill of sale and that the sale be declared void, and that it be decreed that the defendant held the property charged with payment of plaintiff's claim in the sum of $3,617.60; that the property be sold and for further and proper relief. The court, in discussing whether or not an attachment would lie, said: "If a recovery upon such a contract is the purpose of the suit, so far as the right of attachment is concerned, it is immaterial whether the action be regarded as strictly legal or strictly equitable, or partly legal and partly equitable. The subdivision does not in terms prescribe that the action must be one in law, or that it may not be one in equity, or that it may not be one of either law or equity, or of both. Hence it is not necessary in order to uphold the writ of attachment to establish the proposition that the action is either legal or equitable. What must be established is that the action is based upon contract, either express or implied, for the direct payment of money. It is clear that this action addresses itself to both the legal and the equitable powers of the court. But that circumstance will not operate to deny the plaintiff a writ of attachment if he is seeking recovery upon the breach of such contract. * * * Consequently, even if such an action may properly be regarded as partially legal and partially equitable, it will make no difference. The plaintiff is nevertheless entitled to a writ of attachment by virtue of the fact that he is suing for a re-

covery upon the contract which is the gravamen of the action."

[4, 5] But we have not yet considered what shall be the rule of law where the failure of consideration is only partial or where, in case of fraud, something of value has been received. Is a complaining party, on rescission, entitled to a writ of attachment? We cannot see how such party can meet the test set by section 537 of the Code of Civil Procedure, which at the times here involved, required the affidavit to state that plaintiff's demand "is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless. * * *"

For example, if the case is one where plaintiff is the purchaser of personal property, the Civil Code, § 1789, subd. 5, expressly gives him a lien. And where, as here, the purchase is real estate, whether the right of rescission is based upon fraud or partial failure of consideration, the rules of equity give the purchaser a lien upon the real estate involved for the payments made on the purchase, and this lien, too, is supplementary to that created by section 3050 of the Civil Code, which is applicable only to cases of failure of consideration. Montgomery v. Meyerstein, 186 Cal. 459, 199 P. 800; Lockie v. Cooperative Land Co., 207 Cal. 624, 279 P. 428; Bennett v. Superior Court, supra.

[6] It is now necessary to emphasize the difference between rescission in pais and rescission in equity. The former class only have we thus far treated, for in it the law supplies, after notice and offer to restore, a promise of repayment, but in the latter this right follows the decree in equity which for the first time creates the duty to refund.

"The fact that the same word, 'rescission,' is used to designate both the equitable remedy of cancellation and the termination of a contract by the act of a party has been productive of no little confusion. 'In many of the cases for rescission in equity language is used from which it might be inferred that precisely the same principles govern in suits in equity that are applied to determine the right of the party to sue at law.'" 9 Cor. Jur. 1159. "In the opinions in many of these cases the courts advert to the distinction, so often lost sight of, between the equitable remedy of rescission or cancellation, where the avoidance of the contract, with its indispensable adjunct of restoration, is accomplished by the decree of the court, and legal rescission, where the act of plaintiff in avoiding the contract reinvests him with his legal title or right to sue, and must therefore be accompanied with restitution of the thing received by him." 9 Cor. Jur. 1215.

In Gould v. Cayuga County Nat. Bank, 86 N. Y. 75, 84, the court said: "At any rate the difference between an action to rescind a contract and one brought, not to rescind it, but based upon the theory that it has already been rescinded, is as broad as a gulf. They depend upon different principles and require different judgments."

[7] In California the flame of confusion has been fed by the requirement that the rule as to tendering restoration prior to court action applies in both classes of rescission. Crouch v. Wilson, 183 Cal. 576, 584, 191 P. 916; Kelley v. Owens, 120 Cal. 502, 47 P. 369, 52 P. 797; Gifford v. Carvill, 29 Cal. 589. In other jurisdictions it is necessary only in the unilateral or in pais rescission to have previously offered to restore to the party against whom the rescission is claimed everything of value received, and not so in equity. But California decisions plainly recognize the two classes of rescission. Our Civil Code specifically provides how a contract may be rescinded. Sections 1688–1691, inclusive, thereof, provide that a contract may be extinguished by a rescission and the grounds upon which this may be done, including the manner in which it is to be effected, and they seem clearly to contemplate a rescission in proper cases by the individual act of one of the parties to the contract. It is provided in sections 3406–3408, inclusive, of said Code, for the additional and supplemental action in equity by which a rescission may also be accomplished.

The case of Loaiza v. Superior Court, 85 Cal. 11, 13, 24 P. 707, 711, 9 L. R. A. 376, 20 Am. St. Rep. 197, was an action where the basis of the rescission was fraud. Speaking of rescission on that ground, the court said: "It is upon and after rescission, and to enforce rescission, so far as the means of enforcing it are within the jurisdiction of the court. It does not require mutual consent of the parties to rescind. Under section 1689, either party may rescind when consent was given by mistake, or obtained by fraud. According to the record, the purchasers did actually rescind, and rescind promptly, before the action was brought, and did all that is required of them by section 1689, which gives them the right, and section 1691, which prescribes the mode, of rescission. They did not restore, because restoration was not ac-

cepted, but they offered to restore, and in the action they again offer to restore, everything of value received by them under the contract. This offer, with the prompt and proper notice, makes the rescission complete, and entitles them to the aid of a court of competent jurisdiction in securing to them the results and fruits of the rescission. To secure those results and fruits is the object of the action they have brought. Those results and fruits are the restoration of the moneys and things of value which they gave in consideration of the purchase. * * * That the court has jurisdiction to afford the relief sought is supported by ample authority. (Citing many cases.) * * *"

See, also, Kelley v. Owens, supra, 120 Cal. 502, 510, 47 P. 369, 52 P. 797. Also Spreckels v. Gorrill, 152 Cal. 383, 394, 92 P. 1011, 1016, where it is said: "In effect, this is a suit to enforce a rescission which has been offered and refused, and it is of equitable origin and nature. Under our form of procedure whereby the distinction between forms of actions is abolished, the court could in this action administer equitable relief, regardless of the question whether, under former systems of jurisprudence, the action would be deemed an action in assumpsit for the money paid, or an action in equity to compel rescission and a return of the consideration."

In McNeese v. McNeese, 190 Cal. 402, 404, 213 P. 36, 37, it is said: "The interposition of a court of equity to set the contract aside was not necessary to rescission. A contract may be rescinded by the act of the party entitled and desiring to rescind. It is well recognized that sections 1688, 1689, and 1691 of the Civil Code provide for rescission effected by the act of the parties. (Citing many cases.)"

In the case of Fitzhugh v. University Realty Co., 46 Cal. App. 198, 201, 188 P. 1023, 1024, the court said: "That quasi contract went into effect instantaneously upon the service of the notice of rescission, and at the place where such notice was served, * * * and upon this contract created by the law the plaintiff had the right to bring an action in general assumpsit for money had and received." See, also, Bennett v. Superior Court, supra, and Orton v. Privett, 202 Cal. 754, 757, 262 P. 713.

[8] It may be urged that in rescission in pais a party will never know until after the judgment of the court is given that he had a right to rescind, and hence the causes of action are the same and in equity. This confusion arises from a failure to keep in mind that a court of law as well as a court of equity applies equitable principles. The distinction, as pointed out in the case of Philpott v. Superior Court (Cal. Sup.) 36 P.(2d) 635, lies more in the relief administered than in the principles applied.

In any action for a money judgment alone, where rescission in pais is specially pleaded or is relied upon under the common counts, and the plaintiff is denied relief, and the attachment sued out is dissolved, the order of the court denying him a money judgment is not a decree in equity. The fact that the plaintiff is mistaken as to his right to rescind is not proof that the action is in equity. The plaintiff in any kind of an attachment case, upon a hearing on the merits, may be denied relief, and, as a consequence, the attachment sued out by him may be dissolved.

[9] A further observation is necessary respecting the pleading in rescission cases. While it has been held that the common count is sufficient where the contract is executory, or the action is merely to procure a return of the consideration paid and the party rescinding has received nothing of value, still we do not think the rule should be extended to other classes of rescission. We adhere to the holding as announced in Swanston v. Clark, 153 Cal. 300, 303, 95 P. 1117, 1119, as follows: "Again, a party to a contract cannot rescind at his pleasure, but only for some one or more of the causes enumerated in section 1689 of the Civil Code. One seeking to rescind a contract, or to enforce a rescission, which he claims he has effected in the manner provided in section 1691 of the Civil Code, must allege facts showing that he had good right to rescind, and for what cause a rescission had taken place, or that a rescission had been made by consent. 18 Ency. Pl. & Pr. 802, 803, 804. The same rule controls where a rescission is averred as a defense. 18 Ency. Pl. & Pr. 844; Bruck v. Tucker, 42 Cal. 353; Miller v. Fulton, 47 Cal. 146; Dorris v. Sullivan, 90 Cal. 286, 27 P. 216; Kentfield v. Hayes, 57 Cal. 411; Arguello v. Bours, 67 Cal. 450, 8 P. 49; Swasey v. Adair, 88 Cal. 182, 25 P. 1119." See, also, Crouch v. Wilson, supra.

We have not thus far considered in extenso the case of Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 77 A. L. R. 743. It is clear from our holding in the Philpott Case, supra, and from the foregoing discussion, that the Stone Case must give way in order to prevent further confusion. It would be perplexing to have the right of attachment

in all other quasi contract cases and to deny it in cases of fraud. As already observed, the law implies the promise and affords an added remedy if the injured party elects to follow it. The action is not on the fraud, or failure of consideration, or duress, but upon quasi contract imposed by law. It was through failure to concede this additional relief that error crept into the decision in the Stone Case.

We agree in this respect with the statement of Mr. Justice Shaw in his dissenting opinion in the case of Willett & Burr v. Alpert, 181 Cal. 652, 666, 185 P. 976, 982, as follows: "The statute allows an attachment in all cases of implied contracts for the direct payment of money. The word 'direct' is apparently surplusage, for every contract for the payment of money would be a contract for the direct payment of money. The common law has always been in force in this state except as changed by statute. It is to be presumed that the term 'implied contract,' as used in the attachment law, was intended to include all cases where at common law a contract was implied. If this be not so, great confusion would result."

In the Stone Case the transaction was induced by fraud and the stock received was worthless. A proper rescission was made and a suit in assumpsit should lie to secure a return of the consideration paid. The case of Willett & Burr v. Alpert, supra, is not at variance with the conclusions announced herein. It was an action for damages, described by the court as follows (181 Cal. at page 657, 185 P. 976, 978): "As to the character of the action, it is simply one brought by the vendee in a contract for the sale of personalty against the vendors to recover damages for a failure of the vendors to deliver the full quantity of property claimed to be called for by the contract, a delivery of a part of the quantity having been made, and the vendee having paid the full purchase price. There was no entire failure of consideration so as to entitle the vendee to recover the purchase price paid on that ground, nor was there any attempt to rescind for a partial failure so that the vendee could recover the purchase price paid on that ground, and the action in fact is not brought for a recovery of the purchase price, or any part thereof, but is strictly for damages for a breach of contract." The action is clearly for damages for a tort and not upon an implied promise where the tort is waived.

The case of San Francisco Iron, etc., v. Abraham, 211 Cal. 552, 296 P. 82, is plainly an action on the case for fraud and deceit. The same is true of Hallidie v. Enginger, supra, 175 Cal. 505, 166 P. 1. The case of Bennett v. Superior Court, supra, 218 Cal. 153, 21 P.(2d) 946, is in substantial accord with the present holding. We have but extended its doctrine to cover transactions rescinded for fraud, as well as failure of consideration.

Let the peremptory writ of mandate issue, directing the court below to dissolve the attachment, unless the plaintiffs in said action of Harry E. Griffin et ux., Plaintiffs, v. Thaddeus D. McCall et al., Defendants, No. 13573, on the coming down of this writ, justify said attachment by a showing that the security held by them was or has become valueless.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; SPENCE, Justice pro tem.

SHENK, Justice.

I dissent. A copy of the complaint in the action of Griffin v. McCall is attached to the petition herein. In the first cause of action, in 26 paragraphs, the plaintiffs set forth the facts on which they rely for relief. They allege their contract with certain of the defendants for the purchase and sale of real property, under which contract written documents were executed and exchanged, and under certain of which the plaintiffs acquired the title to the real property involved. They allege at length the fraudulent representations under which they were induced to enter into the contract and acquire the property, with appropriate averments of falsity and reliance. They allege rescission of the contract, on notice, and an offer to restore upon the discovery of the alleged fraud. They pray that their recission be confirmed; that the court order a cancellation of the written instruments and compel the defendants to accept a reconveyance of the title to the property received by the plaintiffs in the transaction, and that money paid to the defendants be returned to the plaintiffs.

There can be no doubt that the pending action is a suit in equity, as distinguished from an action at law, and it is not an action on a contract, express or implied, for the direct payment of money. The second and third counts add nothing which may not be adjudicated on the trial of the main issues and are based upon the same transaction involved in the first cause of action. On the theory of the case of Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 77 A. L. R. 743, in that respect, and other cases to

the same effect, the right to an attachment should be denied. Whether the Stone Case is right or wrong on the facts there presented is entirely beside the question in this proceeding. Involved herein is an action to confirm a rescission and to obtain the benefits resulting therefrom by a decree in equity without which such benefits could not be secured. Nothing else incorporated in this complaint should be considered in determining the right to an attachment. In my opinion the peremptory writ should issue without conditions.

I concur: CURTIS, J.

1 Cal.2d 541

DAVIS v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

L. A. 14232.

Supreme Court of California.

Oct. 1, 1934.

Jury ⇐14(2)

Where complaint alleged that plaintiff was induced to enter into land purchase contract through defendants' fraudulent representations, and that plaintiff received nothing, rescinded contract, and demanded money back, and prayer of complaint was for damages in sum representing payments made, together with interest and costs, action *held* not in equity, but at law, entitling plaintiff to jury trial.

In Bank.

Action by Ethel Davis against the Security-First National Bank of Los Angeles, formerly known as the Los Angeles-First National Trust & Savings Bank, and others. From a judgment of dismissal, plaintiff appeals.

Reversed with directions.

Prior opinion, Cal.App., 23 P.(2d) 1036.

W. H. Douglass, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles (Keith Bullitt, of Los Angeles, of counsel), for respondents.

PRESTON, Justice.

Appeal from judgment of dismissal entered upon motion of defendants, after refusal of plaintiff to proceed to trial without a jury.

The complaint in this cause alleges that plaintiff was induced to enter into two contracts for the purchase of lots located in a tract of land solely by fraudulent representations of defendants relative to value of the investment and improvements to be made in the tract; that plaintiff received nothing, rescinded the contracts, and demanded her money back. The prayer of the complaint is for damages in a sum representing the payments made by plaintiff on said lots, together with interest and costs.

After issue joined, the court denied plaintiff a trial by jury upon the ground that the cause of action was equitable and not legal. The question here is whether the court erred in so ruling and, for its determination, we are required to declare the nature of the action alleged in the complaint, whether legal or equitable.

This subject is discussed fully in the cases of Philpott v. Superior Court (Cal Sup.) 36 P.(2d) 635, and McCall v. Superior Court (Cal. Sup.) 36 P.(2d) 642, this day decided. Upon that authority we have no hesitancy in declaring that the facts here alleged state an action at law.

The judgment is reversed, with directions to the superior court to proceed to a trial of the case before a jury.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; SPENCE, Justice pro tem.

We dissent: SHENK, J.; CURTIS, J.

1 Cal.App.2d 317

CITY OF MOUNTAIN VIEW v. SOUTHERN PAC. R. CO. et al.

Civ. 9118.

District Court of Appeal, First District, Division 2, California.

Oct. 10, 1934.

Hearing Denied by Supreme Court Dec. 6, 1934.

1. Municipal corporations ⇐64

Local regulations in unchartered cities are subject to and controlled by general laws (Const. art. 11, §§ 6, 11).

2. Municipal corporations ⇐592(1)

Constitutional provision continuing in cities "vested powers" of control over public utilities as to local, police, and sanitary regulations, relates to powers concerning purely municipal affairs which have been assumed by several cities in their charters, and, as to unchartered cities, refers to powers to enact local regulations not in conflict with general laws (Const. art. 11, §§ 6, 11; art. 12, § 23, as amended in 1914).

3. Railroads ⇐96

Provisions of Public Utilities Act relating to grade crossings prevail over general statutory provisions relating to opening and improvement of city streets, in case of conflict (Const. art. 11, §§ 6, 11; art. 12, § 23, amended in 1914; St. 1933, p. 2227, § 43 (a).

4. Railroads ⇐96

Unchartered city is subject to Public Utilities Act and cannot construct crossing at grade over existing railway line without first procuring consent of railroad commission (Const. art. 11, §§ 6, 11; art. 12, § 23, amended in 1914; St. 1933, p. 2227, § 43 (a).

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Suit by the City of Mountain View against the Southern Pacific Railroad Company and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

E. L. Maxwell, of Mountain View, and Kirkbride, Wilson & Brooks, of San Mateo, for appellant.

Louis Oneal and Arthur G. Shoup, both of San Jose, and Frank Thunen, of San Francisco, for respondents.

Larkin, Rathbone & Perry, of New York City, for respondent Central Hanover Bank & Trust Co.

Millbank, Tweed, Hope & Webb, of New York City, for respondent Chase National Bank of City of New York.

NOURSE, Presiding Justice.

Plaintiff sued to condemn an easement over the right of way of defendant for the purpose of widening and extending Castro street into a new street to be termed Moffatt boulevard. Before the action was instituted the consent of the state railroad commission was requested and refused because the new boulevard contemplated a crossing of the Southern Pacific Railway lines at grade. The trial court dismissed the proceeding upon the ground that such consent was a prerequisite to the construction of the crossing.

The controlling question raised on the appeal is whether an unchartered city may construct a crossing at grade over an existing railway line without having first procured the consent of the railroad commission.

Section 43 (a) of the Public Utilities Act (Deering's Gen. Laws, Act 6386), as amended in 1933 (St. 1933, p. 2227) provides in part: "No public road, highway or street shall hereafter be constructed across the track of any railroad corporation at grade * * * without having first secured the permission of the commission. * * * The commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe."

This statute was enacted in conformity to section 23 of article 12 of the Constitution which was amended in 1911 and again in 1914, and which declared, in part, as follows: "The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities * * * as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

To emphasize the purpose of this legislation section 43 of the Public Utilities Act was amended in 1933 by the insertion of a declaration that subsection (a) was enacted as a germane and cognate part of and as an aid to the jurisdiction vested in the commission, that it involved matters of health, safety, and welfare of the people of the state.

To this point we have a statute, enacted under the express authority and direction of the Constitution, designed for the protec-

tion of the safety and welfare of the general public, and declaring that no such crossing as that contemplated in this proceeding should be constructed without the permission of the railroad commission. No point is made that the Public Utilities Act is not a valid enactment, nor that the provisions of section 43 do not fully cover situations such as that presented in this proceeding.

But the appellant contends that there is an exception. It says that because it has not voted to relinquish to the railroad commission its power of control over public utilities the commission is without jurisdiction over the subject-matter. This point rests on the language of section 23 of article 12 of the Constitution, which provides that all powers respecting public utilities vested in the governing bodies of counties, cities, and towns shall cease so far as they conflict with powers conferred on the railroad commission by the Legislature, but with the proviso that any city may vote to retain such powers of control over public utilities as relate to local, police, sanitary, and other regulations "vested in any city and county or incorporated city or town," and with the further proviso that until such vote is taken "such powers shall continue unimpaired." It is then argued by appellant that since it has not voted to relinquish "such powers" to the railroad commission the commission is without jurisdiction to determine the public necessity of the improvement.

The question requires an examination of other constitutional provisions relating to the powers conferred upon cities. Section 6 of article 11 permits cities to incorporate under a freeholders' charter wherein they may assume the power "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." The same section authorizes the Legislature to provide for the incorporation of cities and towns by general laws and for this purpose the Municipal Corporations Act, with its multitude of amendments has been enacted. Deering's Gen. Laws, Act 5233. Applicable to both chartered and unchartered cities section 11 of article 11 of the Constitution provides that any city "may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

[1, 2] Turning to the proviso in section 23 of article 12, it becomes necessary to determine at the outset what powers are "vested" in the appellant city which remain "unimpaired" because the city has not voted to relinquish them to the railroad commission. The word "vested" as used in this section seems to import more than a mere grant of power by general law which is subject to amendment and repeal at any time at the will of the Legislature. It should be noted that the reference in this section to "vested" powers uses the same language found in section 11 of article 11 of the Constitution relating to "local, police, sanitary and other regulations." The section does not refer to "municipal affairs," which is the expression used in section 6 of article 11. It is a rule too well settled to require citation of authority that in all those cities not governed by charter these local regulations are subject to and controlled by general laws. The Constitution has given to those cities only which are governed by charter under section 6 the power to make and enforce laws and regulations in respect to "municipal affairs" subject only to the restrictions provided in their several charters. Prior to the 1914 amendment of this section all chartered cities were subject to and controlled by general laws except in such municipal affairs as might have been enumerated in the charter and, in the cases involving such powers, it was frequently difficult to determine whether the provisions of the particular charter were sufficiently broad to cover the "municipal affair" involved. It was to avoid this confusion that the section was amended in 1914 containing a specified grant of such local power subject only to restrictions affirmatively placed in the charter.

Section 23 of article 12 was amended in 1911. The section then contained the same provision relating to "vested" powers as is found in the 1914 amendment; but section 6 of article 11 at that time vested in chartered cities only such powers over municipal affairs as were assumed in the respective charters. As to all other municipal affairs, and as to all powers derived from section 11 of the same article, such cities were controlled by general laws to the extent that no local regulation could be in conflict therewith. Viewing the section in the light of the law existing when it was adopted it must follow that the "vested" powers relating to local, police and sanitary regulations were such powers concerning purely municipal affairs as had been assumed by the several cities in their separate charters, and that, as to unchartered cities, such powers to enact such local regulations as were not in conflict with

general laws. Hence, without reference to any particular provision of the Municipal Corporations Act under which the appellant finds its power to organize and to function as a municipal corporation, and without reference to any particular clause of the Highway Improvement Act (St. 1925, p. 849, as amended, Deering's Gen. Laws, Act 3276a) under which these proceedings were instituted, it is sufficient to say that all powers thus conferred upon the appellant are subject to the limitation of the paramount power of the Legislature to control by general law.

[3, 4] The question then resolves itself into the simple inquiry whether, if there be conflict between these acts and the Public Utilities Act, which legislation should control. The answer must be obvious that, the Legislature having been given plenary authority to enact the Public Utilities Act, unlimited by any other provision of the Constitution, the provisions of that act relating to grade crossings, being special and germane to the control of the utility, must control over general provisions relating to the opening and improvement of city streets. See, generally, Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 449, 166 P. 351; City of San Bernardino v. Railroad Comm., 190 Cal. 562, 566, 213 P. 980; In re Iverson, 199 Cal. 582, 586, 250 P. 681; Pac. Tel., etc., Co. v. Eshleman, 166 Cal. 640, 658, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822.

As the appellant does not come within the limitations of section 6 of article 11 of the Constitution relating to municipal affairs, the cases which have struggled with that problem do not demand comment. It is sufficient that the appellant, being controlled by general laws in municipal as well as state-wide affairs, is without power to pass any local or police regulation in conflict with general laws and hence is subject to the control of the Public Utilities Act.

The reasonableness of this conclusion is emphasized by the facts appearing of record in this litigation. The city proposed the construction of the boulevard for the purpose of attracting trade from the newly established naval air base; the state, acting through the railroad commission, refused its permit to cross the railway lines at grade because the new boulevard would provide an attractive connection between two main motor vehicle highways; one the Bay Shore highway paralleling the railway on the east, the other the San Francisco highway paralleling the railway lines on the west. The state was thus concerned with the safety and welfare of the general public using these two highways as well as those using the railway. The city was concerned solely with the advancement of trade within its own borders. The simple statement of the controversy demands a holding that the power of regulation and control must rest with the state.

The judgment is affirmed.

We concur: STURTEVANT, J; SPENCE, J.

1 Cal.App.2d 365

SANFORD et al. v. GRADY et al. *

Civ. 5064.

District Court of Appeal, Third District, California.

Oct. 11, 1934.

Rehearing Denied Nov. 10, 1934.

1. Automobiles ⇨195(2)

Son who upon mother's request started to drive guest home in mother's automobile *held* agent of mother, who was liable for son's willful misconduct resulting in injuries to guest (St. 1931, p. 1693, § 141¾).

2. Automobiles ⇨244(20)

Evidence, in action for guest's death, sustained implied finding that driver of automobile who attempted to pass truck at 45 miles per hour on left, although he saw automobile approaching only 200 feet away, was guilty of "willful misconduct" (St. 1931, p. 1693, § 141¾; p. 2125, § 124).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

3. Automobiles ⇨244(20)

Motorist driving at about 25 miles an hour on right side of road *held* not guilty of negligence contributing to death of guest in automobile that swung out to left of truck at 45 miles an hour and attempted to pass, though driver saw approaching motorist only 200 feet away (St. 1931, p. 2125, § 124).

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by George Sanford and others against Charles S. Grady and others. From a judgment for plaintiffs, the defendants

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 37 P.(2d) 475.

Charles S. Grady and Laura C. Grady appeal, and the defendants Gertrude Steger and Richard Steger also separately appeal.

Judgment against Charles S. Grady and Laura C. Grady reversed, with directions, and judgment against Gertrude Steger and Richard Steger affirmed.

George R. Freeman, of Willows, for appellants Charles S. and Laura C. Grady.

Clark & Heafey, of Oakland, Chenoweth & Leininger, of Redding, and James W. Hughes, of Oakland, for appellants Gertrude and Richard Steger.

Jesse E. Nichols and Clifton Hildebrand, both of Oakland, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

Separate appeals are prosecuted in this case from a joint judgment which was recovered pursuant to the verdict of a jury in an automobile casualty case against the respective owners and operators of two different machines, in one of which the plaintiffs' intestate was riding as a guest. It was assumed the drivers of the vehicles were implicated in concurrent negligence and willful misconduct which resulted in the death of the guest.

Mrs. Edith Sanford, a widow, was visiting her sister, Mrs. Gertrude Steger, at Red Bluff. Mrs. Steger owned a Plymouth coupé. When Mrs. Sanford was ready to return to her home at Hayward, Mrs. Steger directed her son Richard to take her automobile and drive his aunt back to her home. Mrs. Sanford, as a guest in her sister's automobile, started on her return journey on the afternoon of September 9, 1931. Richard did the driving. It was a clear, warm day. They followed the state highway south from Red Bluff over fairly level ground for a distance of about one mile. At this point there is a sharp depression of the roadway where it intersects a substantial swale. From the level highway, until one reaches a point near the dip in the roadway, a vehicle passing through this swale is concealed from view. The highway consists of a concrete strip 15 feet in width with a 6-foot graveled shoulder on either side. Richard Steger was familiar with this road and knew of the depression therein.

The Plymouth car was running 45 miles an hour when it overtook a light truck traveling ahead of him in the same direction at the rate of 40 miles an hour. When the Plymouth car reached a point about 200 feet from the brow of the declivity, Richard suddenly pulled his machine out from behind the truck to the easterly side of the highway and attempted to pass it. Almost immediately he observed a Chrysler machine approaching over the crest of the hill. This Chrysler car belonged to Charles Grady of Napa. It was being operated by his wife, Laura Grady, who was accompanied by her friend, Mrs. Mount. They were driving carefully at a rate of 25 miles an hour, or at least not to exceed 30 miles an hour. After discovering the Chrysler car as it came into view over the brow of the hill, at which time the front wheels of the Plymouth machine were opposite the rear wheels of the truck, instead of dropping back behind the truck, Steger sounded his horn and accelerated the speed of his machine in an attempt to cut in ahead of the truck. A collision occurred between the Plymouth and the Chrysler machines on the east side of the paved portion of the highway opposite the truck which Steger had not succeeded in passing. Mrs. Sanford, who rode as a guest in the Plymouth car, was seriously injured as a result of which she died within a few days.

This suit for damages was instituted against Gertrude Steger and her son Richard pursuant to the provisions of section 141¾ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580, and amended by St. 1931, p. 1693), for alleged willful misconduct of the driver of the Plymouth machine. Mr. and Mrs. Charles Grady were joined as parties defendant on the theory that they were guilty of concurrent negligence which co-operated with the willful misconduct of Richard Steger in causing the collision which resulted in the death of Mrs. Sanford. It was charged that Richard was the agent of his mother in driving the Plymouth car, and that Mrs. Grady was the agent of her husband in driving his Chrysler machine. The cause was tried with a jury. Motions for nonsuit, directed verdicts, and for the rendering of a judgment under the provisions of section 629 of the Code of Civil Procedure notwithstanding the verdict, were made by the respective defendants and denied. A joint judgment for $20,000 was then rendered against the defendants in accordance with the verdict. From that judgment the Stegers and the Gradys have perfected separate appeals.

On appeal, Mrs. Steger and her son Richard contend that the evidence fails to show willful misconduct in the operation of the Plymouth coupé, and that it fails to show that Richard was driving that car as the

agent of his mother at the time of the accident.

On their appeal, Mr. and Mrs. Grady assert there is no evidence of negligence on the part of the operator of their machine; that there is a total absence of evidence that Mrs. Grady was driving the Chrysler car as the agent of her husband; and that, in any event, the judgment against the owner of that machine is limited by the provisions of section 1714¼ of the Civil Code to the sum of $5,000.

[1] There is no doubt Richard Steger was driving the Plymouth coupé at the time of the accident as the agent of his mother, and that she is therefore liable for his willful misconduct in operating the machine. 7–8 Huddy's Enc. of Auto. Law, p. 268, § 101; Cal. Jur. Auto. Supp. 1928, p. 293, §§ 125–129; Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747; Fahey v. Madden, 56 Cal. App. 593, 206 P. 128. Gertrude Steger testified in that regard:

"I asked Richard if he would take her (Mrs. Sanford) to Hayward. * * * My sister's school began on Thursday and she had to be home by Wednesday evening. * * * And he consented to take her to Hayward. * * *

"Q. And you provided him with * * * your automobile, for that purpose? A. Yes."

The record contains no evidence to the contrary. This is a sufficient showing of agency to charge the owner with the willful misconduct of the operator of the machine. In 7–8 Huddy's Encyclopedia of Automobile Law, p. 268, § 101, it is said: "Where the driver is authorized to invite a person to ride with him, or where the passenger is a guest of the owner, the negligence of the driver causing injury to such invitee may be charged against the principal."

[2] We are of the opinion there is adequate evidence to support the implied finding of the jury to the effect that Richard Steger, the driver of the Plymouth coupé, was guilty of willful misconduct in attempting to pass the truck under the circumstances and in the manner which he did, resulting in the death of Edith Sanford, who was then riding as a guest in the car.

There is very little conflict of evidence regarding the conduct of Richard Steger in attempting to pass the truck. There is no doubt that with knowledge on his part of the presence of the declivity in the roadway over which he should have anticipated that an approaching vehicle might come at any moment, he deliberately attempted to pass the truck in reckless disregard to the safety of his passenger. When he actually saw the approaching Chrysler car within less than 200 feet, according to his own admission, instead of pulling his machine back behind the preceding truck which was running 40 miles an hour, as he could have easily done, he persisted in attempting to do the impossible thing of cutting in ahead of the truck by accelerating his speed, knowing that the approaching car could escape a collision only by being forced off the highway into the dirt on the border thereof. There is substantial evidence that in passing the truck, the rear wheels of the Plymouth car skidded out upon the dirt shoulder and occupied a position making it impossible for the Chrysler machine to pass his car, even by running out to the extreme edge of the highway. Mr. Shimonek, who was driving the truck, said in that regard: "It would be approximately 40 feet from the point where the accident occurred, * * * I saw the car * * * clear over on the * * * the back end of the car was skidding to the left * * * in the gravel clear off the highway, * * * just opposite the back end of my truck."

Mrs. Grady testified in that regard:

"As I came up over the hill I saw a truck traveling in a southerly direction. * * * It was very close to me. * * * It (the Plymouth car) shot out across in front of me to the left hand (east) side of the road and immediately came right back and struck me. * * *

"Q. About how fast were you going when you first saw the Plymouth car? A. About twenty-five miles an hour. * * * I jammed on my brakes but I didn't have a chance. * * * I saw it when it shot out from behind the truck. * * * It came right out from back of the truck as though it was attempting to pass, and on across the highway to the left hand (east) side in front of me. * * * Just about here (indicating) is where the other machine crossed the highway. * * * This is the dirt road out here. This car crossed in front of me, * * * circled round, * * * he was going at an excessive rate of speed, and I thought when he got over on the left hand side of the road that he would keep on straight. If he had, the accident would never have happened, but he turned his car, and when he turned his car that's when I saw him coming toward me, and I put on my brakes."

The reckless disregard to safety with which Richard Steger attempted to pass the truck and his knowledge and appreciation of the

danger attending his conduct is evidenced by his own testimony. He said:

"Q. You were driving about 45 miles an hour, were you? A. Yes, forty to forty-five.

"Q. As you followed the truck? A. Yes.

"Q. And the truck driver was driving about forty to forty-five miles per hour? A. Yes, forty.

"Q. You decided, when you were about some two hundred feet from the top of this hill, that you would pass that truck, ahead of you, that's correct, isn't it? A. Yes. * * * I just pulled out, my front wheels caught up with his hind wheels, when I caught sight of that car coming up.

"Q. * * * You saw ahead of you then an automobile about two hundred feet away, is that correct? A. Yes.

"Q. And at that time how fast were you traveling? A. About forty-five. * * * I sounded the horn; sounded the horn twice. * * * After I see that car coming up the hill I increased my speed to cut quick in. * * * We run parallel, the little truck and I. * * *

"Q. * * * After you sounded the horn, you stepped on the gas? A. Yes, sir.

"Q. Intending to cut in ahead of that truck? A. Yes.

"Q. Is that correct? A. That's correct.

"Q. And you saw the other car coming directly toward you? A. Yes.

"Q. Did you know that if the other car didn't turn out there would be an accident? A. Yes, I knew that. * * *

"Q. You knew if the other car didn't pull in to the dirt there would be a collision? A. * * * Yes, if they didn't.

"Q. You thought it would be easier for the other car to pull into the dirt than there would be for you to stop and go around the rear of the truck? A. Yes sir. * * * I didn't want to give any ground because I know another car might come up that hill. * * *

"Q. Didn't (you) figure then that you would make the other car get off into the dirt? A. Yes, that (is) what I thought, that it would pull toward its right. * * *

"Q. Neither one of you got out of the way at all? A. Not that it looked like. * * *

"Q. At the time you first saw the other car * * * you had time, did you not, if you wanted to, to slow up and go in back of the truck? A. Yes.

"Q. But you decided to go straight ahead? A. Yes. * * *

"Q. At the time you first saw the machine of Mrs. Grady it was on its own side of the highway? A. Yes.

"Q. At the time you first saw Mrs. Grady's car your car was on the east side of the highway? A. Yes.

"Q. And on the east side of the highway there isn't sufficient room for two machines to pass, is there? A. No."

Richard Steger admits that he attempted to pass the truck, which was going at least 40 miles an hour, within the space of 200 feet which intervened between his car and the crest of a grade. This was a clear violation of the provisions of section 124 of the California Vehicle Act. The truck was running nearly as fast as his car was traveling. At the rate of 45 miles an hour he would traverse the entire distance to the brow of the hill 200 feet away, in three seconds. It was little more than half that distance to the point where the collision occurred. He knew there was no possibility of his passing the truck before it reached the declivity. He saw the approaching car and realized there would be a collision unless the Grady car ran off into the ditch. He was then so far out on the shoulder of the road as to make that impossible. Still he sounded his horn, increased his speed, and plunged directly into the approaching car. He knew that if the approaching car did not pull out into the dirt there would be a collision. Under such circumstances the jury was warranted in finding that Richard Steger was guilty of willful misconduct.

"Willful misconduct" is defined in the case of Norton v. Puter (Cal.App.) 32 P.(2d) 172, 174, in which case a hearing was denied by the Supreme Court, as follows:

"Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512; Olson v. Gay, 135 Cal. App. 726, 27 P.(2d) 922; Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520; Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279. Webster's New International Dictionary, p. 1379, defines misconduct as 'wrong or improper conduct; bad behavior; unlawful behavior or conduct; malfeasance.' 40 C. J. p. 1221. Willfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences. It

Helme v. Great Western Milling Co., supra, it is said:

"'"Willful misconduct" means something different from and more than negligence, however gross. The term "serious and willful misconduct" is described by the Supreme Judicial Court of Massachusetts as being something "much more than mere negligence, or even gross or culpable negligence," and as involving "conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." In re Burns, 218 Mass. 8, Ann. Cas. 1916A, 787, 105 N. E. 601. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute "willful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central, etc., Ry. Co., 165 Ala. 407, 51 So. 792.'"

[3] This brings us to the problem of determining whether there is substantial evidence to support the implied finding of the jury to the effect that Mrs. Grady was guilty of negligence which was proximately concurrent with the willful misconduct of Richard Steger in producing the accident which resulted in the death of Mrs. Sanford. We are satisfied, from a careful examination of the entire record, there is no substantial evidence to support the judgment against Charles or Laura Grady. We are unable to find any act or omission on the part of Mrs. Grady which is contrary to that which might be expected of a reasonably prudent person under like circumstances. No such act or omission is suggested by the respondents. She was ascending the highway to the crest of a grade at a very moderate rate of speed. She was on her proper side of the highway. She had a right to assume that an approaching machine would not deliberately drive upon her side of the highway in violation of section 124 of the California Vehicle Act (as amended by St. 1931, p. 2125). When she reached the top of the grade and caught sight of the approaching Plymouth car within 200 feet distance traveling out upon the dirt shoulder and coming toward her at an excessive rate of speed, as a reasonable person, she had a right to assume that the driver of that car would observe the impossibility of passing the rapidly moving truck, and that he would drop back behind that vehicle. After reaching her position at the top of the grade, where she first saw the approaching machine about 200 feet away, less than two seconds of time elapsed before the collision occurred. The moment that she realized the serious predicament in which she was placed and that the driver of the Plymouth car persisted in coming onward at a high rate of speed, she applied her brakes, but was unable to avert the collision. Clearly there is no evidence in the record of a single act or omission on her part in conflict with what would have been expected of a reasonably prudent person under similar circumstances. There is no substantial evidence upon which the jury was warranted in finding that Mrs. Grady was guilty of negligence which contributed in the slightest degree to the accident. The judgment against Charles and Mrs. Grady is therefore not supported by the evidence.

While it is true there is no evidence that Laura Grady was acting as the agent of her husband in driving his automobile at the time of the accident, and under no circumstance could he be held liable for the accident which occurred out of his presence, under the provisions of section 1714¼ of the Civil Code, beyond the maximum sum of $5,000, these issues become immaterial in view of the fact that we are persuaded Mrs. Grady was guilty of no negligence which creates a liability against either her or her husband.

The judgment is affirmed against Gertrude Steger and Richard Steger. The judgment against Charles S. Grady and Laura C. Grady is reversed, with directions to the trial court to enter judgment in their favor.

We concur: PULLEN, P. J.; PLUMMER, J.

1 Cal.App.2d 262

PEOPLE v. PAZ et al.

Cr. 2521.

District Court of Appeal, Second District, Division 1, California.

Oct. 6, 1934.

As Modified on Denial of Rehearing Oct. 17, 1934.

1. Criminal law ⇐1081

Notice of appeal from order denying motion for new trial must be dismissed as too late, where not made until fifteen days after denial of motion.

2. Homicide ⇐234(5), 236(1)

Evidence in murder trial *held* sufficient to warrant jury's findings that defendants conspired to attack deceased and that latter's death was direct result of such conspiracy.

3. Homicide ⇐234(5)

In murder prosecution, conspiracy may be proved by circumstantial evidence.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Leo Paz, Candie Arce, John Lopez, Ralph Ablog, and Nicholas Villegas were convicted of manslaughter, and defendants Lopez and Ablog appeal.

Affirmed, and appeal from order denying motion for new trial dismissed.

Frederic H. Vercoe, Public Defender, and George A. Benedict, Deputy Public Defender, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

PER CURIAM.

[1] Appellants Lopez and Ablog, together with three other defendants who have not appealed, were accused of the murder of one Tabajonda, and all were convicted of manslaughter. A motion for a new trial was denied on September 29, 1933, and judgments were pronounced on October 13, after denial of the applications of defendants for probation. The notice of appeal from the judgments and from the order denying motion for a new trial, by defendants Lopez and Ablog, made in writing, was filed October 14. It thus appears that the notice of appeal from the order denying motion for new trial was too late, and for that reason must be dismissed. Therefore we have before us the appeal of only these two defendants from the judgments.

[2, 3] The sole ground of appeal is that the judgments should be reversed and causes remanded for new trial because the verdicts of the jury are contrary to and unsupported by the evidence and are contrary to law. Specifically, the only questions presented by appellants for consideration by this court are, whether a conspiracy existed among the several defendants to attack Tabajonda; and, if so attacked by them, whether the death of Tabajonda was the result of that conspiracy.

The evidence shows that on the night when Tabajonda was killed, a crowd of Filipino boys came out of a dance hall and a fight occurred which is summarized by counsel for appellants as follows: "As the deceased and two other boys reached the bottom of the stairs, one of the boys in the crowd, not one of the defendants in the case, struck one of the boys with the deceased but not the deceased. At once the fight was on and apparently everybody in the crowd engaged in the mêlée, which finally resulted in the death of Tabajonda, the deceased."

However, although the testimony may not be as clear and concise as might be desired, it is thought that it fairly justified a conclusion by the jury of the following facts, to wit: As Tabajonda and two companions, named, respectively, Cusilet and Aliado, together went down the stairs of the dance hall, which was located on the second floor of the building, they were met at the foot of the stairs by one Terrio and the five defendants in the action. At once, Terrio struck Cusilet with his fist, which blow knocked Cusilet to the sidewalk. While Cusilet was still lying on the sidewalk, both Terrio and appellant Ablog attempted to kick Cusilet; that after Tabajonda reached the foot of the stairs, he attempted to run away, but was stopped by Terrio, who stabbed Tabajonda in the back. That blow, however, was not the cause of Tabajonda's death. He did not fall when he was stabbed, but was immediately attacked and struck by all the defendants, except Ablog. As a result of the blows, Tabajonda fell to the sidewalk, and appellant Ablog advanced upon Aliado and made a motion as if to stab Aliado with a knife. Soon after Tabajonda fell, his body was discovered by the police. The autopsy showed that death resulted to Tabajonda from a blow received by him on his head. During the greater part of the time when Tabajonda was being attacked, appellant Ablog was menacing Aliado, who, as

hereinbefore stated, was one of Tabajonda's companions as they descended the stairs from the dance hall.

This court is of the opinion that the foregoing evidence was sufficient to warrant the conclusion by the jury that Terrio and the five defendants herein had entered into a conspiracy to attack Tabajonda and his two companions; and that Tabajonda's death was the direct result of such conspiracy. The authorities are numerous to the effect that proof of a conspiracy, like any other fact, may be established by circumstantial evidence. People v. Lane, 101 Cal. 513, 36 P. 16; People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L. R. A. 193; People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Cory, 26 Cal. App. 735, 148 P. 532; People v. Correa, 44 Cal. App. 634, 186 P. 1055.

The judgments are affirmed. The appeal from the order by which the motion for a new trial was denied is dismissed.

MARKS, Justice.

Judgment in favor of defendant was entered in the court below on December 26, 1933, and notice of entry of judgment was served on December 29, 1933. On January 18, 1934, plaintiff gave notice of appeal to this court. On June 1, 1934, the trial judge terminated proceeding to obtain and settle a bill of exceptions and obtain a transcript. Nothing has been filed here except a certificate of the county clerk setting forth these facts and the defendant's motion to dismiss the appeal, which must be granted.

Appeal dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.App.2d 379

CIANI v. DUBUQUE FIRE & MARINE INS. CO.

Civ. 1360.

District Court of Appeal, Fourth District, California.

Oct. 11, 1934.

Appeal and error ⇐351(2)

Appeal must be dismissed where nothing was filed with reviewing court save county clerk's certificate setting forth steps leading to appeal and trial judge's termination of proceeding to settle bill of exceptions.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Florence Ciani, also known as Florence Cioni, against the Dubuque Fire & Marine Insurance Company. Judgment for defendant, and plaintiff appeals.

Appeal dismissed.

John D. Chinello and Lindsay & Gearhart, all of Fresno, for appellant.

Redman, Alexander & Bacon, of San Francisco, and Conley, Conley & Conley, of Fresno, for respondent.

1 Cal.App.2d 425

LOWE et al. v. CITY OF SAN DIEGO.

Civ. 1159.

District Court of Appeal, Fourth District, California.

Oct. 15, 1934.

Appeal and error ⇐786, 1126

Where motion to dismiss appeal or affirm judgment on ground that appeal was frivolous, taken for delay only, and that questions presented were unsubstantial, was made for purpose of advancing hearing of appeal on merits, or to avoid preparation of brief, and briefs on motion showed that careful study of records would be required, motion was denied (District Court of Appeals, Rule 5, § 3).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Harry S. Lowe and another against the City of San Diego. Judgment for plaintiffs, and defendant appeals. On motion by plaintiffs to dismiss appeal or affirm the judgment.

Motion denied.

C. L. Byers, City Atty., Gilmore Tillman, Asst. City Atty., and James J. Breckenridge, Deputy City Atty., all of San Diego, for appellant.

F. L. Richardson and Edgar B. Hervey, both of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for injuries alleged to have been received because of the defective or dangerous condition of a street. In its opening brief the appellant raised several questions of law and several questions as to the sufficiency of the evidence. The respondents moved to dismiss the appeal or affirm the judgment under rule V, section 3, on the grounds that the appeal is frivolous, taken for delay only, and that the questions presented are so unsubstantial as not to need further argument. This motion of the respondents was accompanied by a typewritten brief of 44 pages, citing authorities and fully arguing the merits of the appeal.

It appears from the opening brief and also from the brief filed by the respondents in support of this motion that a careful study of the record will be required, in which the court should have the benefit of the respondents'-assistance. As was said in Smith v. Rothschild (Cal. App.) 34 P.(2d) 1050: "When this motion is made for the purpose of advancing the hearing of an appeal on the merits, or to avoid preparation of a brief under the rules, it should be denied. The motion in this case is of that character."

The motion is denied.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.App.2d 438

ILLINGSWORTH v. BOYD.

Civ. 1455.

District Court of Appeal, Fourth District, California.

Oct. 17, 1934.

Automobiles ⇨244(20)

Evidence, in action for injuries to guest in defendant's automobile when it skidded and crashed into guard rail while rounding curve, *held* sufficient to support trial court's finding that defendant was not guilty of willful misconduct (St. 1931, p. 1693, § 141¾).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Blanche Illingsworth, by and through her guardian ad litem, against Adalaide Boyd. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. P. Nelson, of Santa Ana, for appellant.

Fred A. Wilson, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

Shortly after noon on July 17, 1932, the plaintiff was injured while riding in an automobile driven by the defendant. It is conceded that the plaintiff was at the time the guest of the defendant, and this action is based upon the theory of willful misconduct. The defendant and her guest started at Pine Knot and were proceeding westerly toward San Bernardino. While rounding a curve some two miles distant from their starting point, the automobile in which they were riding skidded and crashed into a guard rail, resulting in painful injuries to the plaintiff. In this action, which followed, the court found in all respects in favor of the defendant, and the plaintiff has appealed from the judgment entered.

The only point raised is that the findings are not supported by the evidence. The findings attacked are to the effect that the respondent was not guilty of willful misconduct, it being urged by the appellant that such willful misconduct conclusively appears from the evidence. While the appellant's brief sets forth certain facts which are said to be shown by the evidence, none of these asserted facts are supported either by a quotation from or a reference to the transcript.

On the other hand, an examination of the transcript discloses facts considerably at variance with those set forth by the appellant, which may be briefly stated as follows: At the point where the accident occurred there was a rather sharp curve which turned to the left as a driver approached from the east, from which direction this car was coming. The pavement at that point was twenty feet wide and some ten or twelve feet to the right of the pavement was a fence or guard rail. The road was straight for at least three-quarters of a mile to the east of this curve and a car approaching from this direction would be coming slightly upgrade. One witness testified that this grade was about 2 per cent. The appellant testified that at a point about one-half mile before they reached the scene of the accident she looked at the speedometer; that

at that time they were traveling at approximately forty miles an hour; that she then asked the respondent if she could drive as she knew the road better; and that the respondent said: "No, she knew her car better than I and her brakes were not in very good condition." A written statement made by the appellant on the day after the accident occurred and signed by her was introduced in evidence, in which she said: "On Sunday, July 17, 1932, Miss Boyd, who had been staying with us at Big Bear, offered to give me a ride in her Ford roadster, to San Bernardino so I could visit my father. She had to be back in Riverside for work later in the day. We left Big Bear at about 1:30 p. m., and started down the State Highway thru Big Bear Valley. We had gone about 1½ to 2 miles when we approached what is known as the 'I-S' curve, which is near what is called the 'I-S' ranch. We were going between 35 and 40 miles per hour coming down the straight-away approaching the curve. Just as we reached the beginning of the curve, which turned to our left, a large car coming in the opposite direction made a wide turn around the curve and seemed to be coming directly toward us. Miss Boyd swerved to her right apparently to avoid being hit by this car. In turning to the right, Miss Boyd's car got off the pavement into the loose sand on the shoulder of the road, the sand threw the car out of control and the rear end swung to the right and we slid sideways into the guard fence rails along our right side of the road." The respondent's version is not materially different and is as follows: "Before we arrived at the curve there was a long slope. Coming up on the curve I noticed a large car coming toward us. I do not know the name of it, a large car, and it seemed to me it was coming directly toward us. I turned out to the right, and in doing so I hit the gravel and skidded, and the first thing I knew we were stopped, and had gone into the rail."

To say the least, it cannot be held, as a matter of law, that these facts conclusively show willful misconduct on the part of the respondent within the meaning of section 141¾ of the California Vehicle Act, St. 1923, p. 517, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693. Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279; Turner v. Standard Oil Co., 134 Cal. App. 622, 25 P.(2d) 988. While negligence may appear with reference to the condition of the brakes and perhaps in other respects, it certainly cannot be said that the only possible inference from this evidence is that the respondent knew, or should have known, that an injury to her guest would probably result from anything she did or failed to do. Aside from any other consideration, a question of fact was presented which was for the trial court and the evidence supports the finding thereon. Had the findings been to the contrary, a much more serious question as to the sufficiency of the evidence might have been presented.

The judgment is affirmed.

We concur: MARKS, J., JENNINGS, J.

1 Cal.App.2d 437

In re COON.

LONG v. SCHAUB.

Civ. 1458.

District Court of Appeal, Fourth District, California.

Oct. 16, 1934.

Appeal and error ⇨787

Where more than 14 months elapsed after filing of clerk's transcript on appeal without filing of anything further and appellant filed no briefs and made no response after District Court of Appeal required appellant to show cause why appeal should not be dismissed, appeal was dismissed (Rules for the Supreme Court and District Courts of Appeal, rule 5, § 1).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Proceeding in the matter of Ella Jacqueline Coon, a minor, in which Elyda De Long and another petitioned for an order declaring the named minor a ward of the juvenile court and placing her in the custody of petitioners, contested by Alice Schaub. From an adverse order, the contestant appeals.

Appeal dismissed.

James W. Reitz, of Los Angeles, for appellant.

Head, Wellington & Jacobs, of Santa Ana, for respondent.

JENNINGS, Justice.

On June 16, 1933, Alice Schaub appealed from an order of the superior court of Orange

county declaring Ella Jacqueline Coon, a minor, to be free from the custody and control of Alice Mary Schaub and Jake Schaub, her parents, and depriving said parents of the custody of said minor and ordering that the said minor be made a ward of the juvenile court and placed in the custody of Elyda De Long and Keith De Long, who had petitioned said court for the rendition of such judgment. The clerk's transcript on appeal was filed in this court on June 30, 1933. As nothing further was filed, this court, on its own motion, on September 13, 1934, ordered appellant to show cause why her appeal should not be dismissed. No response has been made to this order and no briefs have been filed. Under the authority of section 1 of rule 5 of the Rules for the Supreme Court and District Courts of Appeal, the appeal herein is therefore dismissed.

We concur: BARNARD, P. J.; MARKS, J.

SKIDMORE v. GORGAS, County Auditor.*

Civ. 5177.

District Court of Appeal, Third District, California.

Oct. 16, 1934.

Rehearing Granted Nov. 15, 1934.

1. Mandamus ⇐102(2)

One asserting claim against county for services *held* not entitled to mandamus to compel issuance of warrant in payment, where answer denied that county had funds with which to pay claim and no evidence as to county's ability to pay was introduced.

2. Mandamus ⇐105

Writ of mandamus to compel payment of claim may be denied where there are no funds available for payment.

Petition by C. E. Skidmore for a writ of mandamus to be directed to Edward L. Gorgas, as Auditor of Tuolumne County.

Writ denied.

Frank L. Guerena, of San Francisco, for petitioner.

C. H. Grayson, Dist. Atty. of Sonora, for respondent.

Mr. R. L. THOMPSON, delivered the opinion of the Court.

This is a petition for a writ of mandamus to compel the auditor of Tuolumne county to audit a claim and issue his warrant therefor in payment of services which were performed pursuant to a written contract with the board of supervisors of that county.

The petitioner alleges that on December 7, 1931, he entered into an agreement with the county of Tuolumne upon the terms and conditions expressed in a resolution which was duly passed by the board of supervisors as follows:

"Be It Resolved, that C. E. Skidmore be and he is hereby authorized to check the tax records of Tuolumne County, California, of property on which the taxes were first delinquent for the fiscal year 1925–1926 or are delinquent for prior years, which do not show redemption, cancellation, or sale by the state, on deeds or certificates of sale; said party shall also submit reports covering all such delinquencies, together with recommendation as to further disposition of the same and shall submit lists upon which requests for authorization from the State Controller may be made to advertise and sell as provided for by section 3897 of the Political Code of the State of California.

"Said County of Tuolumne will pay said C. E. Skidmore for such services an amount equal to fifty per cent (50%) of the County of Tuolumne's portion of all moneys received by the said County of Tuolumne from and after this date for redemption or sale of said property above referred to, payments thereof to be made at the regular monthly meeting of the board for the allowance of claims, upon the statement of the County Auditor showing the amount paid in on redemptions and sales of property covered by this contract, subsequent to the last payment thereon; the final payment thereof to be made to said C. E. Skidmore when he has furnished an affidavit setting forth that he has checked, or caused to be checked, the records of the United States Land Office, the State Surveyor's office, the State Controller's office, County Auditor's office and County Recorder's office of the County of Tuolumne to the extent necessary for a complete performance of the things required to be done and performed by him under this resolution, and has also submitted to the Board of Supervisors of Tuolumne County his report and recommendations as hereinabove provided.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 43 P.2d 1110.

"Dated: December 7, 1931."

On May 6, 1930, the petitioner entered into a similar contract with Tuolumne county, evidenced by a resolution of the board of supervisors in substantially the same language which is employed in the preceding quoted resolution.

The petition alleges that, pursuant to these contracts, the stipulated services were fully performed by checking the tax records of that county together with the records of the United States land office, the state surveyor's office, and the state controller's office, for the years specified, and by reporting to the board of supervisors the dates and amounts of all delinquent taxes, together with descriptions of the properties involved, the dates of redemptions from sales, and the amounts of taxes subsequently paid thereon.

Paragraph VII of the petition alleges that on January 12, 1933, a verified claim for the sum of $4,667.31, for services performed pursuant to the contracts heretofore mentioned, was presented to and allowed by the board of supervisors, but that the respondent refuses to audit or draw his warrant upon the county funds in payment of the claim. Paragraph IX of the petition alleges that "said county has moneys available for the payment of said claim and demand with which said warrant may be paid."

[1, 2] The answer admits the allegations of paragraph VII of the petition, but denies that the county of Tuolumne has money available with which to pay the claim.

The respondent concedes the validity of the contracts which are involved in this proceeding, and the liability of the county for the payment of legitimate services of the petitioner pursuant to those contracts. Skidmore v. West, 186 Cal. 212, 199 P. 497. It is argued, however, that Exhibit C which is attached to the petition, and the claim which was allowed by the board of supervisors contain many items of taxes which were paid in transactions wherein the county officers had previously performed all the duties with relation thereto which the petitioner claims to have subsequently performed, and that the compensation of the petitioner should be confined to the labor necessary to secure the information designated in the contracts, exclusive of transactions wherein that service had been previously performed by the county officers.

It is impossible for us to determine from the record which items and charges as indicated by Exhibit C represent transactions in which the desired services were previously performed by the county officers. The respondent fails to designate these challenged items in his answer or otherwise. This information should be supplied to this court if the merit of this cause is to be determined in the light of that contention. The petition was filed in this proceeding May 24, 1934. The time allowed for filing the final brief has expired. No such brief has been filed. This court is without facts or adequate briefs upon which the merit of this proceeding may be determined.

The answer contains a flat denial that the county of Tuolumne has funds with which to pay this claim. No evidence was adduced as to the ability of the county of Tuolumne to pay the claim. It is an established rule of law that a writ of mandamus may be denied where there are no funds available with which to pay an alleged claim. Nelson v. Anderson-Cottonwood Irr. Dist., 51 Cal. App. 92, 196 P. 292; Sutro Heights Land Co. v. Merced Irr. Dist., 211 Cal. 670, 296 P. 1088; 38 C. J. 556, § 28; 18 R. C. L. 139, § 55.

The writ is denied.

We concur: PULLEN, P. J.; PLUMMER, J.

1 Cal.App.2d 433

MEIS v. COLLINS et al.

Civ. 1144.

District Court of Appeal, Fourth District, California.

Oct. 16, 1934.

1. Partnership ⇐332

Assignee's motion to set aside order appointing referee to audit partnership books and act as receiver was properly stricken, where assignee was not bona fide owner of complaining partner's claim but only interested in rendering services for him as an attorney.

2. Appeal and error ⇐113(1)

In suit for dissolution of partnership and for an accounting, order striking motion to set aside an order appointing referee to audit partnership books and act as receiver was not appealable (Code Civ. Proc. § 963).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Appeal and error ⇐113(1)

When an order is appealable, an order denying motion to set order aside is not appealable (Code Civ. Proc. § 963).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Suit by Charles Meis against E. Collins and Michael Salmen. From an order, J. Edgar Ross, assignee of the plaintiff, appeals.

Appeal from order dismissed.

J. Edgar Ross, of Brawley, in pro. per.

C. L. Brown, of El Centro, for respondents.

GRIFFIN, Justice pro tem.

The record indicates that a partnership was formed between plaintiff Chas. Meis, defendant E. Collins, and one Angelo Calianos in July, 1930, in Imperial county, for the purpose of carrying on a business known as the Home Bakery; that thereafter Calianos died and the other two partners carried on the business as surviving partners, paying certain claims for funeral expenses of the deceased partner; that no accounting was had between the surviving partners to determine their respective interests; that the sole contribution of Calianos had been his personal services rendered to the partnership prior to his illness; that on the 1st day of September, 1930, defendant Collins sold to one Michael Salmen, codefendant, a one-third interest in the business; that thereafter the three parties entered into a new partnership agreement in writing and have carried on the business under the name and style of Home Bakery, E. Collins, Proprietor; that defendant Collins received as consideration for the one-third interest the sum of $3,500, which sum, the plaintiff claims, defendant Collins failed, neglected, and refused to account for to the partnership and kept said sum to his own use in fraud of the right of plaintiff Chas. Meis.

Further claim is made that the original surviving partner had from the beginning assumed the management of the business and handled all of the money of the partnership and failed to keep correct accounts and had used the partnership money in his private business and speculation.

The two defendants answer jointly and admit an agreement of sale, one to the other, for $3,500 of a third interest in the business, after the death of the first partner, but deny that plaintiff has any interest in that sum; and deny generally all accusations of misappropriation or mismanagement. Both complaint and answer pray for a dissolution of the partnership and an accounting.

A petition for the appointment of a referee was set for hearing on the 10th day of March, 1933, and on that day the attorney for plaintiff was dangerously ill. Another attorney appeared for him and a tentative agreement was entered into whereby Leonard Buster was appointed referee for the purpose stated in the petition. Plaintiff Meis subsequently refused to agree to the appointment of Leonard Buster and accordingly would not stipulate to his appointment.

On the 14th day of March, 1933, the court made an order appointing Leonard Buster as referee to audit the books of the partnership and to act as receiver, fixing his bond in a certain amount.

On March 21, 1933, the plaintiff Meis served notice on all parties that he did sell, by an instrument in writing, to J. Edgar Ross, all of his right, title, and interest in and to the relief prayed for in the complaint, together with his one-third partnership interest in the business of the Home Bakery. The consideration for this assignment was $1, it being further provided that Ross was to turn over to Meis the first $700 collected on any judgment and that Ross was to retain 15 per cent. of the next $1,000 received and 25 per cent. of any additional amount, the balance going to Meis.

On March 21, 1933, the assignee, J. Edgar Ross, filed a motion to vacate and set aside the order of March 14, 1933, appointing a referee and receiver on several grounds stated therein. When this motion came on for hearing, on March 24, 1933, the attorney for the defendants raised the objection that the said J. Edgar Ross has no right to appear for or represent the plaintiff, on the ground that he was not a licensed attorney and that he was not the real owner of the chose in action. At this hearing Ross testified that he is not a licensed attorney at law in this state; that he drew the original complaint and other instruments; and that an attorney had theretofore appeared for him when an attorney was necessary. At the close of the hearing the court found that the said Ross was not the bona fide owner of the plaintiff's claim or right of action and that the only interest he had therein was one contingent upon his rendering services for the plaintiff as an attorney in the prosecution of the action.

The court then made an order adjudging the said Ross guilty of contempt of court, im-

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posing a fine upon him, staying execution for ten days, and striking from the files the motion filed by Ross to set aside the order of March 14, 1933.

J. Edgar Ross filed notice of appeal from all of this order "except the part thereof adjudging this appellant guilty of contempt and staying execution of said judgment." The appeal, therefore, is only from the order striking his motion from the files.

[1-3] Not only does the order striking the motion from the files appear to have been properly made, but the same was not an appealable order under section 963 of the Code of Civil Procedure. The appellant seems to consider it as, in effect, an order refusing to set aside the previous order entered on March 14. So considered, it falls within the usual rule that when an order is appealable, an order denying a motion to set the same aside is not appealable. De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; Estate of Gregory, 122 Cal. 483, 55 P. 144; People v. Bowles, 135 Cal. App. 514, 27 P.(2d) 411. The attempted appeal from the order striking the appellant's motion from the files should, therefore, be dismissed.

It is so ordered.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.App.2d 295

CAPRON v. PACIFIC SOUTHWEST DISCOUNT CORPORATION et al.

Civ. 9896.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1934.

Appeal and error ⇐458(1)

Corporation appealing from judgment requiring corporation to submit its records to stockholder for inspection *held* entitled to supersedeas preserving status quo and preventing inspection pending determination of appeal (Civ. Code, § 355).

Petition for mandamus by Ralph E. Capron against the Pacific Southwest Discount Corporation and another. From a judgment issuing a writ of mandamus, respondents appeal, securing a writ of supersedeas. On motion to vacate the writ of supersedeas.

Motion denied.

Kenyon F. Lee, of Los Angeles, for petitioner and respondent.

Elmer P. Bromley and H. E. Lindersmith, both of Los Angeles, for respondents and appellants.

DESMOND, Justice.

A writ of mandamus having been issued by the superior court requiring Pacific Southwest Discount Corporation, a foreign corporation, to submit its books of account and minutes of proceedings of shareholders and directors to inspection by a shareholder and his accountant, said corporation appealed therefrom. A petition for a writ of supersedeas was thereafter filed by which it was alleged that said shareholder, Ralph E. Capron, threatened to execute the order mentioned notwithstanding the appeal, and a writ was issued to hold the matter in status quo until final determination of the issues in dispute. Said shareholder has interposed a motion to vacate said writ of supersedeas.

In support of the supersedeas, it is asserted that such inspection and copying from the records is intended but to foster the personal gains of the shareholder and to prevent the company from buying certain of its outstanding shares. On the other hand, it is contended, in turn, that inspection is desired in order to determine the value of Capron's shares, and is for a purpose reasonably related to his interests; that the alleged intention of the company to purchase outstanding shares does not appear to have been authorized by its directors; that there is no allegation in the petition for the writ of supersedeas that the funds to be used therefor will not impair its capital; and further that no inspection of the share register was demanded. It does appear that an inspection of said register was demanded and that the demand was withdrawn; but it is not even suggested, nor may it be, that this is by statute made indispensable to the right afforded by section 355 of the Civil Code, upon which the parties rely. Said section provides, in part: "The share register or duplicate share register, the books of account, and minutes of proceedings of the shareholders and directors * * * shall be open to inspection upon the written demand of any member or shareholder or holder of a

voting trust certificate at any reasonable time, and for a purpose reasonably related to his interests as a shareholder." Arguments against issuance of a writ of supersedeas which to be sustained require proof of unlawful motives, underlying the demand for inspection as indicated, and countercharges upon such issues, must be left to the main proceeding wherein the right claimed was granted and is in controversy upon the appeal. City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 P. 477. But, since the determination below may or may not be upheld, and the purposes of an appeal may be rendered ineffectual in the event of enforcement of the order pending appeal, supersedeas is the proper remedy to preserve the status quo so that the rights involved may not be lost or prejudiced by reason of the intervening execution of such order. Becker v. Hendricks, 109 Cal. App. 166, 292 P. 546, is decisive of the questions here presented.

The motion to vacate the writ of supersedeas prior to final determination of the appeal is denied.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

1 Cal.App.2d 418

NELSON et al. v. SCHOETTGEN.

Civ. 5067.

District Court of Appeal, Third District, California.

Oct. 15, 1934.

1. Mines and minerals ⇐59

Evidence that lessor was given no opportunity to read contract and was told by lessees that its terms were identical with earlier contract, which did not provide that lessor should furnish abstract within 30 days and waive payments until title was cleared, supported finding that provision was inserted in contract by mistake induced by misrepresentation of lessees.

2. Reformation of Instruments ⇐21

Fraud of lessees of mine having option to purchase, in obtaining insertion of provision in lease that failure of lessor to furnish abstract within 30 days would waive purchase payments until title was cleared, did not entitle lessor to reformation.

3. Mines and minerals ⇐59

Where lease giving lessees option to purchase provided that lessor would waive purchase payments after demand for abstract until title was cleared, remedy of lessees who exercised option for failure of lessor to furnish abstract was deferring of payments and recovery of damages, but not rescission.

4. Mines and minerals ⇐78(1)

Where lease of mine giving lessees option to purchase provided that lessees should work 26 shifts per month in mine, and that on exercise of option lessor should furnish abstract in 30 days after demand, failure of lessor to furnish abstract did not relieve lessees of obligation to work required shifts.

5. Contracts ⇐318

Forfeitures are not favored, and, if agreement can reasonably be interpreted to avoid forfeiture, it is duty of court to avoid it.

6. Contracts ⇐322(1)

Party claiming forfeiture has burden of showing that such was the unmistakable intention of instrument.

7. Mines and minerals ⇐78(2)

Lease of mine requiring lessees to work 26 shifts per month in mine *held* not to provide for forfeiture for lessees' failure to work required shifts.

8. Mines and minerals ⇐78(2)

Where attempt of lessees to rescind mining lease for failure of lessor to furnish abstract within 30 days was ineffectual and contemplated repayment to lessees of money expended, attempted rescission did not show lessees' consent to judgment of forfeiture for failure to work required number of shifts in mine thereafter.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by Albert Nelson and another against F. J. Schoettgen, in which the defendant filed a cross-complaint. From an adverse judgment, the plaintiffs appeal.

Affirmed in part, and reversed in part.

Fred A. Watkins, of San Francisco, for appellants.

Rowan Hardin, of Sonora, for respondent.

HELD, Justice pro tem., delivered the opinion of the court.

The plaintiffs herein, on July 20, 1932, entered into an agreement with defendant, whereby defendant leased to plaintiffs five

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

certain quartz claims in the county of Tuolumne. The lease also contained an option to purchase the properties for the sum of $62,500, of which sum $14,400 was to be paid in ninety-six consecutive monthly installments of $150 each, beginning on the 1st day of July, 1932. The remaining $48,100 was to be paid in eight annual installments in varying amounts, beginning on January 10, 1934.

Two clauses in this agreement are the basis of the present action. The first reads as follows: "Work upon said property shall commence upon the execution of this agreement, and such work shall continue thereafter through the life of this agreement, and there shall be performed in and upon said property each month thereafter not less than twenty-six shifts of work: a shift being defined as eight hours' working time for one man, as defined by the U. S. Department of Commerce."

The second reads as follows: "The party of the second part (the plaintiffs) may at any time demand an abstract, and the party of the first part (the defendant) agrees to furnish same within a period of thirty days, and should there be any doubt as to the herein described claims not being clear, then the party of the first part agrees to clear same, and waive all within described payments, both monthly and yearly, until such time as said claims have been fully cleared and guaranteed by the Title Company."

The complaint alleges that the agreement was entered into by plaintiffs on the express representations of defendant that he had good and clear title to the property described, and that relying on the truth of said representations, the plaintiffs paid defendant $1,050 on account of the purchase price, and also paid out $7,000 for labor in working the property, and $7,000 for machinery and equipment installed thereon. It is also alleged that defendant's title to three of said mining claims was defective, and that thereupon plaintiffs rescinded said agreement and tendered to defendant a quitclaim deed to said property. It is further alleged in the complaint that in and by said agreement, defendant obligated himself to furnish an abstract of title to plaintiffs within thirty days after demand therefor; that on the 29th day of August, 1932, plaintiffs demanded of defendant that he furnish such abstract, but that defendant refused to comply with such demand. The plaintiffs pray judgment against defendant for $15,050, the aggregate of the aforesaid sums, and for such sum as they might be required to expend in the defense of a certain action instituted against them by an adverse claimant to a portion of the property.

The defendant, by his answer, admits the execution of the agreement, and also admits that he represented that he had a good title to the property. Defendant alleges, however, that certain unfounded claims were then being made by third parties to a portion of the property at the time that the agreement was entered into, and that plaintiffs then had knowledge of such adverse claims, and that the parties mutually agreed that action would be brought to clear the title thereof. It is alleged also in the answer that plaintiffs had no grounds for a rescission, and that the attempted rescission was not made in good faith. Further answering, defendant alleges that plaintiffs voluntarily and without cause or reason failed and refused to comply with or perform the conditions and covenants of said lease and option, and abandoned the same, and that they forfeited and abandoned all their right to the property, and in said lease and option. As to the demand for an abstract, the defendant in his answer admits that such a demand was made, but alleges that the clause providing for such abstract was inserted in the agreement through the fraud of plaintiffs, and without the knowledge of defendant.

The defendant also interposed a cross-complaint, wherein it is set forth that a prior lease and option agreement was entered into on November 20, 1931, between the parties to this action and others, but that said agreement was thereafter terminated. It is also alleged in the cross-complaint that on the 20th day of July, 1932, the agreement referred to in the complaint was entered into, but that through the fraud of plaintiffs the clause providing for an abstract was inserted, which clause was not in the earlier agreement. The defendant then alleges that since the 1st day of September, 1932, the plaintiffs have not complied with the terms and provisions of said contract, in that they have not paid the monthly installments provided for by said contract, and have not performed the monthly work required by said contract, and have forfeited and abandoned said property and all rights in or to said property or any part thereof. The prayer of the cross-complaint asks that the contract be reformed by striking therefrom the provision for an abstract, and that it be adjudged that plaintiffs have forfeited their rights to said property by reason of their failure to comply with the terms of the contract.

The trial court denied plaintiff's prayer for rescission, and rendered judgment in favor of defendant on his cross-complaint, declaring that appellants had forfeited their interest in the property. The plaintiffs have appealed, and concede that because of an adverse decision by the trial court on questions of fact, they are precluded from an attack on the findings as to those matters where there is a conflict in the evidence. They contend, however, that there is no evidence to support the findings that the provision as to an abstract was fraudulently inserted in the contract, and that finding being without support, and the plaintiffs having made a demand on August 29, 1932, for an abstract, which demand was not complied with, the trial court erroneously concluded that such failure of defendant did not constitute a breach of contract on his part. The plaintiffs further contend that this conclusion of the trial court being erroneous, and hence the defendant having himself breached the contract, could not have a forfeiture because of the admitted failure of plaintiffs to perform work on the property after October 10, 1932.

[1] The evidence is sufficient in our view to warrant the finding of the trial court that the provision as to the abstract was inserted in the agreement without the knowledge of defendant and through the misrepresentation of plaintiffs. The earlier contract did not contain such a provision. The contract of July 20, 1932, was prepared by plaintiff Bjorkman, and presented to defendant for his signature by plaintiff Nelson. Defendant was not given an opportunity to read it before he signed it, and plaintiff, Nelson, represented that its terms were identical with those of the earlier agreement. The trial court therefore properly concluded that the provision relative to an abstract was inserted in the agreement by mistake on the part of defendant, induced by the misrepresentation of plaintiffs. Mazuran v. Stefanich, 95 Cal. App. 327, 272 P. 772.

[2, 3] We agree also with the conclusion of the trial court that while the fraud of plaintiffs in regard to the abstract provision did not constitute grounds for the reformation of the agreement, nevertheless the failure of defendant to furnish an abstract after demand therefor, was not such a breach of said contract as entitled plaintiffs to a rescission thereof. It is not every breach of a contract that entitles the other party to rescind. The remedy of plaintiffs here was for damages, if any, suffered by them for the failure of defendant to furnish the abstract. Murphy v. Sheftel, 121 Cal. App. 533, 9 P.(2d) 568. 13 Cor. Jur. p. 614. The contract itself provides no penalty to be imposed for such failure. It does provide, independently of defendant's obligation to furnish an abstract, that "should there be any doubt as to the herein described claims not (sic) being clear, then the party of the first part agrees to clear same and waive all within described payments, both monthly and yearly, until such time as said claims have been fully cleared and guaranteed by the Title Company." As a matter of fact, a doubt did exist as to the title; conflicting claims by others were asserted to plaintiffs' knowledge, prior to the execution of the contract, and litigation to clear the title was contemplated by all the parties. The plaintiffs had the right to defer payments called for by the contract, but not to rescind.

[4-8] The contract required plaintiffs to commence work upon the property, and to prosecute the same. The failure of defendant to furnish an abstract did not relieve plaintiffs of this obligation. The plaintiff Nelson testified that no work was performed on the property after October 10, 1932. The witness Ellis J. Schoettgen testified that during the month of October, 1932, no work, other than eight or nine shifts by two men, was done. There was clearly a breach by plaintiffs of their obligation to perform a minimum of twenty-six shifts of work each month. For this breach the trial court imposed a severe penalty on plaintiffs herein by terminating and declaring forfeited all their rights under the contract and in the premises.

Forfeitures are not favored by the courts; and, if an agreement can be reasonably interpreted so as to avoid a forfeiture, it is the duty of the court to avoid it. The burden is upon the party claiming a forfeiture to show that such was the unmistakable intention of the instrument. Quatman v. McCray, 128 Cal. 285, 60 P. 855; McNeece v. Wood, 204 Cal. 280, 267 P. 877; 6 Cal. Jur. 362. "A contract is not to be construed to provide a forfeiture, unless no other interpretation is reasonably possible." McPherson v. Empire Gas & Fuel Co., 122 Cal. App. 466, 10 P.(2d) 146, 148; Hansen v. D'Artenay, 121 Cal. App. 746, 9 P.(2d) 889; Booth v. Los Angeles County, 124 Cal. App. 259, 12 P.(2d) 72. A careful examination of the contract here involved fails to disclose any intention of the parties thereto that a breach of the covenant to perform work on the property should entitle defendant to claim a forfeiture of the rights

of plaintiffs. The attempted rescission by plaintiffs on November 12, 1932, cannot be held to be a consent to a judgment of forfeiture. That attempted rescission was ineffective as a matter of law, and furthermore, contemplated repayment to plaintiffs of moneys expended by them.

It is therefore ordered that that portion of the judgment which decrees that plaintiffs take nothing by reason of this action be, and the same is hereby affirmed; and that that portion of the judgment which decrees that plaintiffs and cross-defendants have forfeited and abandoned all right, title, and interest in and to the property described in the complaint be, and the same is hereby, reversed.

Respondent to recover costs on appeal.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

1 Cal.App.2d 436

LEWIS et al. v. SHAW et al.

Civ. 1456.

District Court of Appeal, Fourth District, California.

Oct. 16, 1934.

Appeal and error ⇐787

Where more than 14 months elapsed after filing of clerk's transcript on appeal without filing of anything further and appellant filed no briefs and made no response after District Court of Appeal required appellant to show cause why appeal should not be dismissed, appeal was dismissed (Rules for the Supreme Court and District Courts of Appeal, rule 5, § 1).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by U. F. Lewis and another against Clarence A. Shaw, Harriett Morrow, and others. From an adverse order, the second-named defendant appeals.

Appeal dismissed.

E. O. Leake and J. J. Leake, both of Los Angeles, for appellant.

Fred A. Wilson, of San Bernardino, for respondents.

MARKS, Justice.

On May 9, 1933, Harriett Morrow appealed from an order denying her motion to dissolve an attachment. The clerk's transcript on appeal was filed here on July 1, 1933. As nothing further was filed, this court, on its own motion, on September 13, 1934, ordered appellant to show cause why her appeal should not be dismissed. There has been no response to the order and no briefs filed.

Under the authority of section 1 of rule 5, Rules for the Supreme Court and District Courts of Appeal, the appeal is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.App.2d 402

SOARES et ux. v. GHISLETTA.

Civ. 9275.

District Court of Appeal, First District, Division 2, California.

Oct. 15, 1934.

Hearing Denied by Supreme Court Dec. 12, 1934.

1. Animals ⇐61

Plaintiffs' heifers which were trespassing unattended upon adjoining ranch of defendant at time they were taken up by defendant *held* "estrays" within Estray Act authorizing their sale even if heifers' owners were known to defendant, since act covers animals belonging to known as well as to unknown owners (St. 1933, p. 124, §§ 391–401).

[Ed. Note.—For other definitions of "Estray," see Words & Phrases.]

2. Appeal and error ⇐204(4)

Alleged incompetency of affidavits to prove necessary facts under Estray Act to authorize sale of trespassing heifers could not be raised on appeal if such affidavits were admitted without objection or without proper objection (Code Civ. Proc. § 2009; St. 1933, p. 124, §§ 391–401).

3. Appeal and error ⇐232(2)

Owners of heifers which were sold under Estray Act by defendant could not, on appeal, object to form of affidavits introduced to prove compliance with Estray Act, where, at time of admission, owners objected to substance and trial court had no reason to believe that objection was to form (Code Civ. Proc. § 2009; St. 1933, p. 124, §§ 391–401).

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Peter Soares and his wife against A. Ghisletta. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Alberto Moura and Louis B. De Avila, both of Oakland, for appellants.

Carlos R. Freitas and Jerome A. Duffy, both of San Rafael, for respondent.

SPENCE, Justice.

Plaintiffs sought damages in the sum of $540 for the alleged conversion of twelve heifers. Defendant denied the conversion and alleged by way of affirmative defense that he had taken up the heifers and had subsequently caused the sale of the same pursuant to the provisions of the Estray Act. Deering's Gen. Laws, Act 387 (now Agricultural Code, §§ 391–401 [St. 1933, p. 124, §§ 391–401]). Upon a trial by the court sitting without a jury, defendant had judgment, and from said judgment plaintiffs appeal.

Several points are raised by appellants, but we do not believe that all of said points require extended discussion. Two of the main contentions are, first, that the heifers were not estrays within the meaning of the Estray Act, and, second, that there was no competent evidence to show a compliance by the respondent with the provisions of said act.

[1] With respect to the first contention, appellants concede that the heifers had left the ranch of appellants and were trespassing unattended upon the adjoining ranch of respondent at the time they were taken up. It is claimed, however, that the heifers were not estrays, as their owner was known to respondent at the time. Conceding that the ownership was known, we are nevertheless of the opinion that said heifers were estrays within the meaning of said act. The word "estray" is not one which has had the same meaning at all times and in all localities. See Webster's New International Dictionary. Its meaning at common law and also under the statutes in this state was the subject of an extended discussion in Yraceburn v. Cape, 60 Cal. App. 374, 212 P. 938. On pages 380 and 381 of the opinion in 60 Cal. App., 212 P. 938, 941, the court there said: "The act as thus amended remained in force until the year 1915, when it was again amended by the substitution of an entirely new set of sections for those embodied in the original act of 1901 and of its said amendment in 1909, and from which substituted sections the definition of the term 'estrays' as above quoted was omitted, and the term was apparently used in its original signification, with the exception that under the act of 1915, in order to constitute animals estrays, it was not necessary that the ownership of such animals should be unknown to the person finding and impounding such animal. Stats. 1915, pp. 636, 637." See, also, 2 Cal. Jur., p. 41. From a reading of the statute and the authorities cited, we are satisfied that the present act covers animals belonging to known as well as to unknown owners.

[2, 3] The second main contention of appellants deals with the competency of the evidence admitted to prove a compliance with the provisions of said act. Evidence was admitted to show among other things (1) recordation of a notice of the taking up; (2) service of a similar notice upon the owner; (3) service of notice in writing upon the constable; (4) the sale by the constable in accordance with the statute; and (5) service of notice upon the director of agriculture. For proof of the last three, respondent offered affidavits which were admitted. Appellants now contend that these affidavits were not competent evidence to prove the facts. It may be conceded that the affidavits were incompetent to prove the facts mentioned (Code Civ. Proc. § 2009), but, if such affidavits were admitted without any objection or without proper objection, appellants may not now raise the point. Parsons v. Easton, 184 Cal. 764, 195 P. 419; Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 466, 168 P. 1037; Williams v. Hawley, 144 Cal. 97, 102, 77 P. 762; Janson v. Brooks, 29 Cal. 214, 223; 2 Cal. Jur. 805. In our opinion, the only objection made to the admission of the affidavits was insufficient. Said affidavits were offered but were not admitted at one of the hearings because of an objection to the state of the pleadings. Thereafter respondent filed an amended answer, and said affidavits were again offered at a subsequent hearing. They were then admitted over the following objection: "Now may I make the general objection, Your Honor, in this regard on the ground it is incompetent, irrelevant and immaterial for the reason that the matter set forth in the special and affirmative defenses does not state facts sufficient to constitute a defense. I may state that is a general proposition, Your Honor, to save my making the objection each time a document is introduced." It will thus be seen that the general objection was confined to the reasons stated for the making thereof. Appellants did not object to the form of the proof but to its substance up-

on the ground that the special defense set forth in the answer did not state facts sufficient to constitute a defense. No attack is made upon the sufficiency of the pleadings upon this appeal, and appellants may not now object to the form of the proof when the trial court had no reason to believe that they were objecting upon that ground. The language of the court in Le Mesnager v. Hamilton, 101 Cal. 532, 35 P. 1054, 40 Am. St. Rep. 81, seems pertinent here. The court there said at pages 539 and 540 of 101 Cal., 35 P. 1054, 1056: "If it be assumed that the general objection to the effect that the offered testimony was 'incompetent, irrelevant, and immaterial,' if it had stood alone, would have been sufficient to raise such a question,—a point which it is unnecessary to decide at this time,—still, such objection was obviously insufficient for that purpose, when the particular ground upon which it was claimed that such offered evidence was incompetent, irrelevant, and immaterial was stated to be 'for the reason that * * *'" See, also, Jones on Evidence (3d Ed.) § 893.

The remaining contentions of appellants involve technical objections to the proceedings taken by respondent in causing the sale of the heifers under the provisions of the Estray Act. We have examined the various objections raised, and are of the opinion that there was a sufficiently strict compliance with all of the terms of said act to effect a valid sale.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

1 Cal.App.2d 292

SMITH v. BOARD OF POLICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 8654.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1934.

1. Municipal corporations ⇐621

Where finding of city police commissioners was contrary to record of evidence as presented to trial court on certiorari, trial court's conclusion that evidence was insufficient and judgment annulling order suspending used car dealer's permit *held* not error.

2. Certiorari ⇐70(8)

Evidence which might have supported some finding which was not made will not be considered by reviewing court, unless evidence would also support finding actually made.

3. Municipal corporations ⇐621

That finding of city police commissioners, which was sole basis of police commissioners' decision to suspend used car dealer's permit, was without evidentiary foundation, *held* fatal to police commissioners' jurisdiction.

4. Certiorari ⇐64(2)

When board has power to act only upon given facts, and there is no evidence to show existence of those facts, finding that facts do exist cannot foreclose inquiry by court under writ of certiorari.

5. Certiorari ⇐70(8)

Where evidence is all one way and finding is to contrary, question becomes one of law, reviewable in such proceeding, and decision of inferior tribunal without evidence to support its finding cannot be upheld.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Certiorari proceeding by W. C. Smith to review an order of the Board of Police Commissioners of the City of Los Angeles and members thereof suspending petitioner's used car dealer's permit. From a judgment annulling the order and enjoining enforcement thereof, respondent appeals.

Affirmed.

Prior opinion, 35 P.(2d) 555.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for appellants.

Sparling & Teel, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Respondent, a used car dealer, sold a used automobile to a customer under circumstances which caused appellants to conduct a hearing and make an order under Los Angeles City Ordinance No. 69620 suspending respondent's permit for thirty days. On certiorari to the superior court, judgment was there rendered which was at first incorrectly transcribed in the record presented to this court, but which as corrected reads in part as follows: "The court having considered said petition and return and the facts and

issues thereunder and thereby established and raised, and the law applicable thereto, the court being of the opinion that the ordinance is valid but that the judgment is not sustained by the evidence," and the order of the board was thereupon annulled, and it was enjoined from further proceedings.

In the original writ, after reciting the fact that an order had been made by the board suspending the license of this respondent for one month, it is stated: "Whereas it has been further represented to this court by said petitioner that said order is erroneous and unlawful and void for reasons set forth at length in said petition, and which fully appears from said petition on file herein, reference thereto being hereby made." Attached to the petition as an exhibit is a transcript of testimony taken at the hearing before the board. It is suggested by appellants that this transcript of evidence was incomplete, although its accuracy is not questioned. No other record of evidence appears to have been submitted to the lower court. We may assume that this recorded testimony furnished a basis for the trial court's determination. The writ itself is part of the judgment roll, and, when it specifically refers to such matters in the petition, it would be unreasonable to conclude that the trial court ignored the contents of the petition, which by reference was a part of the writ. Our attention has not been directed to any evidence which was before the court at the time of the hearing on the writ which would contradict, amplify, or explain the evidence as contained in the transcript of testimony above referred to.

The return sets out the decision of the board; the essential finding being as follows: "Evidence submitted to the commission established the fact beyond a reasonable doubt that two men, acting as agents of the defendant W. C. Smith, deliberately misrepresented the condition of the car which they sold to plaintiff, Mrs. Alberta Glass. The statement was made by these agents that the car was practically new, saying it had been driven a distance of only 125 miles. As a matter of fact, evidence submitted and not denied proved that the car originally had been purchased in Michigan and driven from that state to California, where the license plates purchased in Michigan were discarded and California plates substituted therefor. It is obvious that when this car was sold to the plaintiff as a car which had traveled only a little more than 100 miles, a deliberate fraud was perpetrated upon the purchaser." This finding is contrary to the testimony of the customer, Mrs. Glass, who testified that "there was 54 miles on it (referring to the car) when it was delivered," and further responded as follows:

"Q. What was the price quoted on the car? A. I don't know that.

"Q. Second hand car? A. New.

"Q. Do you know whether it was a second hand car? Was it sold to you as a new car? A. The car was sold in Detroit and driven here.

"Q. Did anyone tell you? A. Yes.

"Q. Who told you that? A. Mr. Randall and Mr. Curtis."

The latter two were agents of respondent and were referred to in the decision of the board.

[1-5] Since the above-quoted finding of the board is contrary to the record of evidence as presented to the trial court, we cannot say that the latter erred in concluding that the evidence was insufficient and in entering judgment annulling the order of respondent board. We may not consider evidence which might have supported some finding which was not made, unless it also supports the finding actually made. The order of the board citing Smith before it for hearing did not charge any specific unlawful acts, but merely alleged a violation of the ordinance in general terms. There could be no inference drawn that the board intended to refer to the citation to amplify the language of its findings. We are compelled to conclude, therefore, that the finding quoted herein is the sole basis of the board's decision, and, being without evidentiary foundation, is fatal to that tribunal's jurisdiction. When the board has power to act only upon given facts, and there is no evidence whatever to show the existence of those facts, a finding that they do exist cannot foreclose inquiry by a court under a writ of certiorari. Where the evidence is all one way and the finding is to the contrary, the question becomes one of law, reviewable in such a proceeding, and a decision of the inferior tribunal without any evidence to support its finding cannot be upheld. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

BELLON v. FOX WEST COAST THEATRES et al.*

Civ. 1092.

District Court of Appeal, Fourth District, California.

Oct. 5, 1934.

Hearing Granted by Supreme Court Dec. 3, 1934.

1. Landlord and tenant ⇐169(8)

Lease of storeroom and evidence in action against lessor for death of plumber because of defective electric light cord in basement under such room *held* to show that basement was part of leased premises and in tenant's complete control and possession.

2. Landlord and tenant ⇐167(1)

Rules as to landlord's duty to keep in safe condition portions of building over which he retains control for all tenants' general use and liability for injuries to strangers because of defective condition of such portions *held* inapplicable in action against lessor of storeroom for death of plumber because of defective electric light cord installed by tenant in basement under such room.

3. Landlord and tenant ⇐167(2)

Mere fact that pipes, serving other tenants in building than lessee of storeroom, passed through basement under such room, imposed no duty on landlord to keep such basement or appliances, kept therein by such lessee, in safe condition.

4. Appeal and error ⇐930(4)

Appellate court cannot assume in support of judgment on verdict against lessor in action for plumber's death because of defective electric light cord, installed by lessee, that jury impliedly found that lessor ordered plumbing work done, where court instructed jury that deceased was lawfully on premises.

5. Landlord and tenant ⇐167(2)

Lessor of storeroom *held* not liable for plumber's death because of defective electric light cord, installed in basement under such room by tenant without lessor's knowledge, on theory that deceased was lessor's invitee, regardless of who called plumber.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Ione C. Bellon against the Fox West Coast Theatres, the Silver Gate Theatres, Inc., and others. From the judgment rendered, the last-named defendant appeals.

Reversed in part and affirmed in part.

Wright & McKee, C. M. Monroe, and Wright, Monroe, Thomas & Glenn, all of San Diego, for appellant.

Stearns, Luce & Forward, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages brought by the widow of Raymond C. Bellon, a plumber, who was killed on April 4, 1932, while engaged in cleaning out a soil pipe in a basement under a storeroom in the Balboa Theatre building in the city of San Diego. Seven defendants were named, but the action was dismissed as to one, a nonsuit was granted as to two, a motion for a directed verdict was granted as to three, and there was left to the jury only the question as to the liability of Silver Gate Theatres, Inc. A verdict was returned in favor of the plaintiff for $20,000. From the ensuing judgment, the remaining defendant has appealed and will herein be referred to as the appellant. While the plaintiff filed notice of appeal from all rulings and orders in connection with the directed verdicts in favor of three of the defendants, that appeal has evidently been abandoned as nothing has been presented in connection therewith and the only brief filed on behalf of plaintiff and respondent asks only that the judgment and verdict finally entered be sustained.

The Balboa Theatre building is located at the southwest corner of Fourth and E streets in the city of San Diego. The appellant was at all times here involved the lessee of the entire building, and for the purpose of this appeal may be treated as the owner thereof. The main portion of the building is occupied by the Balboa Theatre, the entrance to which is at the corner of Fourth and E. To the south of the theater entrance and facing Fourth street are certain storerooms, above which are office rooms, all of which were leased by the appellant to various tenants. The first of these storerooms was leased by the appellant to a Mrs. Walsh, who conducted a confectionery store there under the name of the "Sweet Shop," with her son, J. C. Milne, as manager. The next two storerooms were used as one by a restaurant. To the south of the restaurant was a lobby, in which was an elevator used as an entrance to the offices above the storerooms. Beneath the lobby just referred to, and each of these storerooms, was a basement similar in size to the room above it except that each basement room extended under the sidewalk on

Fourth street. None of these basements was connected in any way with the portion of the building used by the theater. As originally constructed, the basement under the Sweet Shop was completely walled in and the only means of access was an iron stairway reaching up to a trapdoor in the floor of the Sweet Shop. There was an archway between the two basement rooms under the restaurant and a doorway beneath the southerly of those rooms and the basement room under the lobby. Access to the basement room under the lobby could be had by the elevator.

The south wall of the basement under the Sweet Shop was constructed of large square hollow tiles. At the time of the accident here in question, some of the tiles in that wall had been removed, leaving a hole probably 2½ feet square near the center of that wall and some 2½ feet above the floor of the basement. It was then possible to enter that room by entering the southerly basement room by the elevator, walking through the two basement rooms under the restaurant, and then crawling through this hole. Near the ceiling at one end of that room were two or three steam pipes which served other parts of the building. In the southerly wall of that room was a drain pipe, serving the offices above, which led in some manner across the two basement rooms under the restaurant and connected with the line to the sewer at the north wall of the lobby basement. This drain pipe was not exposed in the basement room under the Sweet Shop, but, near the ceiling and above the steam pipes referred to, there was a small hole through which a cleanout plug in that pipe could be reached.

In the basement under the Sweet Shop there was a carbonating machine attached by pipes running through the floor to the soda fountain in the Sweet Shop above. This carbonator was operated by an electric motor attached thereto. The current was obtained through two black insulated wires which ran from the motor to an outlet box in the basement ceiling, this being the only electrical outlet in that basement. About a foot below the ceiling, the insulation had been cut from each of these wires running to the motor and an electric drop cord was attached thereto, on the other end of which was a socket for a light globe. This drop cord was old and badly worn with the insulation entirely gone from portions thereof.

On the day in question the sewer line under the restaurant became clogged, as a result of which a large pool of water approximately ½ inch deep, accumulated on the floor of the southerly of the two basement rooms under the restaurant. The deceased responded to a call for a plumber and was engaged in cleaning out the drain pipe when he met his death. He was first observed by a janitor who came into the basement rooms under the restaurant. At that time the deceased was standing on a stepladder in the basement room under the Sweet Shop where he had removed the cleanout plug in the south wall of that room and inserted a steel tape, known as a plumber's "snake," into the drain pipe. A plumber's "snake" is a flexible steel tape about 60 feet long, commonly used by plumbers for the purpose of cleaning out pipes. The janitor, while in the basement under the restaurant, heard the snake hit the sides of the sewer pipe on the south side of that basement and so informed the deceased, who came down from the stepladder and went with the janitor to be shown one of the cleanout plugs which was in the southwest corner of the southerly room under the restaurant.

A little later, the deceased was found lying on the floor of the southerly basement room under the restaurant grasping the plumber's snake, with one end thereof inserted in the pipe where the cleanout plug in that room had been removed. The other end of the snake passed through the archway into the northerly basement room under the restaurant and from that room through the hole in the wall into the basement of the Sweet Shop, where it was found to be in contact with the drop cord in that room, which has been heretofore described. Apparently, the deceased had dragged one end of the snake through the hole in the south wall of the basement under the Sweet Shop, through the north basement room under the restaurant, and into the southerly basement under the restaurant, with the result that while he was manipulating it in the southerly basement room, the part that was coiled on the floor in the room under the Sweet Shop thrashed or flopped around until it came in contact with one of the portions of the old drop cord from which the insulation was gone. This contact caused the electricity to pass from the drop cord through the snake to the decedent who was standing in the pool of water in the southerly basement room, with the natural result.

This entire case is based upon negligence in permitting a defective light cord to be maintained upon the premises, and the only question is whether such negligence can be

attributed to the appellant. The appellant contends that the tenant was in the exclusive control of this basement room under the Sweet Shop and was charged with the duty of seeing that the light cord was maintained in a safe condition. For some reason, the tenant was never made a party to this action. The respondent argues that this basement room was not included in the premises leased to Mrs. Walsh and that the appellant remained in full control thereof and was entirely responsible for maintaining it in a safe condition.

The general rules concerning the liability of landlord and tenant are pretty well settled. In Hamelin v. Foulkes, 105 Cal. App. 458, 287 P. 526, 527, the court said:

"The lessee and not the lessor is ordinarily liable for injuries to third persons occasioned by the negligence of the lessee or due to a defective condition of the premises occurring after the beginning of the lease. Rider v. Clark, 132 Cal. 382, 64 P. 564; 15 Cal. Jur. 737, par. 150. This liability of the lessee exists irrespective of the covenants of the lease relating to repairs, and arises by virtue of his exclusive possession and control of the premises. The right of the lessee to possession and control of the premises is accompanied by a corresponding duty to exercise ordinary care in the use and maintenance of the premises so as not to occasion injuries to third persons. That such liability ordinarily is imposed solely upon the lessee, with certain exceptions hereinafter noted, is conceded by appellants, but it is contended that the general rule applies only where the possession and control of the entire premises passes by the lease and does not apply to the facts in the present case where only a portion of the building was leased and the injury was occasioned by failure to properly maintain a sidewalk hydrant box. There would be much force in this contention if the hydrant box was appurtenant to the entire building rather than to appellants' store, but, where the hydrant box was solely for the use of appellants' store, and was connected with appellants' meter, the lease of the store and basement to appellants passed with it the possession and control of the hydrant box as an appurtenance thereto. 'A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. * * * The general rule is that where a store is leased, everything then in use for the store, as an incident or appurtenance, passes by the lease.' Runyon v. City of Los Angeles, 40 Cal. App. 383, 387, 180 P. 837, 839. Much stress is placed upon appellants' testimony to the effect that they did not use the hydrant. However, it is not the actual use which is important, but the right to the exclusive possession and control which governs.

"The general rule and the exceptions thereto are stated in Rider v. Clark, supra. The court there said at page 386 of 132 Cal., 64 P. 564, 565: 'When the tenant enters into possession under a lease, the landlord parts with all his right to and control over the premises, and is not liable to third persons, except for such defects in the premises or defective construction as existed in the premises when let to the tenant. * * * "It is well settled that a landlord is not liable for such consequences unless: (1) The nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it; or (3) the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury."'"

And in Runyon v. City of Los Angeles, 40 Cal. App. 383, 180 P. 837, 840: "The original structure having been legal and in a safe condition when respondents leased the premises to their tenant, and the injuries having been received in consequence of the grating getting out of repair during the tenancy—the tenant and not the landlord being bound to repair—respondents are not liable as owners, or otherwise. * * * When the premises are in good repair at the time they are let, and the landlord, under the terms of the lease, is not bound to keep them in repair, the tenant in possession, and not the landlord, is liable for an injury resulting from a failure to repair the pavement in front of the premises. * * * The general rule is that it is the occupier, and he alone, to whom such responsibility prima facie attaches. * * * To this general rule the following exceptions are recognized, and the owner of the leased premises may be made liable: (1) If the lease be one under which he, and not the tenant, is required to keep the premises in repair; (2) if the dangerous and defective condition by which the injury was occasioned existed when the premises were leased; (3) if that which occasioned the injury was, inherently, in its nature and character, a nuisance, and was upon the premises when the lease was executed."

The respondent argues that the question whether this basement was included in the lease is a question of fact, which has been determined by the verdict of the jury. In any event, the question remains whether the evidence is sufficient to sustain a finding against the appellant.

In the lease to Mrs. Walsh the demised premises were described as follows: "Those certain premises more particularly known and described as 866 Fourth Street, situate in the Balboa Theatre Building," with the further recital that "the said premises to be used by the lessee for the sole purpose of conducting therein a confectionery, and for no other purpose." The lease contains the clause: "That Lessee has examined and knows the condition of said premises and has received same in good order and repair and that he will keep said premises and the appurtenances and every part thereof in the same good order and condition as they are now," and also provides that the lessor shall not be called upon to make any alterations, improvements, or repairs whatsoever on the premises, or any part thereof, or the appurtenances (excepting in case of damage by fire or the elements), and that the lessor shall particularly not be obliged nor required to repair any plumbing in or upon said demised premises.

Turning to the evidence upon this subject, aside from the lease, the following facts appear: This basement lies directly under the storeroom admittedly covered by the lease. As originally constructed, the only means of access was by an iron ladder through a trapdoor in the floor of the store. A prior tenant testified that she was in possession from 1925 to 1929; that when she took possession she went into the basement and finding it was not suitable for her purposes she covered the trapdoor with linoleum and used the space for fixtures. She referred to the basement as "my basement" and stated that the hole in the wall was made while she was there, although she stated this was not done by her. One of her employees testified that he went into the basement about three times a week during the time she was there and that he never went in through the trapdoor. He did not state the purpose of his visits to the basement and the record is silent as to when or by whom the hole in the wall was made. J. C. Milne, the manager of the business conducted under the lease to Mrs. Walsh, testified that when he took possession he replaced the old linoleum with new, covering the entire floor, including the trapdoor, and that he had never used that entrance to the basement; that there was no other possible entrance to the basement except the hole in the south wall thereof; that the only electrical connection with the basement was by a switch in the Sweet Shop and was there when he took possession; that the carbonator was installed in the basement on October 8, 1931, about six weeks after he took possession of the premises; that he was never in the basement until about two months after that date; that at that time he went down to see if a gas tank in connection with the carbonator had run out; that subsequently he again went to the basement to replenish another gas tank; that he had never used the basement for any purpose other than keeping the carbonator there; that he never knew of any one ever being in the basement except in connection with the carbonator; that when he first went to the basement he observed this light cord; that there was a light globe in it which he used; that he did not observe the wiring as he was interested only in the carbonator; that he did not know who had installed the light cord; and that he had never authorized any one to install it. He further testified that he understood that this room was there for his use if he wanted to use it, and that no one else had used the room to his knowledge. He stated that he entered the basement by the hole in the wall and when asked if there was any other entrance he replied, "Only the trap door, that was for my use, if I wanted to use it." When asked who used the two basements to the south, he said he happened to know that the restaurant owner used them "so much as I would use mine, they have access to it." With reference to the installation of the carbonator, this witness testified that it was installed for him, that the carbonator was connected by pipes with the fountain upstairs, and the motor was operated from an electric switch upstairs. He stated that he arranged with a man named Howerton to install the carbonator; that he mentioned to Howerton the best location in which to run the pipes; that the electric wiring was not mentioned; that he did not tell Howerton to put the carbonator in the basement, but he understood this was to be done; that he did not ask permission of any one, he "just went ahead and had the carbonator installed down there"; that this electric carbonator was larger and made more noise than one they formerly had upstairs and "we thought it would be better in the basement"; that he did not show Howerton the hole in the wall as he "figured he knew as much

about it as I did"; that he did not go down to the basement when the carbonator was being installed, but knew that Howerton's men were doing the work; and that when the work was completed the machine worked. He also testified that when they were putting the carbonator in, Howerton came to him and told him it would be necessary to enlarge the hole in the south wall of this basement room and that he said "go ahead." Howerton testified that he sold this carbonator and motor to Milne; that Milne told him to put it "down where you think it would be the best location"; that he did not try to use the trapdoor as he knew it was not wide enough to get the carbonator through; that there was a small hole in the basement wall which they had to enlarge in order to take the carbonator in; and that he did not know who made the electrical connection. An employee of Howerton testified that he installed the carbonator and ran the pipe lines to the fountain but did not connect up the wiring, and that when he returned the next morning he threw the switch and the motor worked. All witnesses disclaimed any knowledge as to who made the electrical connection to the motor on the carbonator or who installed the drop cord.

In Kunkel v. Abell, 170 Ind. 305, 84 N. E. 503, 504, it is said: "The term 'premises' as here used was evidently intended to be more comprehensive than the word 'room,' as employed in section 7283a. In common parlance the term is broader than the word 'room.' As applied to the occupancy of real property it embraces any definite portion of land and the building and appurtenant structures situated thereon, over which the owner or occupant has the right and does exercise authority and control."

And in Runyon v. City of Los Angeles, supra, the general rule is thus expressed: "A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. * * * The general rule is that where a store is leased, everything then in use for the store, as an incident or appurtenance, passes by the lease."

[1] In view of the language of this lease, and the testimony referred to, we think it conclusively appears that this basement room was a part of the premises leased to Mrs. Walsh and that the evidence is not sufficient to support a contrary conclusion. If there be any doubt as to the interpretation of the lease, that doubt has been removed by the conduct of the parties. Not only does it appear that the tenant thought he had a right to use the basement room but, without objection, he took possession, made an important installation of machinery, and thereafter continued to use it. That he did not use every portion of the room is of no significance, nor is the legal situation changed by the fact that he chose to enter the room by the hole in the wall instead of using the more conventional means of access which was provided. We conclude, therefore, that the case is governed by the general rules where a tenant is in complete control and possession of premises, unless it can be brought under one of the recognized exceptions to that rule.

[2, 3] The respondent further contends that such an exception here appears, in that the tenant was not in the exclusive control and occupation of this basement room because of another clause in the lease in question, which clause reads as follows: "That lessor has reserved the right to enter into any part of the premises hereby demised for the purpose of making repairs or alterations in the plumbing or water pipes, or the improvements connected with any portion of the building other than those hereby leased, and the lessor shall have the right to alter said building, of which the said demised premises are a part, or add thereto, and may for that purpose erect scaffolding or other necessary structures. Lessee shall not, in that event, claim, or be allowed or paid any damages for any injury or inconvenience occasioned thereby."

It is argued that by the clause of the lease, last referred to, the appellant retained some control or possession of this basement room and was, therefore, liable for any nuisance arising therein or for the defective or unsafe condition of those premises. In this connection the respondent relies upon those cases in which it has been held that where a building is rented to different tenants, the duty rests with the landlord to keep in safe condition those portions of the building over which he retains control and which are for the common use and benefit of all of the tenants. The general rule is thus stated in 36 C. J. 243: "Where a landlord has rented a building to different tenants but retained control over parts thereof for the general use and benefit of all the tenants, he will be liable for injuries to a stranger resulting from the defective condition of the parts under his control."

We think those rules have no application here. In general, those rules apply to en-

trances, hallways, and portions of a building which are kept for the common use and enjoyment of the various tenants and persons having the right to visit them. The appellant did not retain control over this basement room and the room was certainly not intended or used for the use and benefit of all of the tenants. While there was a drain pipe in one wall of the room and certain steam pipes near the ceiling at one end of the room, which pipes served other parties in the building, the other tenants so served could have no occasion to enter the room for anything in connection with these pipes. The fact that these pipes passed through the room, or through one of its walls, would not give the appellant control of the entire room regardless of other considerations. Looking to the other matters, we find that the room was a part of the premises leased to the tenant, who had the right to use the room subject to any inconvenience that might be caused by the presence of the pipes. By the reservation in the lease the appellant merely reserved the right to enter the room for the purpose of making repairs or alterations in these pipes. This option was never exercised and the situation which caused the injury, with which we are here concerned, had nothing to do with these pipes or with anything done in connection therewith, but was a condition in that part of the room controlled by the tenant which arose particularly from the way in which certain machinery and appliances were installed for the tenant and allowed by him to remain. The premises were safe when the tenant took possession, and the defective condition arose only in connection with the use he made of the room. While the tenant saw and used the drop cord, which was defective, the appellant's managers had never been in this basement room after the tenant took possession and the uncontradicted evidence is that the appellant had no knowledge that either a drop cord or the carbonating machine had been installed there. The duty to keep this appliance safe did not rest upon the landlord, and the evidence is insufficient to bring this case within the exception relied upon by the respondent. The mere fact that these pipes passed through the room in question could not, under the circumstances here appearing, transfer to the landlord the duty of keeping the room, in general, in a safe condition or make the landlord responsible for the condition of appliances kept therein by the tenant.

[4] It is further urged by the respondent that the deceased was the invitee of the lessor, that the defective condition of the wire must have existed for some time and should have been known to the appellant, and, therefore, the appellant was liable on the theory that a person invited upon the premises of another may recover from such owner for any injuries arising out of dangerous conditions known to the owner and not known to the person so invited. This is based upon the claim that the appellant's manager called the plumber and ordered the work done. One witness testified that three phone calls came into the plumbing shop, that in the third the voice was not the same voice as in the others, and that the last man stated that he was Mr. Kendrick, the manager of the building. Kendrick denied that he had made such a call, and there was other evidence that the manager of the restaurant asked the janitor to call a plumber. And the most that is claimed is that the man who said he was Mr. Kendrick asked why a man had not been sent and whether they intended to send one. It is argued that it must be assumed, in support of the judgment, that the jury impliedly found that the appellant had, in fact, ordered the work done. No such assumption is possible since the court instructed the jury to the effect that the deceased was lawfully on the premises and therefore it made no difference who invited him.

[5] The cases relied upon by the respondent in this connection are those where an invitation to use the premises of another may be inferred, where a certain duty rests upon the invitor, and where he has been negligent in that regard. We think these cases have no application here. No question of the right of the deceased to be present is involved and the entire question is as to which of two parties was under the obligation to remedy a certain condition. We think this duty rested upon the tenant, rather than the landlord, and that the question of who called the plumber is immaterial, so far as this appeal is concerned. While the plumber was rightfully in the building, he was injured not by any defective condition in the pipes over which it may be said the landlord had reserved a right of control, but by a defective appliance installed for and maintained by a tenant, without the knowledge of the landlord, in a portion of the building over which the tenant had control. Under such conditions, we think no liability can be imputed to the landlord under the general theory that the deceased was his invitee. Regardless of any invitation, it was necessary for the respondent to show a duty owed by the appellant and a failure to perform that duty.

That portion of the judgment which is against the appellant Silver Gate Theatres, Inc., is reversed, and the balance of the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.App.2d 183

Ex parte LASSWELL.

Cr. 2540.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1934.

1. Constitutional law ⇐48

Statute should be sustained by court whenever reasonably possible.

2. Constitutional law ⇐26, 50

Purpose, right, and duty of legislative branch of government are to enact such legislation as it deems desirable, and its limitations are natural law and written Constitution.

3. Constitutional law ⇐70(3)

Courts have no voice in policy nor in wisdom of legislative action, but their duty is to construe language of statute and determine its constitutional status.

4. Constitutional law ⇐½

Federal Constitution should not be considered detailed statute, but working set of practical principles.

5. Constitutional law ⇐154(1)

Abridgment of contract is not a constitutional infringement if public welfare demands such abridgment.

6. Constitutional law ⇐154(1)

General welfare should not be protected in such a manner as to unnecessarily deprive individuals of their contract benefits.

7. Constitutional law ⇐81

Any business may be regulated to the extent and in the manner reasonably required to prevent its unreasonable interference with welfare of general public.

8. Constitutional law ⇐113, 296(1)
Trade-marks and trade-names and unfair competition ⇐68(1)

California Industrial Recovery Act, which provided for enactment of codes for business which should be the standards of fair competition, and was enacted because of widespread business collapse, *held* not unconstitutional as violation of due process or impairment of contract obligations, where regulations provided were germane to the condition and neither discriminatory nor arbitrary (St. 1933, p. 2635, § 6; p. 2637; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10, cl. 1; Const. U. S. Amend. 14).

9. Constitutional law ⇐60

Since Federal Constitution divides federal government into three distinct divisions, Congress cannot delegate its power to another governmental division.

10. Statutes ⇐51

Under provision of California Recovery Act that codes adopted by federal authorities for operation of industry should automatically become the California codes, that codes were not in being when their violation was made an offense *held* immaterial as regards validity of act, since primary standard had been laid down (St. 1933, p. 2635, § 6; p. 2637).

11. Constitutional law ⇐62

That California Recovery Act adopting National Recovery Act for state of California and making codes adopted by federal authorities for operation of industry automatically become the California codes, delegated code prescription to President *held* not to invalidate act (St. 1933, p. 2635, § 6; p. 2637; National Industrial Recovery Act, §§ 1–3 [15 USCA §§ 701–703]).

12. Constitutional law ⇐60

"Primary standard law," which is legislative enactment that requires administration to fill up the details, may delegate incidental powers to determine facts or state of things on which enforcement of primary standard law depends to a body, and incidental powers may be measured by a standard not under control of state, and may be subject to change.

13. Constitutional law ⇐60

California Recovery Act which adopted National Recovery Act for state of California and provided that codes adopted by federal authorities for operation of industry should automatically become California codes *held* not unconstitutional as unwarranted delegation of legislative power (St. 1933, p. 2635, § 6; p. 2637; National Industrial Recovery Act, §§ 1–3 [15 USCA §§ 701–703]; Const. Cal. art. 3, § 1).

R. G. Lasswell was charged with violation of the code of fair competition for the clean-

ing and dyeing trade, and he petitions for a writ of habeas corpus.

Writ discharged and petitioner remanded.

J. Wesley Cupp, of Los Angeles, for petitioner.

John K. Hull and D. A. Boone, both of Long Beach, for respondent.

STEPHENS, Presiding Justice.

The petitioner herein is charged with five counts of violation of section 6, chapter 1037 (page 2635), of the statutes of 1933 of the state of California, commonly referred to, in conjunction with chapter 1036 of the statutes of 1933 (page 2637), as the California Industrial Recovery Act, such statute appearing as Act 8775 of title 613a in the General Laws Supp. 1933, and in particular is charged with having violated subsections 1, 7, 14, and 16 of article VII of the code of fair competition for the cleaning and dyeing trade, which code became a part of the statute by section 2 thereof, if section 2 is within the state Constitution.

Count 1 of the complaint alleges a violation of the act, including the code of fair competition, "in that said defendant did * * * clean and press * * * a lady's dress for the sum of fifty cents (50c), being then and there a sum less than the minimum retail price established," etc. Count II of the complaint alleges a violation of the act and such code "* * * in that the said defendant did * * * clean and press * * * a man's three piece suit for the sum of fifty cents (50c), being then and there a sum less than the minimum retail price established," etc. Count III of the complaint alleges as a violation of the act and such code "did wilfully and unlawfully violate the terms and provisions of the Code of Fair Competition of the Cleaning and Dyeing Trade, in that said defendant did, at the time and place last aforesaid, fail to display Insurance Information in a conspicuous place, or at all, as to whether or not the said defendant insured against the hazards of the cleaning and/or dyeing of fabrics for the benefit of the consumer, contrary to section 141, article 7 of the said Code of Fair Competition." Count IV of the complaint alleges a violation of the act and such code "in that said defendant did, * * * accept cleaning and pressing work from one who solicits cleaning and/or dyeing work and from one who was neither a member of the Cleaning and Dyeing Trade nor regularly employed by a member of that trade." Count V of the complaint alleges a violation of the act and such code "in that the said defendant did, at the time and place last aforesaid, advertise in a false and misleading manner in that the said defendant did display the insignia of the National Recovery Administration, to-wit, the blue eagle, while violating the provisions of the said Code of Fair Competition for the Cleaning and Dyeing Trade."

The petitioner herein seeks his release on habeas corpus on the ground that he is illegally restrained of his liberty under a statute which he claims is unconstitutional on the following grounds: (1) The California Industrial Recovery Act is unconstitutional as a violation of the Fourteenth Amendment of the Federal Constitution and in the impairment of the obligations of contract clause of the Federal and State Constitutions (Const. U. S. art. 1, § 10, cl. 1; Const. Cal. art. 1, § 16). (2) The state Legislature of California, contrary to the requirement of article 3, § 1, of its Constitution and contrary to the Federal Constitution, delegated to the federal government administration boards its right to control and legislate concerning local business and intrastate commerce.

The federal enactment of June 16, 1933, 48 Stat. 195, c. 90, denominated "National Industrial Recovery Act," commonly referred to as "N. I. R. A." in section 1 (15 USCA § 701), declares that a national unemployment and industrial emergency exists, in the following terms: "A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Section 2 (15 USCA § 702) fixes the expiration date of the act and the matter of "administrative agencies" by which the scheme proposed may be effectuated as follows: "(a) To effectuate the policy of this chapter, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the provisions of the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended [chapter 13 of Title 5], to fix the compensation of any officers and employees so appointed. (b) The President may delegate any of his functions and powers under this chapter to such officers, agents, and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this chapter. (c) This chapter shall cease to be in effect and any agencies established hereunder shall cease to exist at the expiration of two years after the date of enactment of this act [June 16, 1933], or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 [section 701] has ended."

Section 3 (15 USCA § 703) under the subtitle of "Codes of fair competition" treats in detail of code regulation of industry as follows: "(a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared."

The state acts declare a state and national emergency very much after the fashion of the federal act and declare a policy as follows: "It is hereby declared to be the policy of the State of California to cooperate with and assist the National government in promoting the rehabilitation of trade and industry and in eliminating unfair competitive practices, and to establish a parity in the maximum hours of labor and the minimum rates of pay and the other conditions of employment and standards of fair competition within this State between those in trades and industries or subdivisions thereof engaged in transactions in or affecting intrastate commerce in this State and those engaged therein in transactions in or affecting interstate or foreign commerce." St. 1933, p. 2637, § 1.

So far as this case is concerned, we may say that the federal statute was adopted by the state and that it was provided in the adopting statute that when the federal authorities had fixed a code for the operation of any industry, that code automatically became the state code therefor. The state statute provides also that a violation of such code shall be a misdemeanor and prescribes a penalty for such violation. Thus we have the unavoidable collision of the difference of opinion that causes this proceeding in the consideration of the following questions: (a) Can industry be so regulated? (b) Can the state legally adopt the federal code regulations by reference?

[1-3] It is a salutary doctrine that statutes should be sustained by the courts wherever and whenever this is reasonably possible. It is the purpose, right, and duty of the legislative branch of the government to enact such legislation as it deems desirable and its limitations are natural law and the written Constitutions; the courts have no voice in the policy nor in the wisdom of legislative action; they construe the language of the statute and determine its constitutional status.

[4] Chief Justice Marshall and his associates on the Supreme Bench were statesmen,

and there is statesmanship in judicial opinions. These men lived through the founding of this nation and were contemporaries of the Constitution framers. They wrote the primary rules for the construction of the Constitution from a broad comprehension of the young nation's structure, its duties and obligations, and with an intimate knowledge of the current history. They early determined against a narrow, literal construction and held that the Constitution was never intended as a detailed statute but rather as a working set of practical principles. It was Marshall who exclaimed, "We must never forget, that it is a constitution we are expounding. * * * A constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." M'Culloch v. Maryland, 4 Wheat. 316, 407, 4 L. Ed. 579. After the experience of over 147 years, it now seems apparent that any other conception of the great charter would have caused frequent amendments to it (difficult as amendment is) to meet the requirements of new and changing social influences. Only through this view of the Constitution has it remained the preserver of great fundamental principles instead of becoming a compilation of fixed statutes inevitably delaying, if not preventing, progress.

We have read the great decisions of the Supreme Court of the United States relevant to the issues of this cause and have noted the "adaptation" of the constitutional section pertinent here to the "various crises of our economic history." We perceive that they do not differ upon the principle expressed by Marshall but that they show a constant conflict of opinion as to the extent of "filling in" Marshall's concept authorizes the courts to do. The thought that seems to have sent the Supreme Court to its liberal interpretation of the due process and contract clauses of the Constitution in the Munn Case (Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77), to the stricter construction in the New York theater case (Tyson & Bro. v. Banton, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236) and back again to the high point of liberal construction in the Blaisdell Case, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, and Nebbia Case, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469, infra, is the laissez faire conception of constitutional economics. It may be stated with assurance that there is little historic basis for the doctrine that the government, legally speaking, must "let commerce alone," either in the English law or in American law. As a matter of historic fact, the conception that business is immune from government, as to restricting its practices, but is the legal subject of governmental protection and extension, reached its high point after the Civil War. But soon anti-trust or anti-monopoly, rate-making and safety appliance, usury, and other regulatory legislation began to appear. It may be said that government in business is more of an economic question than a legal one.

[5, 6] There are two very late United States Supreme Court opinions of great assistance to us in this proceeding. These opinions thoroughly analyze the previous opinions and pronounce doctrines which seem convincing to us. We shall examine them. The case of Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 235, 78 L. Ed. 413, 88 A. L. R. 1481, arose through a state legislative enactment that very materially affected the right of foreclosure of an incumbrance on real estate. The statute was based upon the same general emergency alleged in the acts before us and expressed in much the same way. It will be well to remember that in the cited case the contract affected was an existing and definite real estate incumbrance, including definite statutory rights of foreclosure. The remedial legislation postponed the foreclosure beyond the contract date and provided for compensation to the incumbrance beneficiary in the form of the rental value of the premises for the period of postponement. In the instant case, the enforcement of the remedial statute would apply as well to future contracts and offers no compensation to contract beneficiaries except the general good resulting. We think, however, that the reasoning of both the Blaisdell and Nebbia Cases leads to the conclusion that the abridgment of contract is not a constitutional infringement if the public welfare demands it. As a corollary to this principle, it necessarily follows that the general welfare should never be protected in such a manner as to unnecessarily deprive individuals of their contract benefits. Thus in the Blaisdell Case it will be seen that the rental value of the premises could reasonably be paid and yet the taking of the property could be prevented. In the Nebbia Case and the instant case, it will be seen that no such provision was possible. We shall proceed to quote liberally from Mr. Chief Justice Hughes' opinion in the Blaisdell Case:

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave

emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system."

And later in the same opinion he says:

"But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. * * * But, where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause. * * * To ascertain the scope of the constitutional prohibition, we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. * * * Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, —a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. * * * The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

After citing cases with comment, the Chief Justice continues:

"It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests (and the Chief Justice might have mentioned as added reasons for 'an increased use of the organization of society' the advent of perfected labor-saving machines almost coincident with the passing of the frontier and the labor and business competition of foreigners and first generation of American born who are content to live far below the American standard), have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends."

The opinion holds that an emergency existed; that the legislation was addressed to a legitimate end, not for "particular individuals but for the protection of a basic interest in society"; that the legislation was reasonable, and concluded that the statute did not deny the equal protection of the laws to defendant.

The other case calling for some detailed consideration is Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 506, 78 L. Ed. 940, 89 A. L. R. 1469. The defendant Nebbia was convicted of violating an order of the state milk control board fixing retail prices to be charged by stores and he appealed. The state Legislature established a milk control board with power to "fix minimum and maximum * * * retail prices to be charged by * * * stores to consumers for consumption off the premises where sold." The board made extensive investigations and findings as to the condition of the milk trade and fixed a price in accordance with the authorization and Nebbia was convicted of selling contrary thereto. Milk and the sale of milk have been the subjects of regulation in New York for many years, and whether or not the condition at the time of the regulatory order was in the nature of an emergency which we usually comprehend as being a different and radical change from the normal does not seem to us to affect the principle applied by the court in sustaining this legislation. Conditions were found to exist which were inimical to the trade and to the best interests of the consumers of an important food product generally used. The commission found, quoting from Mr. Justice Roberts' opinion, that "the production and distribution of milk is a

paramount industry of the state, and largely affects the health and prosperity of its people." Defendant claimed that he was not given the equal protection of the laws and, after disposing of that issue adversely, the opinion treats of the other defense, to wit, that defendant has been denied due process of the laws under the provisions of the Fourteenth Amendment to the Federal Constitution. The justice says in part:

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. * * * Justice Barbour said for this court: '* * * It is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.' City of New York v. Miln, 11 Pet. 102, 139, 9 L. Ed. 648, 662. * * * Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. (Omitted from this opinion.) These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need. The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power. The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community."

The opinion ably analyzes the principles of regulation of private property and cites many cases illustrative of these principles. It then takes up the claim of defendant that price fixing is illegal or forbidden by the Fourteenth Amendment. It disposes of the possible claim that the business is a monopoly or that it is a public utility or that it requires a franchise, resolving all these suggestions in the negative. The justice then puts a question and answers it:

"But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon

price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77."

Adverting to the argument that the basis for the holding in the Munn or Elevator Case (Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77) was that the business was a monopoly and was affected with a public interest, the opinion quotes from the Munn opinion as follows:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large," and comments thereon: "Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression. * * * The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue."

The opinion later goes on: "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' Northern Securities Co. v. United States, 193 U. S. 197, 337, 338, 24 S. Ct. 436, 457, 48 L. Ed. 679. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." See, also, Hampton, Jr., & Co. v. United States, 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624.

[7] We think the rationale of the Supreme Court's opinions, though it does not reconcile all of them with the same principle, is that any business may be regulated to the extent and in the manner reasonably required to prevent its unreasonable interference with the welfare of the general public.

[8] Applying these principles to the instant case, it seems to us that a condition has been pronounced as existing, which not only justifies but demands remedial action. That such a condition was existing at the time the questioned statutes were enacted and at the time of the alleged offenses of which petitioner is accused, cannot be doubted. That the regulation provided for in the acts was germane to the condition and was not discriminatory nor arbitrary seems equally clear. We think the acts were within the State and Federal Constitutions unless the delegation of the power to prescribe codes is unconstitutional and we shall therefore proceed to examine that question.

[9] Petitioner claims that the California act contravenes article 3 of the California Constitution in that the acceptance of the President's code is an unwarranted delegation of the legislative power. The provision requires that the state's functions—legislative, executive, and judicial—shall be kept separate each from the other. A comprehensive treatise on the subject of delegation of legislative powers is written into the opinion of Mr. Justice Lamar in the case of United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 483, 55 L. Ed. 563, and we shall hereinafter more particularly examine that case. The United States Constitution contains no specific prohibition against the delegation of the legislative powers of Congress, but it is logically deduced that since the Constitution divides the government into three distinct divisions, it does not lie in the power of Congress to delegate its power to another governmental division. As courts so often go back to Chief Justice Marshall for fundamental statements on constitutional questions, so did Justice Lamar in the case referred to, when he quoted the following from Wayman v. Southard, 10 Wheat. 42, 6 L. Ed. 262. The court was considering the power of courts to make rules for their own guidance:

"It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightly exercise itself."

Justice Lamar then comments:

"What were these nonlegislative powers which Congress could exercise, but which might also be delegated to others, was not determined, for he (Marshall) said: 'The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.' From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations,—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done." See, also, United States v. Spotless Dollar Cleaners (D. C.) 6 F. Supp. 725.

Lately the term "primary standard" has come into use as a comprehensive expression for the legislative enactment that requires administration to "fill up the details." As in the cited case, so in the California Supreme Court cases, a very broad and liberal construction has been given to "the power to fill up the details." We shall briefly notice some of the California cases, but first we shall further consider United States v. Grimaud, supra. The basis for this case was a congressional act providing for governmental forest reserves in the public domain. This act provided that the purposes for such reservations were "to improve and protect the forest and to secure favorable conditions of water flows." The cabinet secretary, under whose jurisdiction the forest reserves fell, was authorized by the act to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act [sections 473 to 483 of this title] or such rules and regulations shall be punished," etc. 16 USCA § 551. The secretary propounded rules and regulations as to the pasturing of sheep and cattle on the reserve and Grimaud was arrested and convicted of an offense of violating such rules and regulations. The conviction was sustained as against the claim that such rules and regulations were legislation which Congress could not delegate.

We shall proceed to examine some California authorities.

Ex parte Gerino, 143 Cal. 412, 77 P. 166, 168, 66 L. R. A. 249 (habeas corpus). The Legislature prescribed certain requirements for the issuance of a certificate to practice medicine and among others the candidate was not allowed to take the examination before an examining board unless he should produce "a diploma issued by some legally chartered medical school the requirements of which medical school shall have been, at the time of granting such diploma, in no particular less than those prescribed by the Association of American Medical Colleges for that year." Petitioner claimed that this provision delegated to the association named the power to fix this standard, a power which could only be exercised by the Legislature itself. The court said in part:

"It being proper for the Legislature to demand some standard of efficiency, as we have seen, we think it is equally within its powers to declare that it shall be the same as that prescribed from time to time by an association composed of colleges devoted to the work of preparing persons for the profession. Evidently the standard of proficiency in scholarship as a preparation, and the particular studies necessary to secure a fair preparation, must change as the discoveries in natural science open new fields of investigation, and suggest or reveal new curative agencies. The Legislature cannot successfully prescribe in advance a standard to meet these new and changing conditions. The method adopted appears to be sufficiently definite to enable all colleges to reach the required standard, when in good faith they desire to do so. The law is as fixed, definite, and certain in this respect as the nature of the subject and the object to be attained will permit; and we do not think it should be held void because it adopts the standard fixed from time to time by those who, it will be presumed, are the most eminent in the profession which it attempts to regulate, and who should be the most interested in maintaining the highest degree of professional proficiency, skill, and training." This holding was followed and

approved in Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 P. 319.

The case of Metropolitan Water District v. Whitsett, 215 Cal. 400, 10 P.(2d) 751, 759, was decided in April, 1932. This was a petition in mandate to require the respondent, who is the president and executive officer of petitioner, a public incorporated governmental body, to execute a contract. Respondent refused because the petitioner had not ascertained and specified in its notice inviting proposals and had not inserted in the contract, the general prevailing rate per diem wages in the locality in which the work was to be performed for each craft or type of workman or mechanic needed to execute the contract, as required by the provisions of the act. It was contended, among other things, that there was an unwarranted delegation of power to the commission in that the general prevailing rate per diem wages in the locality in which the work was to be performed, etc., were indefinite expressions. The court, however, disposed of these contentions by showing that the board was authorized by the act to ascertain the prevailing rate of "fair market value" of such labor and that such finding became final and definite in the contract. As to the indefiniteness of the locality in which the work was to be performed, the court held that it was an expression of sufficient definiteness. The court says:

"It is unnecessary to cite cases to the effect that it has become a firmly established rule of law that a large measure of discretion may be delegated to administrative officers and boards. Here the determination of the board of directors is made final. This does not mean that the action of the board may be arbitrary or capricious, but the proper administration of the statute will be presumed. Difficulties in such administration are presented by way of argument, but they do not present judicial questions."

The subject-matter is well summed up in the opinion of Gaylord v. City of Pasadena, 175 Cal. 433, 166 P. 348, 349:

"Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs—nation, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Union Bridge Co. v. U. S., 204 U. S. 364, 27 S. Ct. 367, 51 L. Ed. 523."

See Union Bridge Co. v. U. S., 204 U. S. 364, 27 S. Ct. 367, 51 L. Ed. 523.

The comparatively late case of In re Peppers, 189 Cal. 682, 209 P. 896, contains language that would seem to be in conflict with the other cases herein mentioned. This case arose on habeas corpus, the petitioner having been placed under restraint upon a complaint charging him, in three counts, with having violated "the California fruit and vegetable standardization act." Chapter 719 (page 1234), Cal. Stats. 1921. We are concerned only with count 2. This act sets out in detail various standards for fruit, grapes, melons, vegetables, berries, and their containers. It provides in detail when oranges shall be deemed properly matured for shipment or sale. It provides only the following regarding frosted oranges: "Oranges shall be considered unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped." Section 10. The act provides a penalty in the following language: "It shall be unlawful for any person * * * to pack or cause to be packed for sale or shipment any (articles) specified in this act that do not conform to the standards herein provided." It then makes deceptive or mislabeled packs unlawful and declares: "Any person * * * who shall violate any of the provisions of this act shall be deemed to be guilty of a misdemeanor." Section 14. The very next succeeding section of the act refers to rules as follows: "Sec. 15. The director of agriculture is empowered to define, promulgate and enforce such rules and regulations as may be deemed necessary to carry out the provisions of this act, and to prescribe the limits of tolerance within which deviations from the standard dimensions set forth in section seven shall be permitted."

It is perfectly clear that the act was not drawn with the idea of prescribing a primary standard with the details to be filled in by the administrative officer, as the details of all of the standards provided for or authorized are set up in the act. However, the director of agriculture did prescribe detailed particulars as to just what should constitute a frozen orange that would "endanger the citrus industry if shipped." It is claimed that petitioner violated this regulation, and the court, "assuming but not deciding" that this regulation was within the act as a filling in of the details, said that the Legislature could not so delegate its "exclusive powers" and cited authorities. With great respect for the author of the opinion, we submit that there was no occasion for assuming that the statute attempted to authorize the making of detailed standards by rules and regulations and that the point ruled upon was not properly before the court. With the same respect, we assert that but one of the authorities cited sustains the view of the justice on the point treated. This case, People v. Parks, 58 Cal. 624, cannot be a convincing authority for the reason that it shows the Supreme Court in hopeless disagreement with only three of the seven certainly expressing agreement on the point here being considered. There is another reason why this point was not before the court in the Peppers Case and therefore why it cannot be taken as authority upon it. The penalty clause does not make the violation of the rules and regulations to be prescribed by the director an offense. After stating that violations of the provisions of the act shall be a misdemeanor, it does not, as in the Grimaud Case, supra, add the phrase "or such rules and regulations." A specific ruling upon this exact point upon a statute using almost the identical language as that used in the statute under consideration in the Peppers Case is made in Re McLain, 190 Cal. 376, at pages 378 and 379, 212 P. 620.

The absence of the provision in the primary standard law authorizing penal action and the insufficiency of the primary standard law in other particulars form the basis of the decisions in the following cases: Schaezlein v. Cabaniss, 135 Cal. 466, 67 P. 755, 56 L. R. A. 733, 87 Am. St. Rep. 122; Board of Harbor Com'rs v. Excelsior Redwood Co., 88 Cal. 491, 26 P. 375, 22 Am. St. Rep. 321; Ex parte Cox, 63 Cal. 21; In re McLain, 190 Cal. 376, 212 P. 620; Englebretson v. Ind. Acc. Comm., 170 Cal. 793, 151 P. 421.

The problem then seems reducible to the following: There must be an overlying law which constitutes the primary standard. The function of the delegated power must be "to determine some fact or the state of things upon which the enforcement 'of the primary standard law' depends."

We have before us state and federal acts, both of which recognize a nationwide business collapse and its resultant trail of human misery. Both state and nation are attempting to rehabilitate the interchange of produce. Both governments have decreed that this can best be done through the enactments of codes for business which shall be the standards of fair competition. These decrees are the overlying laws or the primary standards. The power to fill in the details is the delegated power.

[10] The incidental objection that the codes are not in being when their violation is made an offense is immaterial if the primary standard has been laid down. If the codes do not meet with the state's approval, the state may repeal the law and the codes fall with it. Nothing could be more obvious than that the filling in of details must of natural necessity be subsequent to the primary standard law, which provides that the violation of the filled in details of the primary standard shall constitute an offense.

[11] The incidental objection that the delegation of code prescription to the President of the United States on the ground that the state of California is a sovereign state and the President is in this sense a foreign official does not greatly impress us. The correlative rights of state and nation are of great importance, but we are a nation not an alliance of foreign states, and our President is not a foreign potentate.

[12] That the incidental powers may be delegated to a body or be measured by a standard not under the control of the state and that they may be subject to change are all well illustrated by Ex parte Gerino, supra.

If ever there could occur a state of facts justifying, even demanding, co-operative effort between the state and the nation, as provided for in the law under consideration here, we have it in the principle underlying this case. The disease is but one and the patient is but one; how logical that the curative agents must not conflict. A code regulated business entering interstate commerce would be, in a large measure, ineffective if it came in competition with the same sort of business that was unregulated when entering intrastate commerce. Only confusion could result if one code were fixed for produce entering interstate commerce and another code for produce entering intrastate commerce.

[13] It is not here claimed that the code regulations, which petitioner stands accused of violating, are not proper regulations if the general principles of the act herein discussed are held to be within the constitutional requirements.

We conclude that no constitutional right of petitioner has been infringed and that the writ should be discharged and the petitioner remanded and it is so ordered.

We concur: DESMOND, J.; SCOTT, Justice pro tem.

1 Cal.App.2d 382

SCRIMSHER et al. v. RELIANCE ROCK CO. et al.

Civ. 8626.

District Court of Appeal, Second District, Division 2, California.

Oct. 13, 1934.

Rehearing Denied Nov. 10, 1934.
Hearing Denied by Supreme Court Dec. 10, 1934.

1. Appeal and error ⇐347(1)

Where minute order of nonsuit finally disposes of the cause, time for appeal runs from date of minute order and not from date formal judgment of dismissal is signed.

2. Appeal and error ⇐347(1)

Where minute order of dismissal was intended by court, and must have been so understood by the parties, as memorandum for preparation of final judgment of dismissal to be entered later, appeal lies from formal judgment, and time within which it must be taken commences to run from date when formal judgment is signed.

3. Appeal and error ⇐347(1)

Where minute order of nonsuit as to one defendant was made during trial, and formal judgment of dismissal confirming minute order was later entered, appeal was properly taken from formal judgment.

4. Appeal and error ⇐1195(3)

Judgment of appellate court on former appeal that there was sufficient evidence to take case to jury *held* res judicata on question of jurisdiction on subsequent trial, particularly where no motion was made to dismiss appeal for lack of jurisdiction, and appellate court's opinion showed that court considered that appeal had been properly taken.

5. Negligence ⇐136(18)

In action for death of person when struck by crane bucket, whether operator of unloading crane was negligent in swinging bucket over approaching cars without ascertaining whether persons whose duty it was to operate brakes on cars were in danger of being struck *held* for jury.

6. Negligence ⇐124(3)

In action for death of person when struck by crane bucket, which defendant's employee swung over approaching cars, where crane and operator were hired by defendant to decedent's employer, exclusion of testimony concerning how defendant generally unloaded cars *held* not error.

7. Appeal and error ⇐1059

Where excluded evidence in action for negligent death related to whether person causing death was at particular time defendant's employee, or employee of another, and matter was fully covered by another witness and instructions, to which no exception was taken, any error in excluding testimony was harmless.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Mamie E. Scrimsher and another against the Reliance Rock Company and another. From a judgment for plaintiffs, the named defendant appeals.

Affirmed.

Bauer, Macdonald, Schultheis & Pettit, Fred E. Pettit, Jr., and A. S. Halsted, Jr., all of Los Angeles, for appellant.

F. Ray Risdon, J. L. Kearney, and Jas. D. Randles, all of Los Angeles, for respondents.

PACHT, Justice pro tem.

Appellant, Reliance Rock Company, seeks reversal of a judgment of $15,000 and costs, based upon the verdict of a jury rendered herein against it and in favor of Mamie Scrimsher, widow, and Winfred Austin Scrimsher, minor child of William Austin Scrimsher, deceased.

The action, which is one for damages for the death of decedent, caused by the claimed negligence of the appellant, was twice tried. Originally commenced September 28, 1927, against Reliance Rock Company, appellant here, and Robert C. Barnes, as defendants, the cause first proceeded to trial before a court and jury on December 12, 1928; at the close of plaintiffs' case on December 13, 1928, both defendants moved for an order of nonsuit,

which, after argument, was taken under submission by the trial judge. On the following day, the 14th of December, 1928, the court announced its decision in the following language: "* * * I am more firmly convinced than ever that this motion will have to be granted. * * * The motion will be granted as to the Reliance Rock Company. You may proceed with the case against the defendant Barnes."

Thereupon the trial proceeded as against the defendant Barnes alone, resulting in a verdict against him, from which no appeal has ever been taken and which has since become final.

The minutes of the court as they concern the proceedings on the 14th of December, 1928, and the point now raised by appellant, read as follows: "Trial resumed with all parties and jury present as before. A. G. Miner, Reporter. Bernard A. Hodges is sworn and testifies for defendant. Motion for non-suit is by the court granted as to Reliance Rock Company. Motion for a non-suit as to Robert C. Barnes is by the court denied. Defendants rest."

Subsequently, and on January 2, 1929, a formal "Judgment of Non-suit" was submitted for signature by the appellant, and was signed by the trial judge and docketed on the following day. This "Judgment of Non-suit" reads as follows:

"Evidence both oral and documentary having been received on the part of plaintiffs, said plaintiffs having rested their case; thereupon attorneys for defendant Reliance Rock Company, a corporation, having duly and regularly made a motion for a non-suit, and said motion having been duly considered by the court, and the court, by minute order made and entered in the records of said court on the 14th day of December, 1928, having granted said motion of non-suit as to said defendant Reliance Rock Company, a corporation, and thereafter a verdict having been rendered by the jury in favor of the plaintiffs and against defendant Robert C. Barnes;

"Now, therefore, in confirmation of said minute order of court granting a non-suit as to defendant Reliance Rock Company, a corporation,

"It is hereby ordered, adjudged and decreed that plaintiffs, and each of them, take nothing by their complaint as against defendant Reliance Rock Company, a corporation, and that as to said defendant the said complaint be dismissed."

In due time, plaintiffs (respondents here) moved for a new trial as against said Reliance Rock Company; their notice of motion reading as follows:

"To the above named defendant, Reliance Rock Company, a corporation, and Slauson and Ackerman, its attorneys of record:

"You will please take notice that the plaintiffs in the above entitled action intend to and will move this court to vacate and set aside the decision and judgment of the court heretofore rendered in the above entitled matter, decreeing a non-suit as to the plaintiffs and decreeing that plaintiffs take nothing by their complaint as against the defendant Reliance Rock Company, a corporation, which decision and judgment was signed by Hon. John L. Fleming, Judge presiding in said matter, on the 2nd day of January, 1929 and entered and docketed January 31st, 1929 in Book 705, Page 6 of Judgments, in the office of the County Clerk of the County of Los Angeles, and to vacate said judgment and to grant plaintiffs a new trial herein on the following grounds," etc.

The motion for a new trial having, after argument, been denied, plaintiff (respondents herein) on the 18th of March, 1929, served and filed their notice of appeal, reading as follows: "You and each of you will please take notice that the plaintiffs in the above entitled action hereby appeal to the District Court of Appeal of the State of California, Second Appellate District, from the judgment in the above entitled matter decreeing a non-suit as to the plaintiffs, and decreeing that said plaintiffs take nothing by their complaint against defendant, Reliance Rock Company, said judgment being rendered on the 2nd day of January, 1929, and entered and docketed on January 31, 1929, in Book 705, Page 6 of Judgments, in the office of the County Clerk of Los Angeles County; also from the order denying plaintiff's motion for a new trial, made on the 7th day of March 1929."

While pending before the District Court of Appeal, the case was briefed by counsel for the appellant and respondents, and in due time a decision was handed down reversing the judgment of nonsuit; the District Court of Appeal holding that there was sufficient evidence introduced on behalf of the plaintiffs to warrant the submission of the cause to the jury. See Scrimsher v. Reliance Rock Co., 116 Cal. App. 500, 2 P.(2d) 862.

After the remittitur came down, the cause was, on the motion of the plaintiffs, reset for trial before a jury, for the 20th day of April, 1932. On the 26th of March, 1932, appellant, Reliance Rock Company, served upon plaintiffs and filed its notice of motion returnable

April 1, 1932, to vacate the order setting the case for trial and to terminate all further proceedings as against said appellant upon the ground, in substance, that the order of nonsuit made and entered the 14th day of December, 1928, was the definite and final act upon the part of the trial court concluding the case as to the Reliance Rock Company, and was the only appealable order; that the subsequent "Judgment of Non-suit," signed the 2d of January, 1929, from which an appeal was taken by plaintiffs (appellants in the first appeal), was entirely superfluous and of no effect, and that all subsequent proceedings in the District Court of Appeal, including the remittitur reversing the case and sending it back for retrial, were void and of no effect whatever. This motion was after argument denied.

Thereafter, and before the second trial of the case commenced, appellant petitioned the District Court of Appeal for a writ of mandamus requiring the superior court to vacate its order denying appellant's motion for a vacation of the setting and to terminate all further proceedings in the case; likewise another petition for an alternative writ of prohibition to restrain the superior court from retrying the case because of lack of jurisdiction to so do. These petitions were denied without opinion.

The second trial then commenced on April 21, 1932, but, before a jury was impaneled, appellant entered its formal objection to the trial of the action, assigning in support thereof the same grounds stated in its motion of the 1st of April, 1932. This objection was overruled, and the case was then tried, resulting in a verdict for the plaintiffs and against the appellant herein as before noted.

At the close of the evidence, and before its submission to the jury, appellant moved for an instructed verdict in its favor consistent with the minute order judgment of nonsuit of December 14, 1928, and, upon return of the verdict and before the jury was dismissed, and prior to the filing, docketing, or entry of the verdict, the appellant moved for a judgment in its favor notwithstanding the verdict, which motions were based inter alia upon the ground that the court had no jurisdiction to enter any judgment inconsistent with the minute order judgment of nonsuit of December 14, 1928. Both of said motions were denied.

On the 28th day of April, 1932, the defendant Reliance Rock Company served and filed its notice of intention to move for a new trial, and, among other grounds upon which the motion would be based, specified the following: "6. Total lack of jurisdiction in the court to retry the case (as it did the 21st and 22nd days of April, 1932) with minute order judgment of nonsuit duly entered in the minutes of the court of the 14th day of December, 1928, standing in full effect and undisturbed by any subsequent proceedings either in connection with motion for a new trial and/or appeal."

The motion was presented to the court on the day set, and the court thereupon took the matter under submission.

On the day its notice of intention to move for a new trial was filed, the defendant also filed in the District Court of Appeal for the Second Appellate District a petition for rehearing in the mandate and prohibition proceedings above referred to (Civ. Nos. 8370 and 8371), this for the reason that, although the case had then already been tried, the prayers of the petitions in those matters sought general relief, and upon reconsideration the court might have issued writs in such form as would have stayed the enforcement of the judgment entered on the verdict on April 23, 1932. On the 6th day of May, 1932, both petitions for rehearing were denied.

Thereafter, and on the 13th day of May, 1932, petitions were filed in the Supreme Court for a hearing by that court after decision by the District Court of Appeal, together with a further petition for writ of prohibition. (L. A. Nos. 13687, 13688, and 13689.)

On June 2d the petition in Los Angeles No. 13689 and on June 4th the petitions in Los Angeles Nos. 13687 and 13688 were denied by the Supreme Court.

On June 23, 1932, appellant's motion for a new trial was denied, whereupon it appealed to this court from the judgment so rendered against it, bringing up for review the various intermediate orders referred to in the foregoing recital.

Three principal grounds are assigned by the appellant for a reversal of the judgment which, in substance, may be stated as follows:

A. The first appeal having been taken by plaintiffs (appellants in the first case) from the formal judgment of nonsuit instead of from the minute order of nonsuit, no jurisdictional power to act in the matter was conferred upon the appellate court, and, as a result thereof, its proceedings being without effect in law, the trial court had no jurisdiction to retry the case and enter another and different judgment with the minute order judgment of nonsuit standing of record and as a matter of law undisturbed.

B. That, as a matter of law, the evidence produced upon the second trial of the case fails to show any negligence on the part of the defendant as a result of which the decedent came to his death, and therefore, this being the state of the record, it was error for the trial court to deny appellant's motion for judgment notwithstanding the verdict; likewise that decedent was guilty of contributory negligence barring a recovery.

C. The jury having been called upon to determine as a matter of fact whether the defendant Robert C. Barnes (through whose claimed negligence decedent was injured and met his death) was the servant or employee of the defendant Reliance Rock Company, his general master, or the servant of Oswald Brothers, the special master, it was error for the trial court to exclude certain proffered testimony as to whether the methods used in the work were those of the defendant Reliance Rock Company or Oswald Bros.

If the first point made by appellant has merit, it is necessarily determinative of the appeal and of the entire litigation. If we so conclude, it will render unnecessary a discussion of the remaining two points. On the other hand, if we conclude that the notice of appeal served by the plaintiff (appellant in the first case) was addressed to the proper order of nonsuit, and that the District Court of Appeal did acquire jurisdiction of the first appeal, we will then consider and pass upon the other claims of error urged by appellant herein.

[1] 1. Undoubtedly the rule is that where the minute order of nonsuit is the final and definite disposition of the cause, the time within which an appeal must be taken commences to run from the date of the minute order and not from the date of the signing of a subsequent formal judgment of dismissal. Tromanhauser v. Grisemer, 123 Cal. App. 153, 11 P.(2d) 32; Bengel v. Traeger, 100 Cal. App. 526, 280 P. 538; Burks v. Bronson, 58 Cal. App. 143, 207 P. 1018; Brown v. Sterling Furniture Co., 175 Cal. 563, 166 P. 322; Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 P. 882; Henry v. Lingsweiler, 81 Cal. App. 142, 253 P. 357; section 581, Code Civ. Proc.; Matthai v. Kennedy, 148 Cal. 699, 84 P. 37; Lewis v. Hammond Lumber Co., 114 Cal. App. 390, 300 P. 49; Finch v. Eckstrom, 115 Cal. App. 381, 1 P.(2d) 516; Burks v. Bronson, 58 Cal. App. 143, 207 P. 1018; Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 P. 352; Clark v. Superior Court, 37 Cal. App. 732, 174 P. 681; Darlington v. Butler, 3 Cal. App. 448, 86 P. 194.

[2] But, where the minute order was intended by the trial court and must have been understood by the parties to be, and served merely as memoranda affording data from which a proper final judgment might thereafter be drafted disposing of the entire cause, the appeal lies from the formal judgment, and the time within which it may be taken begins to run from the date of its signing. Skaggs v. Taylor, 77 Cal. App. 519, 247 P. 218; Ferris v. Baker, 127 Cal. 520, 59 P. 937; Larson v. Larson, 15 Cal. App. 531, 115 P. 340; Estate of Yale, 208 Cal. 102, 280 P. 358; Gullick v. Interstate Drilling Co., 100 Cal. App. 243, 279 P. 828; Gullick v. Interstate Drilling Co., 111 Cal. App. 263, 295 P. 549, 550; Graf v. Montecito Water Dist., 126 Cal. App. 178, 14 P.(2d) 336.

That the court upon the first trial intended to sign some sort of formal judgment of nonsuit or dismissal is evidenced by its language when it announced its decision on the motion for a nonsuit. And that counsel for appellant (respondent in the first appeal) regarded the minute order of December 14, 1928, as mere memoranda, affording data from which a proper final judgment might thereafter be drafted and presented for signature, is shown by the recitals in the "Judgment of Non-Suit." On the 14th day of December, 1928, when the minute order was made, the entire case had not yet been disposed of; the cause was still on trial as against the codefendant Barnes. It was evidently the intention of the court and counsel to delay the making of a final definite and formal "Judgment of non-suit" until after the verdict of the jury had been rendered as to the remaining defendant. Accordingly, the formal judgment of nonsuit reads: "Now, therefore, in confirmation of said minute order of court granting non-suit as to defendant Reliance Rock Company, a corporation, it is hereby ordered, adjudged and decreed that plaintiffs and each of them take nothing by their complaint as against defendant, Reliance Rock Company, a corporation, and that as to said defendant the said complaint be dismissed."

If the minute order of December 14th was intended to be the final and definite disposition of the case as to the defendant Reliance Rock Company, why was it necessary to make a confirmatory order? In passing upon a similar question in Gullick v. Interstate Drilling Co., supra, Mr. Justice Ira F. Thompson used language which has particular significance in its application to the case now under review: "In view of the fact that the appeal was well within the sixty-day pe-

riod, and also that the respondents could not possibly have had any doubt concerning the intention of the appellant to have reviewed the action of the court in granting a nonsuit, the dismissal of the present appeal would be the result of an insistence upon a pure technicality without either rhyme or reason. It would amount to reliance upon the shadow and not the substance. The law, however, does not require us to so act. It is to be observed that in Bengel v. Traeger, 100 Cal. App. 526, 280 P. 538, the sixty-day period had not only run when counted from the entry of the order of nonsuit on October 30, 1928, but also when reckoned from the entry of the so-called formal judgment on January 3, before the notice of appeal was filed on March 26, 1929. So, too, in Burks v. Bronson, 58 Cal. App. 143, 207 P. 1018, the second judgment was entered a month after the order of nonsuit was 'entered on the minutes and noted in the register of actions by the clerk.' In Estate of Yale, 208 Cal. 102, 280 P. 358, 359, the Supreme Court said: 'Without in any manner attempting to minimize the force of the authorities cited and relied on by the respondents in support of their motion, it is our conclusion, founded on a reading of the several minute orders and of that portion of the formal judgment hereinabove quoted, that the minute orders were intended by the trial court, and must have been understood by the parties, to be and to serve merely as memoranda affording data from which a proper final judgment might thereafter be drafted disposing of the entire cause. In such a case an appeal is held to lie from the formal judgment. Ferris v. Baker, 127 Cal. 520, 523, 524, 59 P. 937; Larson v. Larson, 15 Cal. App. 531, 536, 115 P. 340.' In the case of Ferris v. Baker, just cited, it is said: 'The order in this case was a mere narration by the clerk as follows: "Defendants move the court for nonsuit on the grounds stated. Said motion is argued, and thereupon granted." The order did not show what were the grounds of the motion. It did not purport to be a dismissal of the action, nor a judgment of any kind, and was in fact but a memorandum affording data from which a judgment or proper order might be drafted, similar to the minute made when final judgment is announced, directing that it pass for one party or the other.' The identical observations may with all propriety be made concerning the minute entry here in question. In Larson v. Larson, supra, we also find appropriate language as follows: 'We are inclined to think, however, that the first order was merely "a memorandum affording data from which a judgment * * * might be drafted," and that, therefore, the order of September 22d was the proper one from which to take the appeal. The Supreme Court so held in a similar case. Ferris v. Baker, 127 Cal. 520, 59 P. 937. The appeal was in time, even if the order of nonsuit was entered as claimed by respondent. The error complained of, even if it existed, could not possibly have misled any one, for the notice of appeal identified the order appealed from with reasonable certainty. That is all that is required. Section 941b, Code Civ. Proc. Such errors have always been disregarded. See Weyl v. Sonoma Valley Ry. Co., 69 Cal. 202, 10 P. 510; Anderson v. Goff, 72 Cal. 65, 13 P. 73, 1 Am. St. Rep. 34; Paul v. Cragnaz, 25 Nev. 293, 57 P. 857, 60 P. 983, 47 L. R. A. 540; British Bark Latona v. McAllep, 3 Wash. T. 332, 19 P. 131.' Our conclusion is that an appeal has been duly taken."

Again, in Graf v. Montecito Water Dist., supra, which appears to be the last appellate court decision upon this question, Justice Craig, in passing upon a motion to dismiss an appeal taken from a formal judgment of nonsuit instead of the minute order previously made, concluded that the appeal was effectively taken and denied the motion to dismiss.

[3] Our conclusion, therefore, is that the first appeal was properly taken, that the District Court of Appeal had acquired jurisdiction of the cause, and that the remittitur sending the case back for retrial was a binding disposition of the appeal.

2. Moreover, while no motion to dismiss the first appeal was ever made, nor was the question of jurisdiction raised at any stage of the pendency of the case in the District Court of Appeal, the opinion of Mr. Justice Houser clearly shows that the District Court was well aware of the state of the record and passed on the appeal as if it had been properly taken and from the proper judgment of nonsuit. It will be noted that in making a recital of the facts in the case, and the manner in which it found its way to the Court of Appeal, Justice Houser says: "At the close of the evidence presented by the plaintiffs, an order of nonsuit was entered in favor of Reliance Rock Company; and it is from the resultant judgment that the appeal herein is prosecuted."

[4] It is plain to us that the decision of the first appeal is res adjudicata on the question of jurisdiction subsequently and now raised by appellant. See White v. Fresno Nat.

Bank, 98 Cal. at page 167, 32 P. 979; Clary v. Hoagland, 6 Cal. 685. To hold otherwise on the record here presented would be lending encouragement to dilatory and highly technical procedure subversive of an effective disposition of an appeal fully briefed and decided on the merits. It would give encouragement to a respondent to await the event of an appeal by arguing the substantive questions involved, and, if dissatisfied with the decision of the court, await the resetting of the case for trial, and then, for the first time, raise the question of the jurisdiction of the court of review to entertain the appeal in the first instance. This would certainly give rise to a most chaotic procedure and constitute a stumbling block to the orderly and speedy administration of justice. It "would be the result of an insistence upon a pure technicality without either rhyme or reason. It would amount to reliance upon the shadow and not the substance." It would wholly defeat in this case, upon highly technical grounds, a recovery of damages after two trials, and the lapse of nearly seven years from the date of the commencement of the case to date of this decision. We are satisfied that the law never intended such a final disposition of an otherwise meritorious cause.

To properly pass upon the second point made by appellant, it is necessary to make a brief statement of the essential facts surrounding the happening of the accident.

Oswald Bros. were paving contractors who, to facilitate their operations, maintained near the scene of the accident bunkers for the mixing of rock and gravel which was dumped into waiting trucks. At a railroad siding parallel to the bunkers were located seven gondola cars loaded with rock and gravel. This material was removed from the cars into the bunkers by means of a steam shovel owned by appellant, and operated by the defendant Barnes, who, at the time of the accident in question, was in the general employ of the appellant—the shovel and services of Barnes being rented out by appellant to Oswald Bros. at $5 per hour.

The accident occurred between 1 and 2 p. m. of June 25, 1927; decedent, for a year and a half to two years prior thereto, had been employed by Oswald Bros. as its bunker man; his duties were to see (testimony of appellant's witness Spilmeyer):

"* * * That the materials were properly unloaded, and the trucks were properly loaded, and the operations went along uniformly as to speed; no delays any place.

"To see that the cars were spotted properly when the switch engine brought them in, spotted properly for unloading; and see that the entire operation of unloading went through properly." (Rep. Trans. pp. 86, 87.)

"It was his duty to see that he had material in the bunkers for the operations to be carried along; if he was short of rock or sand, he would tell the operator he had to have more rock or more sand. If the stock pile was down, he would have to get cars up there, keep operations going.

"* * * I talked to Mr. Barnes and Mr. Scrimsher together, and I told Mr. Barnes then that whatever Mr. Scrimsher asked for, that I would expect him to give it to him." (Rep. Trans. pp. 144 and 145.)

"I instructed Mr. Scrimsher, I expected him to keep operations going, and not to delay the mixer or the trucks, and to ascertain why the trouble is, and remove it. I expected him to keep them going. He was in charge at that point over the operation." (Rep. Trans. p. 146.)

Barnes, the shovel operator, who the jury under appropriate instructions found to be the employee of the Reliance Rock Company, came on the job on the 24th of June, the day before the accident, and one Kimball, who assisted in the operations and whose particular duty it was to spot the gondola cars, first came to work at about 10 a. m. on the day of the accident.

The manner in which the accident happened is best described by Kimball, who, in substance, testified as follows:

"There was about seven cars in the string, and just the time before his death we had to move the cars to get out the gravel and sand in the cars—in the full cars." (Rep. Trans. p. 92.)

"I was standing on one end of the car applying the brakes."

"He (Scrimsher) was applying the brakes on the other car on the other end, a car length from me." (Rep. Trans. p. 93.)

The gondola cars were moved as follows:

"The Brown hoist shovel was attached to the cars by means of a cable. This cable attached to the Brown hoist shovel pulled the cars down to the position they wanted them to be * * * the position that would be the handiest for the shovel, or the easiest for the shovel to get the gravel or sand out of the cars with * * * and into the bunkers."

"Q. Now, what means, if any, was used to stop the cars when they reached the proper

place? A. He used all the hand brakes on the cars—on the rock gondolas.

"Q. And who attended to those hand brakes? A. The swamp man.

"Q. And this particular man who was the swamp man? A. I was." (Rep. Trans. pp. 94, 95.)

"Well, about ten minutes before the fatality I had hooked the cable onto the car, as explained to me to hook the cable onto the car and moved them on down.

"And I had hooked that on and gone up on the car to be ready to apply the hand-brake. While I was hooking the cable on, or while I was crawling upon the car, I also saw Mr. Scrimsher walking over to the car. Whether he got on the car—I did not see him get on the car, but I saw him walking to the car." (Rep. Trans. pp. 95, 96, and 98.)

"Q. Now, after you got on the car to apply the brake, just state what happened, did the cars move ahead, or tell us? A. As I climbed on the car the shovel started up towing the cars on down by means of this cable connected with the Brown hoist—towed the cars down, and at a certain position we applied the hand-brakes. That position was told to me by the operator of the shovel.

"Q. He told you when to apply the hand-brakes? A. No, he signaled, that he wanted them stopped there.

"Q. And you did apply the hand-brakes? A. I applied the hand-brakes.

"Q. And the cars came to a stop? A. That I don't know, because as I looked up I am not sure whether the cars were at a complete stop or not.

"Q. Now, you were on the car. Where was Scrimsher when you saw him, where was he in relation to the car? A. On the brake platform of the car in front of me.

"Q. On the brake platform of the car in front of you? A. On the near end, on the east end of the car in front of me.

"Q. And just state now—I believe you came down to where you saw Mr. Scrimsher standing, and just before the shovel struck him, is that correct? A. No, I saw him as he was hit.

"Q. Just as he was hit? A. Yes, sir.

"Q. And what happened? A. Well, he was swept off the car as he was hit. The shovel was reversed, but the back flop of the shovel, or clam-shell was reversed, and the back flip of the clam-shell is what caused the death of Mr. Scrimsher, and I was just climbing off the car as the shovel struck Mr. Scrimsher, to get down to unhook the cable."

Barnes testified that he swung the bucket or steam shovel around at full speed and did not look to see if any one was on the car or not before he swung the boom around (Rep. Trans. pp. 34 and 36), although from his cab he had a full view of the gondola cars (Rep. Trans. pp. 36, 37, 41 and 42).

Appellant contends that Barnes had no reason to anticipate the presence of Scrimsher on the gondola cars, and that it was contributory negligence as a matter of law for him to go upon the cars without notifying Barnes of his desire so to do.

3. Scrimsher's duties in and about the gondola cars and the prompt and efficient dispatch of the gravel and rock therefrom into the bunkers was explained to Barnes by the superintendent, Spilmeyer (Rep. Trans. 144), and must have been fully known to him as a result of their joint operations from the time Barnes came on the job on the 24th of June; he (Scrimsher) no doubt, spotted the cars and braked them before Kimball came to work at 10 a. m. of the morning of the accident, and the nature of the operations was such that it should have been apparent to any prudent and careful man, operating such a dangerous instrumentality as the steam shovel in question, that occasions might arise from time to time for the presence of Scrimsher on the gondola cars for the purpose of spotting them and assisting in the braking.

It was plainly negligence for Barnes to swing the bucket around over the cars at full speed while the braking operations were being performed without looking to see whether anyone was on the cars or not. Barnes owed the duty both to Kimball and Scrimsher to carefully operate the steam shovel to avoid striking either of them with it while they were engaged in the performance of their duties on the gondola cars. He cannot exculpate himself by the assertion that no one told him and that he did not know that Scrimsher at the very time of the accident would be on the cars; a reasonably prudent operator should have and would have known that Scrimsher, in the efficient and proper performance of his duties, would during the course of the operations find it necessary, in order to keep the removal of the rock and gravel speeded up, to go on or near the gondolas.

[5] 4. The question of Barnes' knowledge of Scrimsher's presence on the gondolas at the time of the accident, or of his previous practice in going upon them, was by the learned trial judge squarely submitted to the jury under proper and appropriate instructions, and its implied findings against the appellant

are amply supported by evidence. It was for the jury, as the trier of the facts, to determine whether or not, under the facts and circumstances as they existed while the work was being carried on, Barnes should have anticipated the presence of Scrimsher on the gondola cars, and whether or not it was negligence for him to swing his shovel without taking any observations as to Scrimsher's presence about the cars. He had a full view from his position in the cab of any one going to and from the cars; Kimball saw Scrimsher walking over to the car, and the jury very properly concluded that Barnes' failure to see him was due to his failure to take the ordinary and reasonable precautions of looking before swinging the boom around. Upon well-settled principles we are not inclined to disturb the verdict of the jury, based as it is upon disputed questions of fact.

[6] 5. Error is assigned by appellant to a ruling of the trial court sustaining an objection to a question propounded to the appellant's witness Hodges as follows:

"Q. Do you know whether the Reliance Rock Company in unloading cars, moved them by pulling them with a cable attached to the Brown hoist crane or any other crane?

"Mr. Randles: Object to as incompetent, irrelevant and immaterial, not bearing upon the issues in this case.

"The Court: Objection sustained." (Rep. Trans. p. 127).

The interrogatory was addressed to the issue of whether or not Barnes was at the time of the accident in the employ of the appellant or in the special employ of Oswald Bros. Appellant was evidently seeking to prove that the method used in moving the gravel cars by means of a cable instead of a pinch bar was the peculiar device or method of Oswald Bros. and not that of Reliance Rock Company. It was already in evidence that the steam shovel was the property of appellant; that it, together with the services of Barnes, the operator, were hired by appellant to Oswald Bros. at $5.00 per hour; that Reliance Rock Company paid Barnes' wages, and that Oswald Bros. gave no instructions to and exercised no control over Barnes as to the manner or method in which he should operate the steam shovel.

What methods were used by appellant in moving cars generally, or being unloaded at other bunkers than the one in this case, and under conditions not shown to be the same or similar to those existing at the Oswald bunkers at the scene of the accident, were manifestly immaterial on the issue of whether or not Oswald Bros. exercised any control over the manner and method in which Barnes operated the steam shovel in question in this case. The witness Spilmeyer, likewise called by appellant, and testifying on this point, said:

"Q. By the way, was it the general practice of Oswald Brothers in moving cars to hitch a cable on the hoist or crane, and then they move the crane along and pull the cars that way? A. It depends on the conditions existing at the bunkers.

"Q. Well, in this particular case, was it in accordance with your instructions to move the cars that way? A. I had no instructions there.

"Q. Well, did you give any? A. We used pinch bars, caterpillars, whatever we had available, and the shovel itself. We used all three on that one particular job." (Rep. Trans. lines 2 to 13, p. 106.)

Moreover, the same question was propounded to appellant's witness Ritler, who answered it before the court had an opportunity to pass upon an objection to the question, and whose answer was not stricken out, but remains in the record: "Q. Are you familiar, Mr. Ritler, with the methods used by the Reliance Rock Company in moving cars which are being unloaded at the bunkers? Did they use cables at any time?" (To which we object, on the ground it is incompetent, irrelevant, and immaterial.) "A. No, sir."

[7] It thus appears that the testimony unsuccessfully sought to be elicited from the witness Hodges was, in fact, given by the defendant's witness Ritler, and the benefit of it received by the jury. We hold, therefore, that the objection to the question asked of the witness Hodges was properly sustained, and that in any event the error (if such it be) was, in view of the state of the record, so inconsequential as not to affect the result arrived at by the jury. In addition, the court's charge, to which no exception is taken, upon the issue of whether Barnes was the employee or servant of Oswald Bros. or appellant, gave to the jury full and adequate guidance for the determination of the question.

We have carefully examined the entire record, and find no error warranting a reversal.

The judgment is affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 206

CASEY et al. v. GRITSCH et al.

Civ. 5125.

District Court of Appeal, Third District, California.

Oct. 1, 1934.

1. Automobiles ⇐242(1)

In action arising from rear end collision with defendant's truck, allegedly parked in violation of statute prohibiting parking on paved portion of highway when it is practicable to park off pavement, and excusing unavoidable parking on pavement, plaintiffs were not required to establish that it was practicable to park truck completely off pavement, but defendant had burden of showing affirmatively necessity for parking on pavement (St. 1931, p. 2128, § 136).

2. Automobiles ⇐173(5)

Motorist is chargeable with negligence in not approaching red light with his vehicle under control only where light blocks highway, or is so placed as to indicate that passage is so narrowed as not to afford safe passage within speed limit.

3. Automobiles ⇐245(83)

Whether motorist was contributorily negligent in not observing parked truck or its stationary position, or in not observing that there were 3 feet of truck to left of red light on rear of truck in time to alter course sufficiently to avoid collision with rear end of truck *held* for jury (St. 1923, p. 551, § 106; St. 1931, p. 2128, § 136).

4. Automobiles ⇐168(9)

In action arising from rear end collision with parked truck, rule making it negligence for motorist to drive at speed precluding stop within radius of his headlights *held* inapplicable.

5. Automobiles ⇐245(83)

Contributory negligence of motorist in not keeping proper lookout so as to avoid rear end collision with defendant's parked truck *held* for jury.

6. Automobiles ⇐245(17)

In action arising out of rear end collision with parked truck, whether truck driver was negligent in running out of gas, so as to make it impossible for him to park completely off pavement *held* for jury (St. 1931, p. 2128, § 136).

7. Automobiles ⇐245(83)

In action arising from motorist's rear end collision with parked truck, evidence of arc light 600 feet from point of collision *held* insufficient to raise issue as to interference with vision of motorist.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Lola May Casey and others against Joseph A. Gritsch and another. From the judgment, defendants appeal.

Affirmed.

Elliott, Atkinson & Sitton, of Sacramento, and Christopher M. Bradley, of San Francisco, for appellants.

Downey, Brand & Seymour, of Sacramento, and T. L. Chamberlain and Shannon Turner, both of Auburn, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action prosecuted by the widow and children of John Casey, judgment was entered against the defendants on account of the alleged negligence of the defendant Alfred K. Hansen, the driver of a truck belonging to Joseph A. Gritsch. From this judgment, the defendants appeal.

The record shows that Alfred K. Hansen had been for over a year in the employ of the defendant Joseph A. Gritsch, in driving a truck from San Francisco to Reno, Nev., in the operation of a freight line belonging to the defendant Gritsch. The truck was of a large box car type approximately 22 feet long and 8 feet wide, the top of the truck being about 11 feet from the ground; the rear of the truck rested upon two sets of double wheels. The testimony as to the portion of the truck remaining upon the highway revolved around the position of these wheels after the truck had come to a stop.

The trips from San Francisco to Reno were made in the nighttime; likewise, the return trips from Reno to San Francisco were made at night. The practice had been to take on gasoline at San Francisco, drive to Reno, and return as far as North Sacramento before taking on any additional fuel. At times the truck was conveyed by boat from San Francisco to Vallejo; at other times the truck was conveyed by its own power overland the entire distance, save the crossing of the bay. Whether, on the trip from San Francisco to Reno, preceding the occurrences hereinafter mentioned, the truck had been conveyed from San Francisco to Vallejo, is left uncertain by the testimony, as the driver stated he did not remember definitely.

The scene of the accident involved herein is about 1 mile north of North Sacramento, and is located on what is known as the Auburn

boulevard, a paved highway consisting of three traffic lanes separated by white stripes, each traffic lane being 10 feet in width. From a point on the highway known as Ben Ali Station, to the scene of the accident, the highway is practically straight.

About 2 o'clock a. m., February 17, 1933, as Hansen was returning from a trip to Reno, he noticed, as he rounded a slight curve on the highway near Ben Ali Station, that the engine of his truck sputtered. Applying his foot to the accelerator, the engine at first did not seem to take any gas; a little later it took some gas; he passed down the boulevard several hundred feet, passing what is known as Hasley's filling station and proceeded approximately 600 feet therefrom; as he was proceeding over this distance he noticed that his engine was not taking gas, and, according to the testimony, at the time the gasoline gave out he was traveling between 20 and 25 miles per hour, and thereafter the truck rolled about 15 truck-lengths, which would be approximately 330 feet, during which time he guided the truck partly off the highway. As to how far the rear end of the truck was left on the paved portion of the highway, the testimony is conflicting, but there is sufficient in the record to show that the truck was left on the paved portion of the highway from 4 to 8 feet.

In guiding the truck off the paved portion of the highway it appears that it was left standing somewhat at an angle. Along the right-hand side of the paved portion of the highway, as one proceeds from Hasley's filling station to the point where the truck stopped, the testimony is again conflicting as to the width of the shoulder, and also as to its condition. There is, however, in the record, testimony to the effect that this shoulder is at least 8 feet wide, and is sufficiently solid, and was at the time of the accident sufficiently substantial to justify the parking of the truck completely off the paved portion of the highway.

As to the condition of the rear lights on the truck, the testimony is again conflicting. Several witnesses testified that the bulb of the red light on the truck was covered with dust and dirt, so that it was quite dim; also, that the battery of the truck was weak, which again resulted in the red light being dim. On the other hand, there is some testimony in the record that the red light in question could be seen from 600 to 1,200 feet from the rear of the truck.

While the testimony of the defendant Hansen is to the effect that it had been the usual custom to refuel the truck in North Sacramento, the record is absolutely wanting as to whether any inspection was made by the defendant Hansen on any portion of the trip to ascertain the quantity of fuel supply that he had on hand; nor does it appear in the record that the truck was equipped with any gasoline gauge or contrivance on the instrument board of the truck to warn the driver as to whether his fuel supply was adequate or inadequate.

After the truck had stopped, the defendant Hansen made some effort to start the engine by cranking, explaining that he did not attempt to use the self-starter on account of the weakened condition of the battery. After attempting to start the engine by cranking, the defendant Hanson discovered his lack of fuel, took a can from his truck, and started back to Hasley's filling station to obtain a supply of gasoline, taking with him a flashlight. At this juncture a Studebaker car owned by John Casey, in which he was then riding, driven by Frank Williams, came along at an approximate speed of 45 miles per hour passing the defendant Hansen, who, standing on the opposite side of the highway, waved, or, as he said, jiggled his flashlight at the passing motorist as a warning of the existence of the stalled truck. Williams and Casey proceeded southward along the highway on the right-hand lane thereof, not discerning the presence of the truck until within from 75 to 90 feet thereof.

Williams testified that at the instant of seeing the red light on the truck, he thought it was moving, but immediately thereafter, discerning that it was standing still, swerved his car to the left for the purpose of avoiding the truck, and it appears that the front end of the Studebaker car missed the truck, but going diagonally across the highway to the left, the right-hand side of the Studebaker car came in contact with the left rear end of the truck or box car portion thereof, killing Casey and causing the Studebaker car to turn over. There is also some testimony in the record to the effect that the angle at which the truck was standing rendered the clearance lights on the truck invisible, assuming that they were lighted.

It may be further stated that from the curve on the highway at Ben Ali Station, for a few hundred feet, there is a slight decline, and from Hasley's filling station to the scene of the collision there is a slight incline in the highway. While there is no testimony in the record showing any ditches alongside the boulevard, there is some testimony that outside of the shoulders which we have mentioned, there were some puddles of water standing. However, the record shows that

after the collision, cars passing southward drove around the stalled truck, completely off the highway and along the right-hand side of the standing truck.

There is also some testimony in the record that the day previous had been rainy and the night was cloudy and quite dark.

At the time Williams perceived the presence of the truck, his testimony is that he took his foot off the accelerator, but did not apply the brakes. The red light on the rear of the truck was a little over 3 feet from the left-hand corner thereof. The truck was painted a dark green.

Upon the facts shown by the testimony, a summary of which we have set forth, the appellants contend that Hansen was not guilty of negligence as a matter of law, and that Williams was guilty of negligence as a matter of law. No question is made as to Hansen being the agent of Gritsch, nor that if Williams was negligent, his negligence should be imputed to the deceased Casey.

Section 106 of the California Vehicle Act (St. 1923, p. 551) requires that every vehicle shall be equipped with a red light affixed to the rear thereof, which will be plainly visible under normal atmospheric conditions for a distance of 500 feet. As to whether this light was so visible, the testimony is conflicting. Likewise, there is some variance in the testimony as to the cause of the claimed dimness of the light.

The testimony shows that on the night in question the truck had traveled from Reno to the place of the accident, through a slight snowstorm, and that the red bulb was covered with dust or dirt, thereby dimming the light and shortening the distance at which it could be observed. We may also note the fact that the truck was standing at an angle on the highway so that the direct rays of the red light did not strike directly down the lane on which Williams and the deceased were traveling.

[1] Section 136 of the California Vehicle Act (St. 1917, p. 561, as amended by St. 1931, p. 2128) specifies that no person shall park or leave standing any vehicle, whether attended or unattended, upon the paved portion or improved portion of a public highway, etc., outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway. The second paragraph provides that the section shall not apply to any vehicle which is disabled in such a manner and to such an extent that it is impossible to avoid stopping and temporarily leaving such vehicle on such portion. In this connection the appellants contend that it was the duty of the plaintiffs to establish by testimony that it was practicable to stop the truck and leave it standing completely off the paved portion of the highway. This, however, is not a correct statement of the law. The section of the California Vehicle Act makes it unlawful to leave a vehicle standing upon the paved or the main used portion of a public highway, and then specifies certain exceptions which, if proven, relieves the person who leaves such vehicle so standing upon the highway, free from responsibility. The correct rule, we think, is stated by the Supreme Court of Oregon, in the case of Watt v. Associated Oil Co., 123 Or. 50, 260 P. 1012, 1013, to wit: "One who parks his automobile upon the public traveled part of a highway is prima facie a violator of the law, and it is incumbent upon him to show affirmatively that it was necessary for him to so park it at that time and place. It is not the duty of a party injured in a collision, under such circumstances, to show that such parking was not necessary, but for the other party to bring himself within the exception prescribed in the statute. Of course, the mere fact that such parking is unnecessary will not permit a recovery by one who recklessly or carelessly runs against the car so parked. Contributory negligence is still a defense, but this must be pleaded and proved, either by the circumstances themselves or by affirmative testimony." In that case, as in the one before us, the driver of the automobile colliding with the truck stopped upon the paved portion of the highway, when he first perceived the presence of the truck, thought it was moving in the same direction, but shortly thereafter perceived that it was standing, but not in time to avoid a collision by stopping his own vehicle. An automobile was approaching on the left-hand side of the highway, preventing the plaintiff from attempting to pass the standing truck to the left. The question as to the negligence of the driver of the standing truck, and as to the contributory negligence of the driver of the automobile that collided therewith, were left to the jury.

[2] In the instant case there is no question but that there was a free highway to the left of the standing truck, had Williams, as the driver of the Casey car, perceived that the truck was standing, in time to swerve a sufficient distance to the left to avoid the collision. In this particular it is worth while to consider the location of the red light on the truck.

Mention may also be made of the fact that the truck carried no white light, as provided by the California Vehicle Act, showing the license number. As stated herein, the red light on the rear of the truck was a trifle over 3 feet from the left rear corner thereof. This red light, of course, is a signal of danger, but it is also more than a signal of danger. As said in Martin v. Puget Sound Electric R. R. Co., 136 Wash. 663, 241 P. 360, 362: "While a red light is a signal of danger, it is also a signal that usually points out the place of danger. If it is at one side of the highway, an approaching driver has the right to assume that it marks the limit of danger, and that the other side of the highway is clear. It is only when the light blocks the highway, or is so placed as to indicate that the passage is so narrowed as not to afford a safe passage within the speed limit, that he is chargeable with negligence if he does not approach with his vehicle under control."

[3] Applying this rule, the testimony shows that the driver of the Casey car altered his course sufficiently to the left to avoid the indicated place of danger. The question of whether the dark green 3 feet of the truck to the left of the indicated point of danger should have, or could have been perceived by Williams in time to alter the course of his car sufficiently to avoid the collision, was something for the jury to consider in determining the question of his contributory negligence. Likewise, the question of whether Williams was guilty of contributory negligence in not observing the position of the truck and its stationary position in time to avoid the collision was a question of fact for the jury.

[4] While the appellants have cited a number of cases holding that it is negligence for a driver to propel an automobile at such a rate of speed that it cannot be stopped within the radius of his headlights, it is unnecessary to review such cases because that rule of construction has never been applied in this state. See opinion denying rehearing in the case of Burgesser v. Bullock's, 190 Cal. 679, 214 P. 649.

The same question was before the court in the case of Sawdey v. Producers' Milk Co., 107 Cal. App. 467, 290 P. 684. There, it was urged that Sawdey was negligent because he did not travel at such a rate of speed that he could stop within the radius illuminated by his lights. The court held that the Wisconsin rule which predicated negligence as a matter of law in driving at such a rate of speed that one could not stop within the radius illuminated by his lights, and which rule had been adopted in a number of eastern states, had not been adopted in this state. A petition for hearing in the Supreme Court, after decision of the District Court of Appeal, was denied.

[5] Again, it is urged that Williams should have seen the standing truck had he kept a proper lookout. The testimony of Williams is to the effect that he was so doing, which presents a question similar to that passed upon by this court in the case of Flynn v. Bledsoe Co., 92 Cal. App. 145, 267 P. 887, 891. It was there said: "The only possible theory upon which contributory negligence might be charged against the automobile driver would be that he should have, as a reasonable person, seen the projecting sills in time to have avoided the collision. This, of course, was a question of fact submitted to the jury and is in no sense a question of law as urged by appellant, and the finding of the jury against the appellant is conclusive here."

In Gammon v. Wales, 115 Cal. App. 133, 300 P. 988, 989, it was again held that whether or not an automobile driver is or is not guilty of contributory negligence in not seeing an obstruction ahead of him in time to avoid a collision is a question of fact for the jury. The language of the court there is as follows: "Defendants contend that the plaintiff was guilty of contributory negligence, as a matter of law, in not seeing the truck in front of him. This was a question of fact for the jury. The law is well settled that the question of contributory negligence, like that of negligence, is a question for the jury, and only when the facts are clear and undisputed, and when no other inference than that of negligence or contributory negligence can be drawn from such facts, is the court authorized to withdraw the question from the consideration of the jury. Nagle v. California So. R. R. Co., 88 Cal. 86, 25 P. 1106; Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 P. 618, 620, 36 P. 407; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, 515; Fike v. San Joaquin Light & Power Corp., 73 Cal. App. 712, 239 P. 344."

As to the duty of Hansen to guide the truck entirely off the paved portion of the highway, and the burden of excusing compliance with section 136 of the California Vehicle Act, we may also cite the case of Giorgetti v. Wollaston, 83 Cal. App. 358, 257 P. 109, 111, where it is said: "The defect in the headlights of the truck, which led respondents to stop, was, as fairly appears from their testimony, due to a condition which developed a few minutes before the car was stopped and was not caused by a lack of due care on their part; but the absence of lights either in front or in the rear

rendered the operation of the truck at the hour mentioned unlawful, and it was the duty of respondents to remove the same from the main traveled portion of the highway. * * * The failure of any person to perform a duty imposed upon him by law raises a presumption of negligence, and if such negligence proximately contributes to his injury, he cannot recover. McKune v. Santa Clara, etc., Co., 110 Cal. 486, 42 P. 980; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Shimoda v. Bundy, 24 Cal. App. 675, 142 P. 109. This presumption, however, is not conclusive, but may be overcome by evidence that the failure was excusable or justifiable under the circumstances and not inconsistent with the exercise of due care."

Appellants cite the case of Berlin v. Violett, 129 Cal. App. 337, 18 P.(2d) 737, 738, where it is said: "All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such lookout, or failure to see that which may be readily seen, if the driver is looking, would constitute negligence as a matter of law."

While approving what is here said, as a matter of abstract principle, its application depends upon the circumstances surrounding the particular case under consideration. If the testimony is conflicting as to whether the driver of the vehicle did or did not keep such a lookout, and also whether, if he kept such a lookout, the obstacle in front could or could not have been readily seen is uncertain, then and in that case the question of whether the act of the driver of the vehicle did or did not amount to contributory negligence is a matter of fact for the jury.

As bearing upon the question of Hansen's negligence, we may also cite the case of Rath v. Bankston, 101 Cal. App. 274, 281 P. 1081, 1083, where it is said: "Generally speaking, it is the duty of one driving a motor vehicle along a public highway to see that it is properly equipped so that it may be at all times controlled to the end that it be not a menace to the safety of others or of their property. The law requires that such a vehicle be equipped with brakes adequate to its quick stopping when necessary for the safety of its occupants or of others, and it is equally essential that it be maintained in such a condition as to mechanical efficiency and fuel supply that it may not become a menace to, or an obstruction of, other traffic by stopping on the road. But if the person in charge of such vehicle has done all that can be reasonably expected of a person of ordinary prudence to see that his vehicle is in proper condition, and an unforeseen failure of a part of his equipment occurs, it does not necessarily follow that he must be deemed guilty of negligence as a matter of law."

[6] In other words, all such questions are matters of fact for the jury, unless only one conclusion can be drawn from the testimony. As we have stated, the record in this case is entirely silent as to whether the driver of the truck had, at any time during his trip from San Francisco to Reno and back to the point of collision, made any inspection of his fuel supply, but was resting entirely upon the assumption that as he had been able to make the trip theretofore from San Francisco to Reno and back to North Sacramento before refueling, he could do so again. This entirely overlooks the different conditions of the highway upon which he was driving, the freight load which was being transported from San Francisco to Reno, and also leaves open the question of whether there were any appliances on the instrument board of the truck indicating the fuel supply on hand.

In the case from which we have just quoted, the truck was equipped with a gauge indicating the gasoline supply on hand, which for some unexplained cause failed to indicate the lessening supply of gasoline, and the truck suddenly stopped without warning. Had the jury in this case found for the defendants on the theory that Williams was guilty of contributory negligence, then the cases cited in appellants' briefs would, of course, be controlling here, and such a verdict could readily be held supported by the testimony set out in the transcript. But having found the facts contrary to the appellants' contentions, the cases having to do with the contributory negligence of the driver of an automobile which collides with a standing truck are inapplicable.

[7] Though argued by the respective parties, we find nothing in the record in relation to the alleged momentary interference with the vision of automobile drivers, caused by the arc light in front of Hasley's filling station, which could in any wise affect the determination of this cause, as 600 feet intervened between the place where the arc light is located and where the collision took place. Therefore, it is unnecessary to review the principles upon which the case of Meads v. Deener, 128 Cal. App. 328, 17 P.(2d) 198, and other cases relating to automobiles driving

while blinded by approaching lights or by sunlight, rely.

No other alleged errors being relied upon, and no question being made as to the award of damages, the judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

1 Cal.App.2d 265

SMARDA et ux. v. FRUIT GROWERS' SUPPLY CO. et al.

Civ. 4966.

District Court of Appeal, Third District, California.

Oct. 6, 1934.

Hearing Denied by Supreme Court Dec. 3, 1934.

1. Appeal and error ⇐930(1)

On appeal from judgment for plaintiff, plaintiff's testimony was controlling in determining whether plaintiff's contributory negligence was for jury, although contradicted by deposition of plaintiff taken before trial.

2. Negligence ⇐93(2)

Contributory negligence of husband who was driving automobile at time of accident would be imputable to wife who was passenger.

3. Automobiles ⇐245(83)

Whether motorist colliding with unlighted rear of truck stopped on paved highway was contributorily negligent, in view of evidence that motorist drove during heavy rain in evening at approximately 20 miles per hour, after being blinded by glaring headlights of approaching automobile, and was unable to stop soon enough after seeing rear of truck to avoid collision, *held* for jury.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by Andrew Smarda and wife against the Fruit Growers' Supply Company and others. From a judgment in favor of plaintiffs, Clark A. Morse and Van M. Morse appeal.

Affirmed.

M. J. Cheatham, of Red Bluff, and Carr & Kennedy, of Redding, for appellants.

J. Oscar Goldstein, of Chico, for respondents.

PER CURIAM.

This appeal, from a judgment upon a verdict of the jury in favor of plaintiffs for injuries sustained in an automobile accident, was heretofore considered by this court and the judgment therein reversed. The matter is now before us upon rehearing.

Briefly the facts are that about 5:45 o'clock on the evening of December 21, 1931, respondents, seated in the front seat of their automobile, were proceeding southerly on the Pacific highway near the town of Corning. It was raining hard. At some point near the "city limits" sign of the north boundary of Corning, a large car with glaring headlights approached from the opposite direction and so blinded Andrew Smarda, who was driving, and also his wife, Anna Smarda, that for an interval of time their vision was so obscured they could see nothing in front of them. About this time respondent reduced the speed of his car to approximately 20 miles an hour and continued this speed until a truck that was standing upon the highway suddenly loomed before them with which they collided, demolishing the car and causing severe injuries to Mrs. Smarda.

At the point of collision for some distance in both directions the highway is 20 feet wide, straight and level. The truck in question, owned by Clark A. Morse and operated by Van M. Morse, was also proceeding southerly along the Pacific highway and had reached a point about 275 feet south of the northerly city limits sign when one of the gas reservoirs became empty. The truck was stopped on the highway with the left side thereof about 10 inches to the right of the center of the highway. The driver alighted and had turned on a reserve reservoir and had returned to his cab when the accident took place. Whether or not the lights on the truck were burning at the moment of impact was in dispute. Plaintiffs claim the lights were not burning until after the collision when they flashed on, while the driver testified the lights, including the tail-lights and clearance lights, were burning all the time. In view of the finding of the jury, we must assume that the truck was not lit at the moment of collision.

[1] Prior to the trial, the deposition of Andrew Smarda was taken, which differed in several material respects from the testimony given by him at the trial. The conclusions

reached by us in our former opinion were based in a large measure upon the testimony given in the deposition, but we have come to the conclusion that testimony given upon the trial of the case is controlling on appeal and any discrepancy was for the jury to pass upon and for them to say where the truth lay. A similar situation arose in the case of Miller v. Schimming, 129 Cal. App. 171, 18 P.(2d) 357, 359, where the court, after reciting the inconsistent and contradictory statements of plaintiff given in his deposition and at the trial, said:

"From the above recital it is apparent that not only was plaintiff's testimony during the trial contradicted by his previous testimony given during the taking of his deposition, but also that his testimony on direct examination as to the location of his truck when he looked both to the east and west, and more particularly the distance to the west within which his vision was unobstructed, was contradicted by his later testimony on cross-examination. Nevertheless, we are not prepared to say that his testimony, although clearly contradictory in the respects mentioned and conflicting in other respects, is entirely discredited and unworthy of consideration. It is not conclusive of this appeal that the record indicates that plaintiff's testimony during the trial was, in many respects, conflicting, and that it was contradicted by his testimony given on another occasion. The question of the credibility of witnesses is one that is to be determined solely by the triers of fact. Farmers' Bank of Camarillo v. Goodrich, 90 Cal. App. 717, 266 P. 550; Winning v. Board of Dental Examiners, 114 Cal. App. 658, 667, 300 P. 866. The jury, by its verdict herein, has indicated that it did not consider plaintiff's testimony, inconsistent and conflicting though it undoubtedly was, as beng entirely unworthy of belief. By this determination we are bound unless it appears that plaintiff's testimony is inherently so improbable and impossible of belief that, in effect, it constitutes no evidence at all. De Arellanes v. Arellanes, 151 Cal. 443, 90 P. 1059; Crow v. Crow, 168 Cal. 607, 610, 143 P. 689."

[2] The issue before this court is whether, under the facts adduced at the trial, Andrew Smarda was guilty of contributory negligence as a matter of law. There is no question that if Andrew Smarda, the husband, was guilty of contributory negligence, such negligence is imputable to the wife. Basler v. Sacramento Gas & Electric Co., 158 Cal. 514, 111 P. 530, Ann. Cas. 1912A, 642; Solko v. Jones, 117 Cal. App. 372, 3 P.(2d) 1028.

[3] Smarda, testifying in regard to the accident, said: "I started south and traveled at a rate of thirty miles because it wasn't safe and I am not a fast driver, down south on the highway and as I been nearing Corning, I mean I come to that bridge there, that concrete bridge,—I was nearing here to the concrete bridge then I slow down.—I been coming to this bridge. I slow down for this bridge.—I slow down because a heavy rain been setting in and I keep on slowing down and I seen that here, that second stop sign for the city limits. I kept on slowing down, went at the rate of twenty, not over twenty-five miles and as I passed this city limits kept on going slow with my foot on the brakes all the time, because I been slowing down. A heavy car from the opposite direction been coming with powerful headlights, blinded my eyes, so I couldn't see no left hand side but I could see the telephone and power line poles and I could have a clear vision of the right hand side of the road. I had a clear vision on the right hand side, I couldn't see no left side, but I could see to the right hand side. Heavy sheets of rain came and it wasn't just like a few seconds, we just traveled at the rate of about twenty miles an hour and then as soon as that car went like a flash pretty fast and I just approximately—I seen the pole—I seen this pole, and I see plain the right hand highway, I seen very plain, I could see to the right but I couldn't see to the left. I seen very plain.

"Q. Now, Mr. Smarda, after this car passed you, as you say here somewhere, someplace, what happened? What did you see? A. Well, I just been blinded, as I say to the left, but I could see clear to the right, because I seen that city limits and seen that pole and as soon as it been just like a flash that car passed and the truck loomed right in front of us and all I could do, I could hear another car come from the opposite direction and see the lights shine from the opposite direction here, I couldn't turn to the left, I couldn't turn to the right, all I could do, with all my power jam my brakes on the car, shoot forward and bump into the truck and the truck hit just that quick (witness indicates by snapping his fingers), for two seconds I didn't have the chance to go either way. I tried to stop with all my power my car.

"Q. When you first saw that truck loom up, were there any lights on that truck? A.

No. My wife said there no lights and all I could say was to jump on the brake with all my force, with all my power.

"Q. How soon before you hit that truck did your wife say—what did she say? A. She said, 'Truck, no lights,' and I seen it myself but I couldn't say a word. You couldn't get a word out of me. I got my foot on the brake, but with all my might I got hold of the emergency and pulled it back and still tried to stop my car. I got four wheel brakes. The brakes locked or something and the car just shot forward, skidded on the wet pavement and as she skidded on the wet pavement with all the force she had into that truck, the truck being at a standstill, the truck kind of forced the car a little back.

"Q. What happened after your machine struck the truck with regard to anything that happened to the lights of the truck? A. As soon as we hit it and the car came back, the lights flashed on. You could see the side lights. Afterward they snapped on the side lights, but we never seen that tail-light light.

"Q. Did you see the side lights go on? A. Yes, we seen it and my wife seen it snap on.
* * *

"Q. Now, then, when you got across the bridge here you slowed down the first time? A. Yes.

"Q. Then you slowed down here for this sign? A. Yes, sir.

"Q. Now you say you slowed down again when these headlights passed you? A. Yes.

"Q. And blinded you. How far away or how long a distance existed between the time that this automobile passed you between these two poles and when you saw that truck for the first time? A. I couldn't say. It been dark in the night and heavy rain, the truck loomed right in front of me just in a second, that car passed and I been right in front of the truck.

"Q. But up to the time the car passed you could you see anything at all? Did you see any red lights of any kind? A. No, I did not.

"Q. Were you able to see ahead? A. Yes, I could see the poles, those power line poles, and the city limit sign, I could see that very plain. I could see the center line. If there had been red lights I could have seen them.

"Q. Could you see the center line of the highway? A. Yes.

"Q. Did you have your car equipped with a windshield wiper? A. Yes, sir.

"Q. Was that working? A. Yes, sir, automatic.

"Q. Was there anything at all to distract your attention from your driving as you drove along? A. No, we never talk, we just drive steady on.

"Q. Immediately after this car passed, this truck loomed up? A. Yes, sir."

The situation here presented is very similar to the facts in the case of Haynes v. Doxie, 52 Cal. App. 133, 198 P. 39, 40, where the plaintiff, driving his car at a moderate rate of speed over a paved highway in a downpour of rain, collided with a truck standing near the center of the highway without a rear light. Plaintiff did not see the truck until within 25 or 30 feet of it. There the truck company contended for the rule, that it was negligence for the driver of an automobile to drive on a highway on a dark night at such a rate of speed, that he could not avoid objects after they came within the area illuminated by his lights. In that case the court, in declining to say that plaintiff, as a matter of law, was guilty of contributory negligence, said:

"The fact that respondent was not able to see, and did not see, the unlighted truck until he was within 25 or 30 feet of the same does not fully establish the facts necessary to give appellant the benefit of the rule above stated. Notwithstanding the facts stated, it may also be true that if the truck had been lighted, as required by law, plaintiff would have been able to see it, and would have seen it, while at a distance great enough to enable him to stop his automobile, and avoid the collision. The condition of the road, as to its openness and the distance to any point of intersection or any railroad crossing, was known to both parties, and the plaintiff was entitled to proceed at a rate reasonable under those conditions." See, also, Burgesser v. Bullock's, 190 Cal. 679, 214 P. 649.

In the case of Sawdey v. Producers Milk Co., 107 Cal. App. 467, 290 P. 684, it was urged that plaintiff was negligent because he did not travel at such a rate of speed that he could stop within the radius illuminated by his lights. In that case the court distinctly refused to follow the rule which had been adopted in several of the eastern states.

In the case of Schurman v. Los Angeles Creamery Co., 81 Cal. App. 758, 254 P. 681, 682, the plaintiff collided with an unlighted wagon which was approaching him from an opposite direction, a portion of which was encroaching on the portion of the highway where he was traveling. In refusing to hold that plaintiff was guilty of contributory negligence, the court there said: "Appellant asks

the court to determine, as a matter of law, that a person traveling the highway at night must see every object on his half of the highway in face of the fact that automobile engineers and manufacturers are expending vast sums of money in extensive research to develop lights that will measure up to appellant's requirements, and have so far been but partly successful. In order that this court could determine, as a matter of law, that respondent was guilty of contributory negligence, much more is required than would be sufficient in the trial court to sustain a finding of fact to the same effect. It must be clearly shown from the undisputed facts, judged in the light of common knowledge and experience, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure. * * * The evidence against the plaintiff should be so clear as to leave no room for doubt, and the facts such that the inference is irresistible, to justify this court in determining, as a matter of law, plaintiff guilty of contributory negligence against the finding."

In the case of Gammon v. Wales, 115 Cal. App. 133, 300 P. 988, 989, this court made the following statement, which is applicable to the present case: "There is a very wide difference between the inferences drawn, and the conclusions reached, by the appellant from the testimony in this case, and those contended for by defendants, which emphasizes the fact that reasonable minds might reach different conclusions from the same testimony, and, therefore, in such case, it is a question of fact for the jury to determine."

The case of Casey et al. v. Gritsch et al., 36 P.(2d) 696, decided by this court on October 1, 1934, is similar in many respects to the instant case. There, upon a dark and stormy night the gasoline supply of a tank belonging to defendant became exhausted and the truck stopped upon the highway. While so parked, the car in which John Casey was a passenger ran into the rear of the truck, causing his death. Some witnesses testified the rear lights could be seen 1,200 feet from the truck; others testified as positively, the rear lights upon the rear of the truck were covered with dirt and mud and the lights were very dim.

The jury found in favor of plaintiffs, and the appellants contended on appeal that the deceased was guilty of negligence as a matter of law, and claiming it was the duty of plaintiffs to establish by testimony, that it was practicable to stop the truck and leave it standing completely off the paved portion of the highway as required by section 136 of the California Vehicle Act (St. 1923, p. 561, as amended by St. 1931, p. 2128). It was held, however, that such is not a correct statement of the law, the court saying: "The section of the California Vehicle Act makes it unlawful to leave a vehicle standing upon the paved or the main used portion of a public highway, and then specifies certain exceptions which, if proven, relieves the person who leaves such vehicle so standing upon the highway, free from responsibility. The correct rule, we think, is stated by the Supreme Court of Oregon, in the case of Watt v. Associated Oil Co., 123 Or. 50, 260 P. 1012, to-wit: 'One who parks his automobile upon the public traveled part of a highway is prima facie a violator of the law, and it is incumbent upon him to show affirmatively that it was necessary for him to so park it at that time and place. It is not the duty of a party injured in a collision, under such circumstances, to show that such parking was not necessary, but for the other party to bring himself within the exception prescribed in the statute.'"

We believe enough has been said to make clear the gist of the testimony before the trial court, from which the jury have, by their verdict, found that defendants were negligent and that the acts and conduct of plaintiff did not contribute to the injuries sustained. Purely a question of fact was present which the jury resolved in favor of plaintiff. We find nothing to warrant a different conclusion.

The judgment is therefore affirmed.

1 Cal.App.2d 254

Ex parte WACHOLDER.

Cr. 1393.

District Court of Appeal, Third District, California.

Oct. 5, 1934.

1. Evidence ⇐32

Courts cannot take judicial knowledge of city ordinances not offered in evidence, properly authenticated.

2. Licenses ⇐7(1)

Section of city ordinance, requiring retail florists, before obtaining license, to obtain and thereafter maintain store rooms or greenhouses properly equipped, *held* too indefinite and uncertain for application as not specifying what constitutes properly equipped storeroom or greenhouse.

3. Constitutional law ⇐87

Every citizen has right to maintain flower stands or sell flowers on private property in city, irrespective of source of flowers or whether they are sold in open, unless such sales interfere with peace, health, or good order of city.

4. Licenses ⇐7(1)

Section of city ordinance, requiring that florists obtaining licenses post cash bonds to remain in business for 180 days at location specified in licenses, unless previously engaged in such business for 365 days, *held* invalid as discriminatory.

5. Licenses ⇐7(1)

Section of city ordinance, requiring florists obtaining licenses to post cash bonds to remain in business for 180 days at locations specified in licenses, unless previously engaged in such business for 365 days, *held* invalid as unreasonable and beyond city's police power.

6. Evidence ⇐18, 20(1)

It is common knowledge that city rents differ in different locations and that firms frequently change locations to lessen overhead expenses or secure more advantageous places for transaction of business.

7. Municipal corporations ⇐611

Change of business location to lessen overhead expenses or secure more advantageous place for transaction of business is private right, with which city's police powers have no concern.

8. Constitutional law ⇐230(3)

Section of city ordinance, requiring florists not engaged in such business for year to post cash bonds to remain in business for 180 days at locations specified in their licenses, *held* to violate Federal Constitution as imposing on citizens not in business for year burden not placed on those engaged in business for 180 days (Const. U. S. Amend. 14).

9. Licenses ⇐7(3)

Sections of city ordinance, providing for issuance of licenses to persons engaged in business as florists for over 180 days, and requiring that persons not engaged in such business for year post cash bonds to remain in business for 180 days at locations specified in licenses, *held* invalid as violating constitutional requirement that all general laws operate uniformly; such sections not applying to all persons alike (Const. art. 1, § 11).

10. Constitutional law ⇐205(5)

Section of city ordinance, requiring florists not engaged in business for year before obtaining licenses to post cash bonds to remain in business for 180 days at locations stated in licenses, *held* unconstitutional as granting citizens already in business for 180 days immunities denied other citizens not in business for year (Const. art. 1, § 21).

11. Constitutional law ⇐230(3)

Section of city ordinance, requiring florists not in business for year before obtaining licenses to post cash bonds to remain in business for 180 days at locations specified in licenses, *held* nullity as in conflict with constitutional provisions guaranteeing same rights to all citizens (Const. arts. 1, 11, §§ 1, 11).

12. Constitutional law ⇐230(3)

City ordinances, imposing penalties on persons transacting business merely because they have not been in business as long as other persons engaged in like business, are neither police nor revenue measures, but invalid as exclusive and discriminatory (Const. Cal. art. 1, §§ 1, 11, 21, and art. 11, § 11; Const. U. S. Amend. 14).

Proceeding by A. Wacholder for a writ of habeas corpus.

Writ granted.

James F. Gaffney, of Sacramento, for petitioner.

Hugh B. Bradford, City Atty., and B. F. Van Dyke, both of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

On the 25th day of July, 1934, the above named petitioner was arrested upon a warrant charging him with violation of Ordi-

nance No. 613, fourth series, of the city of Sacramento, based upon a complaint charging violation of such ordinance, by William M. Hallahan, chief of police of the city of Sacramento. The petition herein is for an order of discharge based upon the alleged invalidity of Ordinance No. 613, supra.

The petition sets forth the following facts: That the petitioner is a florist, and is and has been since the 1st day of February, 1934, engaged in the floral business at 914 K street in the city of Sacramento; that the business is conducted upon leased premises for which the petitioner has obtained a lease for one year at a monthly rental of $90.

Among other reasons for discharge, the petitioner alleges that ordinance No. 613, supra, is void, in that it is a violation of section 1 of article 1, section 11 of article 1, and section 21 of article 1, of the Constitution of the state, and likewise violative of the Fourteenth Amendment to the Constitution of the United States.

[1] Both upon oral argument and upon the briefs filed in this cause counsel have devoted much attention to the subject of licenses governing itinerant venders, overlooking the fact that courts are not allowed to take judicial knowledge of city ordinances that are not offered in evidence, properly authenticated. We may state, however, that, if the ordinance governing itinerant venders had been properly placed before us, the section of the ordinance to which counsel refers could be given no application, for the simple reason that in its attempted definition of an itinerant vender it limits the period of time to 90 days, whereas the calculation of the facts set forth in the petition shows that the petitioner in this cause had been in business at a regularly established place for the period of 175 days prior to this arrest. We express no opinion as to the validity of the section attempting to define what constitutes an itinerant vender, further than to say that, if it appears that an attempted definition is discriminatory, or states something as true which is not true as a matter of fact, its validity, of course, would be open to question.

[2, 3] The petitioner in this case, as we have stated, was arrested for the alleged violation of Ordinance No. 613, supra, the title to which reads as follows: "An ordinance licensing and regulating the retail sale of flowers and plants, providing a penalty for the violation of this ordinance and making this ordinance an emergency measure, to take effect immediately." Sections 2, 3, and 4 of that ordinance read as follows:

"Section 2. It shall be necessary before obtaining a license for each person, firm, partnership or corporation selling flowers at retail to obtain, and thereafter to maintain a storeroom or greenhouse, which shall be equipped properly to care for such flowers, plants, shrubs and cut flowers.

"Section 3. Each retail merchant who has been engaged in the business of selling cut flowers, plants, shrubs, funeral sprays, wreaths, designs, corsages, potted plants, bedding plants, or any other form of natural flowers, plants, or bushes, for more than 180 days last past shall pay the sum of $6.00 annually for a license to continue in such business, which license shall be issued in the name of the person, firm, partnership or corporation so engaged in business, which license shall not be transferable.

"Section 4. Every person, firm, partnership or corporation desiring to engage in such business and not heretofore having been so engaged for at least 365 days last past shall, in addition to obtaining the above described license, post a cash bond, to be approved by the City Controller, in the sum of $500.00 with said Controller with a penalty that said bond shall be forfeited to the City of Sacramento if said person, firm, partnership or corporation does not remain in such business for a period of 180 days in the City of Sacramento at the location for which such license is issued."

Section 2, it may be observed, is so indefinite and uncertain that no application could be made thereof. As to what constitutes a properly equipped storeroom or greenhouse is not specified, and such matters cannot be left to the exercise of the discretion of either the police department or the license department of the city. Furthermore, if upon private property, it is the undoubted right of every citizen to maintain a flower stand or to sell flowers, irrespective of the source from which those flowers are obtained, or whether they are sold in the open, unless it is made to appear that such sales interfere with the peace, health, or good order of the city. In this respect it may be stated that the ordinance in question is not based upon any such premise. It does not appear to be a police regulation or even an ordinance passed for the purpose of raising revenue. The amount of the license fixed is only $6 per year.

Section 3 provides that a license shall be issued to any one upon payment of $6, who has been engaged in the business of a florist for more than 180 days prior to the enactment of the ordinance.

[4-7] Section 4 is to the effect that, unless one has been so engaged in the business of a florist for 365 days last past, he shall, in addition to obtaining a license, post a cash bond to be approved by the city controller in the sum of $500, conditioned that such sum shall be forfeited to the city unless such person remains in business for the period of 180 days at the location for which such license is issued. Here is a plain discrimination between the persons engaged in a like business made dependent upon the time in which they have been so engaged. Also, section 4 is unreasonable, in that it requires that a florist must remain at a particular location for at least 180 days, with the penalty of forfeiting $500, irrespective of whether other or different locations may be offered where his business may be conducted to a much greater advantage. The matter of compelling, under penalty, any one to remain in business at a particular location, is not within the province of the police powers of the city of Sacramento. It is common knowledge that the rents of a city differ in different locations, and that firms are changing locations frequently to lessen overhead expenses or to secure a more advantageous place for the transaction of business. That is a private right with which the police powers of cities have no concern.

[8] Again, the section referred to is violative of the Fourteenth Amendment to the Constitution of the United States, in that it imposes upon citizens who have not been in business in the city of Sacramento for 365 days a burden not placed upon those who are already engaged in the business and have been so engaged for the period of 180 days.

[9] Section 11 of article 1 of the state Constitution reads: "All laws of a general nature shall have a uniform operation." Sections 3 and 4 of the ordinance, which we have quoted, have no such application. They do not apply to all persons alike.

[10] Again, section 21 of article 1 of the Constitution reads: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Freedom from giving a bond, immunity from placing $500 in jeopardy, freedom to move from one location to another, granted to citizens already in business for the period of 180 days, denied to all other citizens, unless they have been in business 365 days.

[11] Section 11 of article 11 of the state Constitution is in these words: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Thus, if in conflict with general laws, the ordinance becomes a nullity. Without quoting the section in full, we may refer to section 1 of article 1 of the state Constitution, which guarantees the same rights to all citizens.

[12] In the case of In re Robinson, 68 Cal. App. 744, 230 P. 175, 176, this court considered quite fully a discriminatory ordinance of the city of Sacramento, and in the opinion in that case reviewed the case of Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L. R. A. 527, the case upon which the respondent in this action chiefly relies. In so doing we quoted, from the opinion in the case of Haskell, the following: "It may be conceded that, if it could be said to discriminate in favor of residents of the city of Chico by requiring such license only from nonresidents engaged in the line of business pursued by Haskell, it would be bad; or if it discriminated against residents of the state, or against merchandise from without, or not the product of, the state, that it would be void. * * * It in no way discriminates, as to the class against which it is directed, between those living within the city and those without, but is broad enough to include all of such class wherever residing." Following this quotation, this court then said: "In other words, the Chico ordinance, upheld in the Haskell Case, did not do the very thing which the Supreme Court declared would make it bad, and which thing the city council of the city of Sacramento did when adopting the ordinance now under consideration. There is a distinct and positive discrimination between solicitors carrying on the same kind of business, taking orders in the same manner, between those representing houses outside of the city of Sacramento and those within the city. One class is placed under a heavy burden, the other is exempted entirely." Here the ordinance under consideration is plainly discriminatory. It places a burden upon those who have not been engaged in business in the city of Sacramento for the specified time, and specifically exempts those who have, irrespective of the fact that the different persons are conducting exactly the same kind of business. The only difference is that they have different locations. When thoroughly considered, the Haskell Case as well as the Robinson Case, supra, established the invalidity of the ordinance under consideration. The fact that

there is a disparity of rents in different locations within the city does not justify the enactment of discriminatory ordinances. Nor has the city council the power to impose a penalty upon one person transacting a like business with another person simply because person No. 1 may not have been in business for quite so long a period as person No. 2. Such ordinances are neither police nor revenue measures, but are simply exclusive and discriminatory, and under the constitutional provisions which we have referred to cannot be sustained.

Without the inclusion of the discriminatory sections which we have discussed, it is evident that Ordinance No. 613, supra, would not have been passed.

The petitioner is entitled to a discharge and the writ is granted.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

1 Cal.App.2d 260

OLSON v. COMBS.

Civ. 8612.

District Court of Appeal, Second District, Division 1, California.

Oct. 5, 1934.

1. Automobiles ⇐245(91)

Evidence in action for pedestrian's injuries sustained when struck by automobile in crossing street at point other than established cross-walk *held* sufficient to make issue for jury of defendant driver's liability under last clear chance doctrine.

2. Appeal and error ⇐110

No appeal lies from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Charles Olson against George R. Combs. From a judgment of dismissal and an order denying a motion for new trial, plaintiff appeals.

Reversed, and appeal from order denying motion for new trial dismissed.

Chas. G. Young, of Los Angeles, and E. L. Medler, of Hot Springs, N. M., for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

SCHAUER, Justice pro tem.

Plaintiff, as a pedestrian, during daylight hours, attempted to cross a congested city street in a business district at a point other than in an established crosswalk, and was struck and injured by an automobile driven by defendant. The trial ended with a nonsuit upon the ground that plaintiff's evidence established contributory negligence as a matter of law, and this appeal is from the judgment of dismissal entered thereon.

Plaintiff contends: (1) That the trial court erred in holding upon the evidence that he was guilty of contributory negligence as a matter of law; (2) that in any event the case should have been submitted to the jury upon the theory of the doctrine of last clear chance.

In view of the conclusions reached upon the second point it is unnecessary to consider the first.

[1] Defendant, called as a witness under section 2055 of the Code of Civil Procedure, testified in part that he was driving his car at a rate of speed of 25 or 30 miles per hour and saw plaintiff walking in the street "with his head down" at a distance of approximately 150 feet, at which point defendant "commenced to slow up"; thereafter he watched plaintiff continuously, and when about 30 feet from the point of impact applied the brakes of his automobile, its wheels skidding the remaining distance; no sound signal was given. There is a conflict in the evidence as to whether plaintiff proceeded directly to the point of collision or, having once reached a position near the center of the street, turned and retraced his steps toward the curbline and again turned and advanced to the place where he was hit. Plaintiff testified in effect that he did not see the automobile or become aware of impending danger at any time.

The foregoing summarized evidence is legally sufficient to support a verdict for the plaintiff upon the theory of the doctrine of last clear chance as recently enunciated by the Supreme Court in Girdner v. Union Oil Co., 216 Cal. 197, 13 P.(2d) 915, 918, wherein the rule is declared to be that: "A defendant is never relieved of liability if he has it in his power to prevent the injury. This

doctrine applies whether one is unaware of his peril by reason of his negligence, or when exercising ordinary care is so ignorant. In either situation the rule is the same."

[2] An appeal is also made from the order denying plaintiff's motion for new trial. Since no appeal lies from such an order, that appeal is dismissed.

The judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

1 Cal.App.2d 334

WHELAN, Dist. Atty., etc., v. BAILEY, Public Adm'r.

Civ. 1121.

District Court of Appeal, Fourth District, California.

Oct. 10, 1934.

1. Counties ⇐3½

Home-rule county charters must be confined to matters properly governmental in their nature and be consistent with general scheme of government (Const. art. 11, § 7½).

2. Executors and administrators ⇐24

Public administrator after his appointment exercises an essentially private function and obtains power to do so not by virtue of his office, but by grant of power from court appointing him.

3. Executors and administrators ⇐24
Statutes ⇐73(2), 94(1)

Home rule charter undertaking to provide that public administrator must appoint as his attorney the county attorney who should collect attorney's fee and pay it into county treasury *held* void as in excess of authority granted to county, as attempting to empower county to practice law and as inconsistent with constitutional provisions prohibiting passage of local or special laws and requiring that general laws have uniform operation (St. 1933, art. 4, § 17, and art. 6, § 31, pp. 2821, 2823; Pol. Code, §§ 3901, 4000; Const. art. 4, § 25, subd. 12; art. 11, § 7½).

4. Corporations ⇐377½

Corporation may not practice law either directly or indirectly by hiring lawyers to practice on its behalf.

5. Counties ⇐1

County is a corporate body with corporate power, and may be classed as a "quasi corporation" (Pol. Code, §§ 3901, 4000).

[Ed. Note.—For other definitions of "Quasi Corporation," see Words & Phrases.]

Appeal from Superior Court, San Diego County; C. C. Haines, Judge.

Mandamus proceeding by Thomas Whelan, District Attorney and ex officio County Counsel of the County of San Diego, State of California, against Le Roy Bailey, Public Administrator of the County of San Diego, State of California. From a judgment for defendant, plaintiff appeals.

Affirmed.

Thomas Whelan, Dist. Atty., and Frank T. Dunn, James B. Abbey, and Carroll H. Smith, Deputy Dist. Attys., all of San Diego, for appellant.

De Riemer & Fisher and C. A. Brinkley, all of San Diego, for respondent.

R. M. Switzler, of San Diego, amicus curiæ in support of respondent.

Frank J. Macomber, Seymour W. Wurfel, H. C. Gardiner, and J. A. Donnelly, all of San Diego, amici curiæ for San Diego Bar Ass'n in support of respondent.

BARNARD, Presiding Justice.

The county of San Diego adopted a charter in 1932 which was approved by the Legislature and went into effect on July 1, 1933 (St. 1933, p. 2814). Section 17 of article 4 of this charter contains the following: "There is hereby created the office of County Counsel. The District Attorney shall be ex officio County Counsel." Section 31 of article 6 of the charter, in setting forth the duties of the county counsel, includes the following: "He shall also act as attorney for the Public Administrator in the matter of all estates in which such officer is executor, administrator with the will annexed, or administrator, and the County Counsel shall, in every such matter, collect the attorney's fee allowed therein by law and pay the same into the County Treasury."

After the charter went into effect the respondent public administrator filed in the superior court of San Diego county a petition for letters of administration in the estate of Frank Plotos, also known as Frank Pololus, deceased. The public administrator was represented in this matter by a firm of San Diego

attorneys. Shortly thereafter, the petitioner herein demanded of the respondent, in writing, that he be substituted as attorney in said matter in accordance with the charter provision above set forth. This demand having been refused, the petitioner filed in the superior court a petition for a writ of mandate, asking that the respondent be compelled to substitute the petitioner as attorney of record in said estate and to permit the petitioner to act as his attorney in all estate matters thereafter handled by the respondent as public administrator. A demurrer to the petition was sustained, the petitioner declined to amend, and from the judgment then entered this appeal is taken.

The appellant's position is that the charter provision is controlling since the charter was authorized by section 7½ of article 11 of the state Constitution, and since that section permits the creation of new offices and the giving of new duties to officers by charter provisions. It is then argued that the entire matter is one of policy, the wisdom of which has been determined by the adoption of the charter.

[1] The first and most important question is whether this particular charter provision is authorized by section 7½ of article 11 of the Constitution. The purpose of that section "was to give local self-government or county home rule to counties of the state." Reuter v. Board of Supervisors (Cal. Sup.) 30 P.(2d) 417, 422. That purpose is declared in the opening paragraph of that section as follows: "Any county may frame a charter for its own government consistent with and subject to the Constitution (or, having framed such a charter, may frame a new one), and relating to matters authorized by provisions of the Constitution." In other words, such charters are authorized and may be framed for the purpose of giving a certain local control over the means of carrying out governmental functions in such counties, with the limitation that anything in the charters, so authorized, shall be consistent with the Constitution and shall relate only to matters authorized by that fundamental law. While a county is thus authorized to provide for a measure of self-government, this authorization must be and is confined to providing for such functions as are properly governmental in their nature and which are consistent with our general scheme of government.

[2] Is the function contemplated by this charter provision a governmental function within the authorization conferred by section 7½ of article 11? While the public administrator has a certain public function, in that the state is interested in seeing that someone takes charge of property which is more or less without a guardian, in the performance of his duties he exercises what is essentially a private function, in that he is the personal representative of the deceased, handling the estate for the benefit of the heirs. He obtains his right to so act not by virtue of his office, but by grant of power from the court, his office merely giving him the right to obtain such a grant of power from the court under certain circumstances. After appointment and while acting in the administration of an estate, his functions as the administrator of that particular estate are severable from his status as a public officer, although the two coexist. As the learned trial judge in this case observed: "I do not see anything fundamentally inconsistent in regarding him so far forth as a functionary of the public, with the view that once he has taken charge of an estate and acquired by judicial grant in the particular case the right to administer it, he has ceased to be active primarily in a public capacity, but has become to all intents and purposes what he is by law, the personal representative of the decedent, for every administrator, executor or administrator with the will annexed is that, and there is a saying that 'no man can serve two masters.' The fact that the public has a sufficient interest in preventing estates from being squandered and seeing that some orderly disposition is made of them, to provide such an officer and sees fit to pay the officer is one consideration. It does not alter the fact that in the essential nature of his duties the officer is the personal representative of the decedent. His governmental function, if such he has, is satisfied when he prevents the property from being something merely abandoned or allowed to seek the attention of some chance custodian. The state is interested in seeing that such a situation shall not occur. Therefore, it has created this office, and that is the only legitimate reason why such an office exists, but it never was intended, apparently, to render the general course of administration anything different from that in the case of any other personal representative of the decedent, except as to the matter of oath, bond and qualifications generally."

Regardless of what may be said of the legal status of a public administrator when appointed and acting in the handling of a private estate for the benefit of private persons interested therein, the function of his attorney in such an estate is private rather than governmental. The only interest the

public has in such an estate, ordinarily, is the same interest it has in any estate, namely, that the same be handled in an orderly manner for the benefit of those interested therein. The only function of an attorney in such an estate is to take the matter through a state court in compliance with state laws regulating and providing an orderly procedure in conformity with the only interest which the public has. The work of such an attorney, if one is needed and employed, is neither for the county nor for the public administrator in his official capacity as such. It is for the public administrator in his capacity as the administrator of a private estate, as the personal representative of the deceased, and is primarily for the benefit of the private parties interested in the estate. The work of an attorney in such a case differs in no respect, material here, from similar work in any estate. The matter of providing attorneys for administrators has never been considered a governmental function. If an attorney is needed, the general law governing the probate of estates indicates how one may be obtained and provides for his compensation from private sources. The charter provision in question attempts to compel the employment of a county official in every such estate, whether an attorney is needed or not, and then attempts to take for the county the compensation thus earned in what is, essentially, a matter of private employment. Whether or not it could be considered a proper governmental function to furnish such services free in certain cases, it certainly is not a governmental function to furnish such services for the benefit of private persons only as a source of profit to the county. Aside from this hope of profit, the county has no possible interest in the matter of who shall act as attorney for a private estate.

[3] We conclude that this charter provision is not within the purposes declared in and contemplated by section 7½ of article 11 of the Constitution, and the same is void as in excess of the authority thereby granted to a county.

The matter of profit, above referred to, suggests another objection to the validity of this charter provision. If valid, that provision permits the county of San Diego through an agent, the district attorney, to engage in the practice of law for a profit. And a further result would naturally follow. While a county has no interest in the actual administration of such estates, it not infrequently happens that a contest arises between an estate and the county, over taxation or other matters. In such an event, the county would not only be an interested party, but through its agent, the district attorney, would also represent the other side to the controversy. Thus the county would be allowed not only to practice law but to act in this capacity for its own adversary.

[4, 5] It is well settled that a corporation may not practice law either directly or indirectly by hiring lawyers to practice on its behalf. People v. Merchants' Protective Corporation, 189 Cal. 531, 209 P. 363, 366; People v. California Protective Corporation, 76 Cal. App. 354, 244 P. 1089; 1932 Suppl. Cal. Jur. 19. A county is a corporate body, with corporate power, and may be classed as a quasi corporation. Sections 3901 and 4000, Pol. Code; County of Sacramento v. Chambers, 33 Cal. App. 142, 164 P. 613. In People v. Merchants' Protective Corporation, supra, the court said: "The essential element underlying the relation of attorney and client is that of trust and confidence of the highest degree growing out of the employment and entering into the performance of every duty which the attorney owes to his client in the course of such employment. It is the existence of this essential element as the basis of said relation which has called into being the various statutory regulations governing the admission of attorneys and counselors at law and which embody certain requirements of character, integrity, and learning as the prerequisites of such admission to the right and privilege of practicing law. It is the possession or reputation for the possession of these personal qualifications which constitutes, as a rule, the main inducement for the formation of the personal and confidential relation of attorney and client. The intervention of a corporation between the membership it secures and the attorneys it employs, which corporation can in and of itself possess none of these qualifications, obviously leaves out of view the necessity for their existence."

The reasons for the rule that a corporation may not practice law would seem to apply equally in the case of a public corporation. The necessary elements and requirements are as obviously lacking in the one case as in the other.

It would further appear that even the general public interest in such estates as are handled by a public administrator, which has been above referred to, is a matter of public policy which is state-wide and which bears no relation to local self-government. It would therefore, seem that this charter provision, instead of being "consistent with * * * the Constitution" as required by section 7½ of article 11 is in conflict with subdivision 12

of section 25 of article 4, prohibiting the passage of local or special laws affecting the estates of deceased persons and also with such other provisions as that prohibiting a special law where a general law can be made applicable, and that providing that all laws of a general nature shall have a uniform operation.

For the reasons given the judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.App.2d 281

Ex parte GUTIERREZ.

Cr. 274.

District Court of Appeal, Fourth District, California.

Oct. 6, 1934.

1. Habeas corpus ⇐87

Where sheriff's return to writ of habeas corpus showed that prisoner was held under commitment valid on its face, and petitioner did not except to return or deny its allegations, writ would be discharged.

2. Habeas corpus ⇐73½

Function of petition for writ of habeas corpus is to secure issuance of writ requiring return by person having custody of prisoner.

3. Habeas corpus ⇐83, 84

Petitioner for writ of habeas corpus may present exceptions raising questions of law, or traverse raising issues of fact, or both, to return to writ.

4. Habeas corpus ⇐92(1)

Writ of habeas corpus may not be used as a means of considering alleged insufficiency of evidence produced during trial of criminal action.

5. Habeas corpus ⇐55

Petitioner for writ of habeas corpus claiming that writ could be used to consider question of alleged insufficiency of evidence to support conviction was required to present complete record of such evidence.

6. Habeas corpus ⇐4

Alleged failure of justice of peace convicting petitioner of vagrancy in not informing accused of date of trial and of his legal rights and in denying accused opportunity to subpœna witnesses and benefit of counsel and jury trial *held* not grounds of discharge in habeas corpus proceeding, since alleged errors did not go to jurisdiction of court and objection thereto should have been presented by appeal from conviction (Pen. Code, § 647).

7. Habeas corpus ⇐54

Where petitioner for writ of habeas corpus did not allege that he suggested to justice of the peace convicting him of vagrancy that he was under 18 years, or that such fact appeared to justice, petitioner could not claim that failure of justice to certify petitioner to juvenile court deprived petitioner of legal right affecting jurisdiction of justice and authorizing petitioner's discharge (Pen. Code, § 647; St. 1921, p. 799, § 6).

Application by Miguel Gutierrez, Jr., for a writ of habeas corpus against the Sheriff of Imperial County.

Writ discharged, and prisoner remanded.

James M. Carter, of Los Angeles, and Grover C. Johnson, of San Bernardino, for petitioner.

Elmer W. Heald, Dist. Atty., of El Centro, for respondent.

JENNINGS, Justice.

This is an application for a writ of habeas corpus. A petition for the writ was filed with this court, wherein it was alleged that Miguel Gutierrez, Jr., was being illegally confined in the county jail of Imperial county. Thereafter, this court directed the issuance of the writ and made the same returnable on August 21, 1934. On the last-mentioned date the sheriff of Imperial county made his return in which he alleged that the said Miguel Gutierrez, Jr., was held in custody by him by virtue of the authority contained in a commitment issued by the justice's court of Brawley township in said Imperial county. Attached to the return is a copy of the commitment and a copy of the complaint filed in said justice's court, wherein the said Miguel Gutierrez, Jr., was charged with the offense of vagrancy. Included with the return and forming a part of it is an answer by said sheriff to the petition for the issuance of the writ. This answer contains a general denial of each and every allegation of the petition, an admission that the said Gutierrez was held in custody by him until he was released on bail by order of this court,

a specific denial that the imprisonment and detention of Gutierrez was illegal, and a denial, based on lack of information, of the various other allegations of the petition. Attached to the answer thus filed and forming a part thereof is an affidavit of the justice of the peace of Brawley township. This affidavit contains a detailed statement in narrative form of the proceedings which were held in the justice's court of Brawley township in the case in which said Miguel Gutierrez was accused of the offense of vagrancy and which resulted in the conviction of said Gutierrez of the commission of said crime and of his being sentenced to be confined in the county jail of Imperial county for a term of four months as punishment therefor. No traverse of the allegations contained in the return and answer thus filed has been made by the petitioner herein, and no stipulation has been entered into whereby we are permitted to consider the petition for the writ as a traverse to the sheriff's return.

[1-3] The situation which is thus presented is therefore that we have here a return made by the officer to whom the writ was directed, which shows that the person on whose behalf the petition was filed was confined in the county jail of Imperial county by authority of a commitment issued by the justice of the peace of Brawley township, which commitment appears to be legal and valid on its face, and that there is no denial of the allegations contained in said return and in the affidavit of the justice of the peace thereto attached. These facts would justify a prompt discharge of the writ heretofore issued by this court. The function of the petition for a writ of habeas corpus is to secure the issuance of the writ, and, when the writ has issued, the petition has accomplished its purpose. The writ requires a return by the officer or other person who has custody of the prisoner. To the return the petitioner may present exceptions, raising questions of law, or a traverse, raising issues of fact or both. In re Collins, 151 Cal. 340, 90 P. 827, 91 P. 397, 129 Am. St. Rep. 122; In re Delgado, 107 Cal. App. 688, 290 P. 589. Here the petitioner has neither presented legal exceptions to the return nor has he denied the allegations of the return. Under the established rules of this procedure, we have therefore a return of the officer to whom the writ was directed, which shows that, at the time the prisoner was released on bail by order of this court, he was holding him in custody by virtue of the authority of a valid legal commitment, and no exception raising questions of law has been made to such return and no denial of the facts set forth in the return has been presented.

If, however, we treat the petition as an answer to the return, the situation is hardly more advantageous to petitioner. He has alleged in his petition that the person in whose behalf the application is made was arrested on May 18, 1934, and that on the following day he was taken before the justice of the peace, who told him that he was charged with vagrancy without specifying the particular subdivision of the statute (Pen. Code, § 647) mentioned in the complaint and that he was asked how he pleaded; that he said "not guilty"; that the justice then informed him he was entitled to a trial by jury, and that he could have any subpœnas he wished to compel the attendance of witnesses in his behalf; that the prisoner then stated that he desired a jury trial, and that he had a lawyer to represent him; that he was thereupon returned to jail in default of bail and was not informed of the date of trial; that he remained in jail until May 29, 1934, when he was again brought before the justice of the peace in company with six other persons, and the court commenced the joint trial of the seven persons, none of whom was represented by counsel; that at this time Miguel Gutierrez, Jr., presented to the justice of the peace a list of fifteen persons, with the request that the individuals there named be brought into court; that the justice then informed him that his request came too late, and that he should have requested the issuance of subpœnas for the attendance of such persons on the date of his arraignment; that three unnamed witnesses gave certain testimony, the substance of which is set forth; that upon the conclusion of this testimony the justice asked if any of the defendants had anything to say in their favor, whereupon two of them gave certain testimony whose substance is related; that the defendants were thereupon taken to the city jail in Brawley, where they remained until 5 p. m. of the date of trial, when they were returned to court, and the justice of the peace imposed certain specified sentences of imprisonment upon them.

Basing his contention on the above-mentioned allegations, it is urged that Miguel Gutierrez, Jr., was deprived of certain constitutional rights and privileges whereby he was not accorded a fair trial, and that consequently the sentence of imprisonment pronounced upon him was invalid and he is entitled to be released from custody. In particular it is contended that Gutierrez was not informed of the charges against him; that

he was denied counsel and was not represented by counsel; that he was denied the right of trial by jury; that he was not informed of the time of trial; that he was not afforded the opportunity of securing the attendance of witnesses in his behalf, and was thus deprived of the privilege of presenting such witnesses; that no evidence was produced which showed that he was guilty of the commission of any crime.

[4, 5] With respect to the contention that no evidence tending to show that Gutierrez was guilty of the commission of any criminal offense was presented at the trial, it will suffice to say that the writ of habeas corpus may not be used as a means of considering the question of the alleged insufficiency of the evidence produced during the trial of a criminal action. In re Jacobs, 175 Cal. 661, 166 P. 801; In re Horr, 177 Cal. 721, 171 P. 801; In re Williams, 183 Cal. 11, 190 P. 163; In re Gutierrez, 46 Cal. App. 94, 188 P. 1004; In re Kaster, 52 Cal. App. 454, 198 P. 1029; In re Samaha, 130 Cal. App. 116, 19 P.(2d) 839. Furthermore, even if it could be so used, it would be incumbent upon petitioner to present a complete record of such evidence.

[6] With respect to the alleged failure of the justice of the peace to inform him of his legal rights, it must be observed, first, that, treating the petition as a traverse to the return, the pleadings are conflicting upon this matter, and, second, that, even if it may be assumed that there was a failure to inform him of his legal rights, such failure is not a ground for discharge on habeas corpus. The proper method of presenting this objection is by appeal from the judgment. Ex parte Ah Sam, 83 Cal. 620, 24 P. 276; In re Maldonado, 97 Cal. App. 288, 275 P. 495.

The same conclusion must be reached with respect to the following contentions: First, that he was not afforded an opportunity to secure the issuance of subpœnas to compel the attendance of witnesses in his behalf, and was thereby deprived of the privilege of presenting the testimony of such witnesses; second, that he was not informed of the date of trial; third, that he was denied counsel and was not represented by counsel; fourth, that he was denied the right of trial by jury. Each of the foregoing rights is one that he could have waived, and the alleged denial of any one or all of them might properly have been raised by appeal but is not a ground for discharge in this proceeding. In particular, the alleged denial of the right to a trial by jury is not an objection which goes to the jurisdiction of the court which pronounced the judgment whose effect is sought to be nullified by the issuance of the writ. In re Fife, 110 Cal. 8, 42 P. 299; In re Turck, 37 Cal. App. 601, 174 P. 100.

[7] The final contention of petitioner is that the petition specifically alleges that Miguel Gutierrez, Jr., is sixteen years of age, which fact is not controverted in the return to the writ, and that, being under the age of 18 years, he was entitled by virtue of the provisions of the Juvenile Court Act (St. 1915, p. 1225, as amended) to be certified to the juvenile court. It is urged that the denial of this legal right affects the jurisdiction of the justice's court and that it furnishes a sufficient ground for the discharge of Gutierrez through the medium of the writ of habeas corpus. Unfortunately for Gutierrez, the petition nowhere alleges that at any time it was suggested to the justice of the peace of Brawley township that Gutierrez was under the age of 18 years. Section 6 of the Juvenile Court Law (St. 1915, p. 1229, as amended by St. 1921, p. 799) provides that, whenever a complaint is filed in any court other than a superior court charging a person with a crime, and it shall be suggested or shall appear to the judge of such court that the person charged was under the age of 18 years on the date on which the crime was alleged to have been committed, the judge shall immediately suspend all proceedings against such person and examine into his age, and, if it shall appear to the satisfaction of the judge that such person was under 18 years of age on the date when the crime is alleged to have been committed, he shall forthwith certify said person to the juvenile court. The plain language of the law imposes upon the juvenile the burden of at least suggesting to the court that he is under the age of 18 years. In the absence of such suggestion, and unless it appears to the judge that the individual charged with the commission of a criminal offense is under the specified age, no duty arises to suspend the proceedings and examine into the age of the accused. Since the petition entirely fails to show that Gutierrez at any time suggested that he was under the age of 18 years, and there is in the petition no allegation or intimation that it ever appeared to the justice of the peace that he was under 18 years of age, it necessarily follows that he may not, in this proceeding, complain that he was deprived of a legal right which affected the jurisdiction of the trial court and thus obtain his discharge from custody. People v. Oxnam, 170 Cal. 211, 149 P. 165; In re Bastiani, 81 Cal. App. 294, 253 P. 951;

People v. Luzovich, 127 Cal. App. 465, 468, 16 P.(2d) 144.

The writ is therefore discharged, and Miguel Gutierrez, Jr., is remanded to the custody of the sheriff of Imperial county.

We concur: BARNARD, P. J.; MARKS, J.

1 Cal.App.2d 424

PEOPLE v. DAVIS.

Cr. No. 303.

District Court of Appeal, Fourth District, California.

Oct. 15, 1934.

Rehearing Denied Nov. 5, 1934.

Criminal law ⇐1182

Where appellant failed to appear after cause was regularly placed on calendar for oral argument and no brief was filed, conviction was affirmed on motion of Attorney General (Pen. Code, § 1253).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Merriweather Davis was convicted of a violation of Penal Code, § 288, and he appeals. On motion to affirm the judgment.

Motion granted, and judgment affirmed.

Head, Wellington & Jacobs, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Warner Praul, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was convicted of a violation of section 288 of the Penal Code by the verdict of a jury and filed notice of appeal from the judgment. The clerk's transcript was filed in this court on August 17, 1934, and the reporter's transcript on September 6, 1934. The cause was regularly placed upon the calendar for oral argument on October 9, 1934. No appearance being made and no brief having been filed, the Attorney General moved to affirm the judgment under section 1253 of the Penal Code.

The motion is granted, and the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

SMITH v. WILSON et al.

Civ. 8604.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1934.

Hearing Denied by Supreme Court Dec. 6, 1934.

1. Replevin ⇐1

Right of possession only is involved in replevin action.

2. Replevin ⇐112

Where owner recovered judgment for possession of personal property subject to lien, orders obtained by lienors after judgment for enforcement of judgment and satisfaction of lien were in derogation of judgment and in excess of court's powers.

3. Execution ⇐84

Execution must rest upon and follow judgment, and if it exceeds judgment it has no validity.

4. Execution ⇐84

Where owner recovered judgment for possession of personal property subject to lien, lienors were not entitled to writ of execution, because writ of execution is issued for enforcement of judgment, and court's inherent powers do not include issuance of writ of execution contrary to express language of judgment (Code Civ. Proc. § 681).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by J. A. Smith against Paul N. Wilson and Smith & Graham, a copartnership composed of W. L. Smith and W. H. Graham. From orders obtained by Smith & Graham after judgment became final for enforcement of judgment and satisfaction of lien, the plaintiff appeals.

Orders reversed.

Hyams & Himrod and Mark A. Hall, all of Los Angeles, for appellant.

Raphael Dechter, of Los Angeles, for respondents.

SCOTT, Justice pro tem., delivered the opinion of the court.

Plaintiff sued to recover certain personal property, and obtained judgment for its possession subject to a "lien" in favor of Smith & Graham. After the judgment became final the latter obtained from the court (1) an "order to enforce judgment," and (2) an order directing the issuance of a writ of execution to levy upon and sell said property to satis-

fy the lien. From these orders made after judgment, plaintiff appeals.

The court found that the personal property before the commencement of the action was located in an oil well and at no time was affixed to the realty; that at no time did the owner of the realty or the personal property engage Smith & Graham to furnish any labor or materials, but that defendant Wilson without the knowledge or consent of plaintiff had requested them to do so, and they had furnished labor and materials of value of $1,270; that plaintiff had not requested nor consented to their furnishing such labor or materials, and Smith & Graham did not at any time give plaintiff any notice of the performance of said labor or furnishing of said materials. As a conclusion of law the court stated: "From the foregoing findings of fact the court concludes that the plaintiff is entitled to a judgment against the defendants, and each of them, for the recovery of the possession of the goods and chattels described in the complaint, subject to a lien in favor of the defendants Smith and Graham, a copartnership composed of W. L. Smith and W. H. Graham, for labor performed and materials furnished, in the principal sum of $1,270.00 and that plaintiff is entitled to a judgment for his costs incurred herein." Judgment was thereupon rendered: "Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendants Paul N. Wilson and Smith and Graham, a copartnership composed of W. L. Smith and W. H. Graham, the possession of the property described in the complaint * * * (describing it) subject to a lien for labor performed and materials in the sum of $1,270 in favor of Smith and Graham, a copartnership. * * * It is further ordered, adjudged and decreed that the plaintiff do have and recover his costs of suit herein, taxed in the sum of $50.85."

The orders from which plaintiff appeals are as follows:

(1) Minute order of June 10, 1932: "Come now the parties by their respective counsel, Hyams & Himrod and Mark A. Hall appearing for plaintiff, and R. Dechter for the defendants, and defendants move the court to enforce judgment. After argument by counsel, said motion is by the court granted."

(2) Written order of June 14: "* * * It appearing to the court that the above action was instituted by the plaintiff for the possession of certain personal property which at the time of the commencement of this action was in the possession of the defendants Smith and Graham under a claim of lien for services rendered by said defendants Smith and Graham in the extraction and removal of said personal property from an oil well and in the transportation and storage thereof in the sum of $1,270.00. And it further appearing to the court herein that judgment was rendered that plaintiff was entitled to possession of said property as to the defendant Paul N. Wilson and that the defendants Smith and Graham did have a lien as set forth in their answer in the sum of $1,270.00; and it further appearing to the court that the judgment as drawn herein made no provision for the enforcement of said lien of said defendants Smith and Graham in the sum of $1,270.00 on said personal property, and it further appearing to the court that said lien so found to be had by said defendants Smith and Graham has not been discharged or paid by the plaintiff herein, and it further appearing to the court that this is a proper case for the court to exercise its inherent power to enforce its judgments: Now, therefore, it is ordered that a writ of execution issue to the sheriff of this county, authorizing the sheriff of this county under and by virtue of said writ of execution to levy upon the personal property in the judgment herein described and to sell the same for the purpose of satisfying said lien of the defendants Smith and Graham in the sum of $1,270.00, together with interest at the rate of 7% per annum from the date of the judgment herein, and that if any surplus remains after said sale in the manner provided by law for such execution sales, that such surplus be paid to the plaintiff herein."

[1] The judgment was in favor of plaintiff in a replevin action, in which only the right of possession is involved (Riverside, etc., Co. v. Taft, 192 Cal. 643, 221 P. 357), and the declaration as to the lien asserted, if viewed in the light most favorable to respondents, might be construed as referring to the latters' claim of lien, in order that they might not thereafter be precluded from seeking to enforce their lien in an appropriate action. The reasons for such a recital in the judgment are not clear, since it is not a mechanic's lien, the court's findings would seem to negative the idea that it might have been a lien under Civil Code, § 3051, and the language used shows that the court by its judgment was not enforcing respondents' equitable lien for such labor and materials.

[2-4] The orders made after judgment were in derogation of the judgment and in excess of the court's powers. Their effect would be

to negative and render void and meaningless the judgment theretofore rendered. It is settled law that "the execution must be warranted by the judgment. It rests upon and must follow the judgment; if it exceeds the judgment, it has no validity." Davis v. Robinson, 10 Cal. 411. A writ of execution is issued for the enforcement of a judgment (Code Civ. Proc. § 681), and since the judgment was in favor of appellant, respondents were not entitled to the issuance of such a writ. The inherent powers of the court do not include the issuance of a writ of execution contrary to the express language of the judgment.

Orders appealed from reversed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 340

ANDERSON v. GEO. L. BARNEY CO., Inc., et al.

Civ. 1100.

District Court of Appeal, Fourth District, California.

Oct. 10, 1934.

1. Trial ⇐395(1)

In principal's action against real estate agents for commission paid and secret profit, where court found facts which constituted fraud and deceit, failure to use the words "fraud and deceit" in findings was immaterial.

2. Brokers ⇐19

Licensed real estate agents who accepted commission from principal for services in effectuating exchange of properties *held* agents and not middlemen who owed no duty to principal.

3. Brokers ⇐34

Licensed real estate agents who caused principal, paying commission, to believe that she was exchanging her property for other property, whereas agent was selling each property to other persons for cash and making a secret profit, *held* liable to principal for amount of secret profit and commission received from principal.

4. Brokers ⇐34

Principal suing real estate agents for commission paid and secret profit made by agent who had led principal to believe that she was exchanging her property for other property, whereas agent sold each property to other persons, *held* not charged with knowledge of terms of secret escrow agreement to which she was not a party and of which she had no knowledge.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Ethelyn B. Anderson against the George L. Barney Company, Inc., and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Stearns, Luce & Forward and Fred Kunzel, all of San Diego, for appellants.

George H. Stone, of San Diego, for respondent.

MARKS, Justice.

Plaintiff recovered judgment for $1,726.50, being $300 real estate commission paid defendants, and $1,426.50 secret commission or profit received by them while acting as her agents for the exchange of her real property.

Geo. L. Barney Company was a duly licensed real estate broker, and Raymond K. Worrell and Gaylord B. Parkinson were licensed real estate salesmen employed by and acting for and under the broker's license of Geo. L. Barney Company, as was S. B. De Silva. Hartford Accident & Indemnity Company furnished the real estate broker's bond for Geo. L. Barney Company.

Plaintiff owned property in Seattle, Wash., which she desired to exchange for property in San Diego, Cal. De Silva, who was related by marriage to plaintiff, introduced her to Parkinson, who showed her a number of properties in San Diego, among them one owned by Abraham L. Richey and Lettie L. Richey, his wife. On July 1, 1931, plaintiff signed a written offer to exchange her Seattle property for the Richey property, and agreed to pay Geo. L. Barney Company $500 commission if the transaction were consummated. She also agreed that Geo. L. Barney Company might act for and accept a commission from the Richeys. This exchange offer and agreement expired by its terms in thirty days, but was extended by plaintiff to August 30, 1931. As the exchange was not made, the offer and agreement terminated on that date. Parkinson tried to consummate an exchange

with another person, but could not complete the transaction.

Richey informed defendants that he would accept $2,300 for his San Diego property. Defendants immediately attempted to find a cash purchaser for plaintiff's Seattle property. On December 28, 1931, they telegraphed agents in Seattle, asking if it could be sold for $4,000 cash. On January 2, 1932, they received a telegram from the Seattle agents conveying the information that a purchaser had been found who would pay $4,000 cash for the property. Other telegrams had been exchanged in the interim.

On December 30, 1931, Worrell and Parkinson went to De Silva's home and told him that a trade then pending between plaintiff and one Harris could not be consummated, but that Richey was now willing to trade his San Diego property for the Seattle property. Plaintiff had gone to Pittsburg, Cal., for the holidays. Parkinson and De Silva went to that city, and Parkinson again presented the Richey trade to her. He did not tell her that Richey was willing to sell his San Diego property for $2,300, or that her Seattle property could be sold for $4,000 cash. On January 2, 1932, he secured plaintiff's signature to escrow instructions, agreeing to exchange her property for the San Diego property and to pay Geo. L. Barney Company $300 commission upon the consummation of the transaction. Mr. and Mrs. Richey approved the instructions, and the deal was consummated and deeds recorded on January 23, 1932, by Mr. and Mrs. Richey conveying the San Diego property to plaintiff and she conveying the Seattle property to them.

At the same time another escrow was started with the same company handling the Anderson-Richey escrow. This second escrow was for the sale of the Seattle property by Mr. and Mrs. Richey to Tiney W. Griffith. Mr. and Mrs. Richey agreed to accept $2,300 for their San Diego property. Griffith agreed to pay $4,000 for the Seattle property. The deed from Mr. and Mrs. Richey to Griffith to the Seattle property was placed in escrow by Geo. L. Barney Company, with instructions to deliver it upon payment of $4,000 cash, which was to be disbursed as follows: $2,300, less expenses of sale to Richey and the balance of $1,700 less expenses, to Geo. L. Barney Company. This company received $1,426.50 from this fund in addition to $300 commission from the plaintiff. The money was expended as follows: $115 to plaintiff for adjustment on rents on the Richey property; $181 to De Silva to pay his expenses to Pittsburg and as his share for having introduced plaintiff to defendants; the balance one-third to each defendant. The deed from Mr. and Mrs. Richey conveying the property to Griffith was recorded on January 23, 1932.

The trial court found, and the finding is supported by the evidence, that on January 2, 1932, defendants knew that the Richey property could be purchased for $2,300 cash and the Seattle property sold for $4,000 cash, that this information was not communicated to plaintiff or to De Silva, and that they did not know of it or that defendants had made $1,426.50 secret profit out of the transaction until in July, 1932.

[1] One principal ground of attack on the judgment is that the trial judge made no specific finding of fraud on the part of defendants. It is true that the findings do not contain the words "fraud" or "deceit." The findings do recite that the defendants had knowledge of facts which they concealed from plaintiff to their profit in the sum of $1,426.50. Where the findings show facts which constitute fraud and deceit, the absence of those words from the findings is immaterial.

In Thomas v. Snyder, 114 Cal. App. 397, at page 404, 300 P. 117, 120, it is said:

"What is required of an agent toward his principal is clearly set forth in the text found in 1 California Jurisprudence, page 789, as follows: 'The proposition is conclusively settled that an agent is charged in full measure with the duty of good faith in his dealings with his principal, touching the subject of his authority. The animating principle in this proposition is that no one should, nor will be permitted to enjoy the fruits of an advantage taken of a fiduciary relation whose dominant characteristic is the confidence reposed in one person by another. The law requires perfect good faith on the part of agents not only in form but in substance, and not only from agents receiving compensation, but also from gratuitous agents. Indeed, the rule is so familiar as to be trite that the obligation of an agent to his principal demands of him the strictest integrity and most faithful service.' Other requirements are set forth in the section containing the text from which we have quoted, suffice to say that the requirement of the law of the relation of agent and principal is to the effect that the agent cannot be allowed to profit at the expense of his principal, whether the result be reached by misrepresentation or concealment or other fraudulent device. This is further set forth in section 1709 of the Civil Code, which reads: 'One who willfully deceives another with intent to

induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.' This is the definition of 'deceit,' and section 1710, Civil Code, defining 'deceit' in subdivision 3, contains the following: 'The suppression of a fact, by one who is bound to disclose it,' etc. We do not need to cite authorities to the effect that an agent is bound to disclose to his principal every fact within his knowledge which bears upon the value of the property with which the parties are dealing, and the concealment of which would lead to the injury of the principal. As stated in 1 California Jurisprudence, 799, § 85: 'Any act of an agent with respect to the subject matter of the agency, injurious to the principal, may be avoided by the principal as between themselves.' And as further said in the same section: 'An agent will not be allowed to deal in his own behalf with his principal with reference to the subject matter of the agency unless he makes full, complete and honest disclosure of the truth of the transaction.' To the same effect is the case of Curry v. King, 6 Cal. App. 568, 92 P. 662, 665, where this court, speaking through Mr. Justice Hart, took occasion to set forth the law showing that an agent is absolutely prohibited from dealing with the subject-matter of the agency by concealment or otherwise, so as to enrich himself. The case of Curry v. King, supra, also holds that the value of the property involved is immaterial. The unlawful profits obtained by the agent by reason of his fraudulent conduct is all that is necessary to be ascertained.

"In Rempel v. Kells, 62 Cal. App. 81, 215 P. 1042, it is likewise held that the profits obtained by an agent through fraudulent conduct constitutes the basis for recovery. This case also goes further and holds that an agent obtaining profits by fraudulent conduct and concealment from his principal is not entitled to recover expenses incurred by him in connection with the property."

[2] Defendants contend that they were not agents for plaintiff but were acting as middlemen in the transaction. The trial court found against this contention, and the finding is supported by the evidence. In this connection it might be pertinent to inquire why they accepted $300 commission from plaintiff if they were not her agents.

Defendants urge that De Silva was agent of plaintiff and had knowledge of the transactions which would be charged to his principal. The trial court found that De Silva had no knowledge of the secret profit until July, 1932. This finding is supported by the testimony of De Silva.

[3] Defendants maintain that, as plaintiff received just what she bargained for, she was not damaged and cannot complain. This contention is answered by the cases of Calmon v. Sarraille, 142 Cal. 638, 76 P. 486; King v. Wise, 43 Cal. 628; Nightingale v. Williams, 70 Cal. App. 424, 233 P. 807; and Patterson v. De Haven, 88 Cal. App. 418.

[4] Defendants maintain that plaintiff had notice of the entire transaction through the escrow instructions and rely upon the case of Early v. Owens, 109 Cal. App. 489, 293 P. 136, to support them. Defendants can find no comfort in that case. There the trial judge found that the plaintiff had actual notice of all the details of the transaction and that no fraud was practiced on her. In the instant case, the contrary is true. In that case the trial court found that the plaintiff had constructive notice through the escrow instructions. In the instant case there were two separate files of escrow instructions. One was between plaintiff and Mr. and Mrs. Richey, which bore escrow No. 244649, and was merely for the exchange of the two properties, without disclosing the matters concealed from plaintiff. The other bore escrow No. 244650 and was between Mr. and Mrs. Richey, Tiney W. Griffith, and Geo. L. Barney Company. It did disclose the details of the transaction and the secret profit of defendants. Plaintiff was not a party to this second escrow, had no knowledge of it, and cannot be charged with notice of any of its terms.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.App.2d 565

PAGE et al. v. HALE et al.

Civ. 9684.

District Court of Appeal, Second District, Division 2, California.

Oct. 23, 1934.

1. Venue ⇐52½

Upon voluntary dismissal of action as against certain defendants, motions of such defendants theretofore served and filed for change of venue *held* properly denied.

2. Appeal and error ⇐1139

Orders denying motions of certain defendants for change of venue, entered upon voluntary dismissal of action as against them, were affirmed on appeal on condition that plaintiffs file stipulation not to rejoin such parties as defendants, since such rejoinder after appeal would preclude them from again seeking change of venue.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Marie Markham Page and another, as executors of the last will and testament of Benjamin E. Page, deceased, and another, against P. C. Hale, L. M. Giannini, and others. From orders denying their respective motions for change of venue, defendants L. M. Giannini and certain others appeal. On motion to dismiss or affirm appeal.

Order in accordance with opinion.

Cushing & Cushing and Cullinan, Hickey & Sweigert, all of San Francisco, Clarke & Bowker, of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson, of Los Angeles, for appellants.

Chandler, Wright & Ward, of Los Angeles, for respondents.

PER CURIAM.

[1] Appellants have taken this appeal from the orders of the court denying their respective motions for change of venue. After their demands and notices of motion to that effect had been served and filed, respondents filed with the clerk an order directing him to dismiss without prejudice as to appellants. Thereafter the lower court entered the order denying said motions for change of venue. Such order for dismissal was effectual to dismiss the action as to the defendants who have taken this appeal, and the order by the lower court properly followed. Prendergast v. Mitchell-Silliman Co., 65 Cal. App. 456, 224 P. 243.

[2] Appellants apprehend that respondents may, if this appeal is dismissed, amend their complaint by adding as party defendants these appellants, who they declare would thereby be precluded from again seeking to assert their right to a change of venue. Respondents disclaim such intention, and to evidence good faith have offered to file a stipulation that at any time they seek to rejoin these appellants as party defendants the entire action may be ordered dismissed with prejudice. Except for such possibility it is obvious that the questions presented by this appeal are moot.

It is therefore ordered that within ten days respondents prepare and file in this court, to be transmitted to the lower court for filing therein, a stipulation as above outlined, and that thereupon this appeal be dismissed; and that unless such stipulation be so filed within the time indicated this motion to dismiss or affirm shall be denied.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

1 Cal.App.2d 374

TREPPA v. JUSTICE'S COURT OF NO. 3 TP., LAKE COUNTY, et al.

Civ. 5239.

District Court of Appeal, Third District, California.

Oct. 11, 1934.

1. Prohibition ⇐3(5)

Prohibition *held* to lie to restrain justice's court from exercising jurisdiction in proceeding on complaint stating no offense, since defendant's only right in justice's court would be to plead "guilty" or "not guilty," and he would not be able to challenge sufficiency of complaint until appeal, if convicted, which would be inadequate remedy (Pen. Code, § 1429).

2. Indians ⇐38(4)

In prosecution for selling intoxicating liquor to full-blooded Indian, it must be alleged and proved that liquor was intoxicating (Pen. Code, § 397).

3. Indians ⇐38(4)

Information charging sale of "liquor," namely, beer containing more than ½ per cent. and not more than 3.2 per cent. of alcohol by volume, to full-blooded Indian, *held* insufficient to state offense, in absence of allegation that liquor was intoxicating, since court could not declare such beer intoxicating as matter of law (Pen. Code, § 397).

Prohibition proceeding by Arthur Treppa against the Justice's Court of No. 3 Township, Lake County, and Fred S. Fuller, Justice thereof.

Writ granted.

Charles Kasch, of Ukiah, for petitioner.

Burt W. Busch, of Lakeport, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

It appears from the petition for a writ of prohibition that Arthur Treppa is charged by an information filed in the justice's court of township No. 3 of Lake county with having sold liquor to one Byron Augustine, a full-blooded Indian.

This information is purported to be based upon the provisions of section 397 of the Penal Code; the portion material to this decision being in the following language: "Every person who sells or furnishes * * * intoxicating liquors * * * to any Indian of whole or mixed blood, * * * is guilty of a misdemeanor."

The force of petitioner's objection will be seen in comparing the allegations of the complaint with that of the language of the section just quoted; the complaint alleging "that said defendant Arthur Treppa, at said time and place did unlawfully furnish to Byron Augustine, liquor, to-wit: beer containing more than one-half of one per cent and not more than three and two-tenths per cent of alcohol by volume, the said Byron Augustine being then and there an Indian of the whole blood," which omits the direct allegation found in the statute of the intoxicating quality of the drink.

It is urged that the complaint, therefore, does not state any offense known to the law, and the trial court, being about to exercise jurisdiction in an unauthorized proceeding, creates a situation wherein prohibition is the proper remedy.

[1] We were at first disposed to the opinion that the justice's court had jurisdiction to proceed, and that, if error were committed, petitioner still had a plain and speedy remedy at law adequate in the premises. Inasmuch, however, as the only right of a defendant in the justice's court, according to section 1429 of the Penal Code, is to enter a plea of guilty or not guilty, it is apparent petitioner has no opportunity to challenge the sufficiency of the complaint prior to trial, and the remedy is not, under these circumstances, adequate. In Ex parte Hayter, 16 Cal. App. 211, 116 P. 370, 376, this court, speaking through Mr. Justice Hart, said:

"To require him to resort to his remedy by appeal would likely only be to force him to suffer imprisonment until his trial is had, and, in case of conviction, until his appeal could be heard and determined, and all this as the result of a proceeding of which the court has no jurisdiction. Moreover, to require him to go to trial would necessitate the entailment of an unnecessary and no insignificant expense upon the taxpayers of the county of Merced, a consideration which should have some weight in the determination of a question which, in point of fact, involves, in its solution, so far as its importance as a legal proposition is concerned, in this case at least, merely a decision as between 'tweedledum' and 'tweedle-dee.'

"The remedy by appeal is neither speedy nor adequate in a case where a citizen is restrained of his liberty under an illegal process. Where one is unlawfully imprisoned and

it may be made so to appear to a court in an appropriate legal proceeding, there can exist no conceivable reason why he should not be restored to his liberty by the shortest cut recognized by the law, and not be compelled to remain in a county prison, and thus be made to suffer the inconveniences of such restraint until some more dilatory remedy, which may ultimately be available to him, has been put in operation." Terrill v. Superior Court, 127 Cal. xviii, 60 P. 38; Arfsten v. Superior Court, 20 Cal. App. 269, 128 P. 949.

The question for determination, therefore, is whether it can be said as a matter of law that liquor, to wit, beer containing not less than one-half of 1 per cent. nor more than 3.2 per cent. of alcohol by volume is intoxicating. We doubt if a court has the power, in the absence of legislative definition, to fix the intoxicating quality of liquor as a matter of law. The Legislature has not exercised its right to so prescribe what is intoxicating, nor to declare whether the use of the word "beer" or "liquor" of itself connotes any intoxicating alcoholic content.

As was said in In re Simmons, 199 Cal. 590, 250 P. 684, that in order to make enforcement of the prohibition of the traffic in intoxicants effective, the Legislature as a matter of legislative expediency might prohibit traffic in beverages which are near to intoxication, even though they are not in themselves intoxicating, but, when this twilight zone of expediency is invaded by the Legislature, it does so only for the purpose of facilitating the enforcement of its prohibitory legislation. In the language of the court, it is there said: "It is a matter of common knowledge that liquor containing $5\frac{1}{100}$ per cent of alcohol is not in fact intoxicating, yet under the Wright Act, the possession of such liquor for beverage purposes is unlawful while the possession of liquor containing $4\frac{9}{100}$ per cent is lawful."

The function of the courts is to declare the law, and not to make it. Section 1858 of the Code of Civil Procedure, laying down the general rule of construction, says: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

[2, 3] There is nothing in the language of the complaint nor in the statute itself that will enable a court to hold that liquor of an alcoholic content of less than 3.2 per cent. is intoxicating as that term is used in the statute in question. The Legislature not having declared that beer of such alcoholic strength is intoxicating, it is necessary, in order to charge a person with a violation of section 397 of the Penal Code, to allege that the liquor furnished was intoxicating, and upon the trial to prove that it was intoxicating in fact.

We are therefore of the opinion that the complaint before us states no public offense, and the writ prayed for should be granted, and it is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

1 Cal.App.2d 518

PEOPLE v. HOWE et al.

Cr. 2502.

District Court of Appeal, Second District, Division 2, California.

Oct. 22, 1934.

1. Criminal law ⇐576(4)

That defendant's prosecution was continued for trial more than 60 days after finding of indictment did not authorize dismissal, where time lost was occasioned by defendant's change in plea and defendant did not object to continuance, since his consent to continuance was presumed (Pen. Code, § 1382).

2. Criminal law ⇐660

Alleged misconduct of trial court consisting of effort to confine defendant to answering questions put to him while being examined as witness was not available to defendant, where defendant did not object at time and did not show in what way such conduct was prejudicial.

3. Criminal law ⇐728(2)

Alleged misconduct of district attorney was not available to defendant, where defendant did not object thereto and alleged misconduct consisted chiefly in verbal surplusage which was in no way prejudicial to defendant.

4. Criminal law ⇐982

Summary denial of application for probation is permissible by statute (Pen. Code, § 1203).

Appeal from Superior Court, City and County of Los Angeles; Charles S. Burnell, Judge.

Chloe B. Howe and Charles O. Haskell were informed against, and Charles O. Haskell was convicted of grand theft and violation of the Corporate Securities Act, and he appeals.

Affirmed.

George D. Higgins, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

[1] Appellant was convicted in counts 1, 3, 5, 7, 9, and 11 of grand theft, and in counts 2, 4, 6, 8, and 10 of violation of the Corporate Securities Act (St. 1917, p. 673, as amended); each of the five latter offenses growing out of the same transaction as that referred to in the count of grand theft immediately preceding it. He contends that the trial court should have dismissed the case under Penal Code, § 1382, because it was continued for trial for a period in excess of sixty days after the finding of the indictment.

Much of the time thus lost was occasioned by the action of appellant in pleading guilty to two counts and thereafter seeking and obtaining permission to withdraw that plea and enter one of not guilty, whereupon the case was again set for trial. The record shows no objection by defendant at the time the continuances were ordered, and his consent is therefore presumed. Ray v. Superior Court, 208 Cal. 357, 281 P. 391.

No suggestion is made that the evidence is insufficient to support the conviction on the counts of grand theft, but it is urged that the evidence is lacking to sustain conviction under the Corporate Securities Act. An examination of the transcript shows ample support for the verdicts. No authorities are cited to support appellant's contention in this regard.

[2] Complaint is made of alleged misconduct of the trial court, which consisted chiefly of an effort to confine defendant to answering the questions put to him while being examined as a witness. No objections were interposed at the time, and appellant has not suggested in what way the conduct of the court prejudiced him.

[3] Likewise, the alleged misconduct of the district attorney passed without objection, and consisted chiefly in verbal surplusage which was in no way prejudicial to appellant.

[4] An application for probation was summarily denied by the court. This was permissible under Penal Code, § 1203. People v. Martin, 114 Cal. App. 337, 300 P. 108; and People v. Judson, 128 Cal. App. 768, 18 P.(2d) 379.

The judgment is affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 533

ROBINSON v. RAQUET et al.

Civ. 8068.

District Court of Appeal, Second District, Division 2, California.

Oct. 22, 1934.

1. Trial ⇐404(2)

In action for damages for breach of stock sale contract, portion of decision incorporated among findings of fact stating that it was not true that plaintiff had been damaged, *held* "conclusion of law" misplaced in decision.

2. Trial ⇐398

Findings of probative facts can be used to overcome express finding of ultimate fact.

3. Appeal and error ⇐1008(1)

Facts found by trial court *held* controlling on appeal.

4. Corporations ⇐118

In action for damages for breach of stock sale contract, defendants *held* to have breached contract where plaintiff fulfilled all conditions precedent and demanded delivery of stock, which defendants failed to make (Civ. Code, § 1439).

5. Corporations ⇐121(6)

Where court found facts constituting defendant's breach of stock sale contract, it follows as matter of right and law that plaintiff was entitled to damages for such breach.

6. Corporations ⇐121(6)

In action for damages for breach of stock sale contract in which court found facts constituting breach, thereby entitling plaintiff to damages, conclusion of trial court that failure of defendants to issue and deliver stock on plaintiff's demand was not repudiation of agreement, becomes surplusage and irrelevant.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

7. Contracts ⇐313(1)

"Repudiation" or "renunciation" of contract is in nature of anticipatory breach before performance is due, but does not operate as anticipatory breach unless promisee elects to treat repudiation as breach, and brings suit for damages.

Such "repudiation" or "renunciation" is but act or declaration in advance of any actual breach and consists usually of absolute and unequivocal declaration or act amounting to declaration on part of promisor to promisee that he will not make performance on future day at which contract calls for performance.

[Ed. Note.—For other definitions of "Renunciation" and "Repudiation," see Words & Phrases.]

8. Corporations ⇐121(6)

In action for damages for breach of stock sale contract, trial court's conclusion that plaintiff would not have had full proprietary interest in or ownership of stock had written demand for delivery been complied with, and that case was one of injuria absque damno *held* unsupported, where only limitation on plaintiff's proprietary interest or ownership of stock would have been pledge thereof as security for balance unpaid on note.

9. Pledges ⇐21

Where personal property is pledged, the general property and title remain in pledgor subject only to lien in favor of pledgee for amount of his debt.

10. Damages ⇐9

In action for breach of contract, nominal damages are presumed to follow as conclusion of law from proof of breach (Civ. Code, §§ 3281, 3360, 3523).

11. Corporations ⇐121(7)

In action for damages for breach of stock sale contract by failure to deliver stock, measure of damages was excess of value of property to buyer over amount which would have been due seller under contract if it had been fulfilled (Civ. Code, § 3308).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by S. R. Robinson against Julia Raquet and another. From an adverse judgment, and from an order denying a motion to vacate the judgment, plaintiff appeals.

Reversed and remanded with directions.

William C. Mathes, Alford P. Olmstead, and Wendell P. Hubbard, all of Los Angeles (Lloyd Melvin Smith, of Los Angeles, of counsel), for appellant.

Murphy & Doherty, of Los Angeles, for respondents.

WILLIS, Justice pro tem.

This is an appeal by plaintiff from a judgment that he recover nothing from defendants and from an order after judgment denying a motion to vacate such judgment under the provisions of sections 663 and 663a of the Code of Civil Procedure.

On June 30, 1927, Raymond E. White and his brother Clarence White were copartners, owning and conducting business under the firm name of Oil Well Manufacturing Company, then in process of incorporation under the same name, in which it was provided that 1,000 shares of capital stock, at $100 par value, were to be issued upon receiving the permit of the state corporation commissioner so to do, one-half thereof to each of said partners. Defendant, respondent herein, Julia Raquet, it is admitted and found, was at the time the agent of Raymond E. White and carried in her name his interest in such firm, and in all the transactions herein acted for him and under his direction as his agent, all parties herein having knowledge of such relationship. White, therefore, is the sole real party defendant.

On the date first mentioned, Julia Raquet and plaintiff entered into a contract in writing, wherein the former agreed to sell to Robinson 125 shares of the capital stock above described, if and when issued under permit, for the sum of $12,500, and Robinson agreed to buy the same and to pay for it as follows: $4,000 in cash "upon the issuance and delivery to him" of said 125 shares of stock, the balance of $8,500 to be evidenced by a nonnegotiable, noninterest-bearing note due and payable on or before six years from date thereof, "when and as a dividend or dividends on said One Hundred and Twenty-five (125) shares of stock are declared and paid, and only to the extent, at such time or times, of such dividend or dividends," but with right of the maker to pay in full at any time. It was further agreed that Robinson would deposit with Julia Raquet the said 125 shares of stock and pledge the same as collateral security to said note, under agreement to hold the same as collateral for six years unless the note was sooner liquidated, and at the end of that period Julia Raquet might proceed to sell said stock in liquidation of any unpaid balance on said note, if any was

then existing. It is further provided therein that one of the considerations for the execution of this contract of purchase and sale of stock was the fact that contemporaneously therewith Robinson, the purchaser, had entered into an employment agreement with the Oil Well Manufacturing Company, the corporation to which contract reference is made, it being specially provided that any salary provided for in said employment agreement, and paid to Robinson, should not be deemed a profit to be applied on payment of said note. Finally, it was therein provided, that this contract of purchase and sale and the contract of employment shall be read together in the event it became necessary to construe either of said agreements.

The employment contract, executed on June 30, 1927, and above referred to, provided for the hire of Robinson as a salaried employee of the corporation, or of the partnership in the event the permit to issue stock was not obtained, for a term of five years from July 1, 1927, with salary and duty provisions set forth at length. Cancellation thereof was limited to (a) illness of the employee for six or more consecutive months, and (b) failure of the employee to devote his time to the business and to discharge his duties as such employee. In the last-named event the company might terminate the contract upon sixty days' notice in writing, but such cancellation should not be deemed to in anywise or manner affect, cancel, or abrogate the contract of even date with Julia Raquet for the purchase and sale of stock, unless the company should establish, by an award of a board of arbitrators, that it terminated said contract of employment for a good and sufficient cause, not included in any circumstances of illness of the employee. And if so established, or should the employee voluntarily leave the employ of the company during the term of said agreement, then it is provided that Julia Raquet might terminate the stock sale contract; and if so terminated, then Julia Raquet should be obligated only to repay to Robinson such amounts as might have been received in cash or by way of dividends or profits, inclusive of undistributed dividends or profits, on account of the purchase price of said stock or copartnership interest, and upon such repayment Julia Raquet should be entitled to the return of the stock described. It is further provided that should Robinson voluntarily determine to sever his employment with the company, and should desire to dispose of said stock, then he should offer in writing to Julia Raquet the opportunity to purchase said stock at book value thereof; that in event book value could not be agreed upon the same should be determined by arbitration, and when so determined, either by agreement or arbitration, then Julia Raquet should have a period of sixty days within which to accept or reject such offer, and in case of rejection Robinson was to have unrestrained privilege and right to sell said stock as he might desire.

It should be stated at this point that a similar stock sale contract to that of Julia Raquet was contemporaneously executed by plaintiff and Clarence White, in which the latter likewise, and under the same terms and conditions, agreed to sell to Robinson 125 shares of his 500 shares if and when issued under permit. The appeal in a similar case against Clarence White, and tried along with this action, has been dismissed under stipulation, and we have for consideration only the action against Julia Raquet and Raymond E. White.

In December of 1927 appellant had paid to Raymond E. White the $4,000 required by the stock sale contract with Julia Raquet, and two dividends of $10 each per share have been paid to White, one in December of 1928 and the other in January of 1929, and by him credited on the note to Julia Raquet, such credit being in the sum of $2,500, leaving a balance of $6,000 on the note.

Upon the execution of these contracts appellant began his service with the company in a sale capacity, and later, when permit to issue stock had been given, he was made a director and president of the corporation, in which capacity he served until June 29, 1929, when he was served with written notice of cancellation of the employment contract upon the grounds of failure to devote his time to the company business and failure to properly or otherwise discharge his duties as employee, and upon other specified grounds. The sufficiency of the grounds of cancellation have never been established by arbitration as provided for in such employment contract, and hence under its provisions such cancellation had no effect on the stock sales contract of Julia Raquet. And as it appears that appellant has never voluntarily left the employ of the company, no right to terminate the stock sale contract arose in favor of Julia Raquet; nor was appellant under obligation to offer his stock interests for sale to her at book value as provided for in said contract.

After receipt of the notice of cancellation, and on or about August 23, 1929, appellant

executed and delivered to Julia Raquet and Raymond E. White a promissory note bearing date July 1, 1927, in the sum of $8,500, payable on or before six years after date to Julia Raquet without interest, with provision for crediting dividends received and for deposit of the 125 shares of stock as collateral. This note the respondents retained and still have possession thereof, and on it has been credited the two dividends.

Concurrently with the delivery of said note appellant served on respondents a document entitled "Offer to Perform and Demand for Performance," wherein appellant offered to perform all things required of him by the stock sales contract and wherein he offered the note above described and further offered to pledge the 125 shares of stock as security for said note. Demand is made therein upon respondents to assign and transfer to appellant the 125 shares of stock and to credit on the said note all dividends received on said shares since the date of the stock sales contract. It is therein further stated that on failure to accept this offer and to comply therewith appellant would take such legal steps as necessary to protect his rights under said contract.

On September 26, 1929, appellant commenced action against respondents by the filing of a complaint setting forth three separate causes of action, the first for specific performance of the stock sale contract, the second for damages for breach thereof, and the third for damages for conversion of said stock. At the commencement of trial appellant dismissed the third cause of action, and trial proceeded on the first and second causes. Prior to submission of his case by appellant he elected to pursue the second cause of action and abandoned the first cause, and the case was finally submitted for decision on the cause of action for damages for breach only.

In its decision the lower court found that the contracts described had been executed as alleged and set forth; that $4,000 had been paid by appellant to respondents and that $2,500 in dividends had been received by respondents and credited on the contract price of the stock; that on or about August 23, 1929, appellant executed and delivered the $8,500 note and his demand for the transfer and delivery of the 125 shares of stock; that respondents retained possession of the note delivered but did not then or thereafter issue to or deliver the 125 shares of stock or any part thereof to appellant; that the reasonable value of said stock on August 23, 1929, and until institution of this action was $22,500, or $180 per share. The court then found that appellant had not been damaged or injured by refusal or failure or neglect of respondents to perform the terms or promises or covenants or conditions on their part to be performed, or by any act or neglect or refusal to act or failure to act on the part of respondents.

Upon its findings the court made its conclusion that the failure of Raymond E. White to issue and deliver the 125 shares of stock pursuant to the written demand of appellant "was not a repudiation of the agreement of June 30, 1927," and that such refusal "did not result in any damage to the plaintiff herein. This cause therefore, is an instance of injuria absque damno." Further, the court concluded as follows: "Only damages to full proprietary interest or ownership of personal property may be regarded or considered under section 3308 of the Civil Code of the State of California, and by reason of the fact that plaintiff, S. R. Robinson, has shown in this action no evidence of any damage to said full proprietary rights, he should take nothing by his complaint herein and judgment should be for the defendant for his costs herein expended." Judgment was thereafter entered as hereinbefore stated, denying plaintiff any relief, and a subsequent motion for new trial and motion to vacate the judgment and enter another therein in favor of plaintiff for $16,500 on the findings were denied.

On this appeal from the judgment and from the order denying the latter motion appellant assigns two points, namely: First, the defendants breached their contract for the sale of the stock to plaintiff in its entirety, and that plaintiff is entitled to receive full damage for such breach; second, that the measure of damages is the excess of value of the stock to him over what would have been due to defendants under the contract if it had been fulfilled by them, and that plaintiff was therefore entitled to recover the sum of $16,500.

[1, 2] In the consideration and determination of these points it is first necessary to allocate to its proper station that portion of the decision of the trial court, incorporated among the findings of fact, stating that "it is not true that plaintiff has been damaged," etc., hereinabove more fully set forth, and comprising the last three clauses of specific findings of fact on the second cause of action, numbered 1. This is evidently a conclusion of the court from the facts found and

must be considered simply a conclusion of law, misplaced in the decision. This view is confirmed by subsequent conclusions of the court, wherein it embraced within its conclusions of law a conclusion that the failure of defendants to issue the stock pursuant to plaintiff's demand did not result in any damage to him, characterizing the case as an instance of "injuria absque damno." Under circumstances such as are herein presented, it is clear that the so-called finding of absence of damage is a mere conclusion of law and should be so classified. Ions v. Harbison, 112 Cal. 260, 273, 44 P. 572; Niles v. Edwards, 90 Cal. 10, 13, 27 P. 159, 296; Klein v. Lewis, 41 Cal. App. 463, 467, 182 P. 789. Should such declaration of lack of damage or injury be considered as a finding of an ultimate fact, essential to the case to be made by plaintiff, still it must be held that as such finding it would be contrary to the evidence, as the previous findings of probative facts relative to failure to perform the obligations of the contract by defendant dispose of all the facts involved in respect to a breach, and therefore overcome such ultimate finding. 24 Cal. Jur. 972. The findings of probative facts can be used to overcome an express finding of the ultimate fact found, or where it appears that the trial court made the alleged finding of ultimate fact simply as a conclusion from the particular facts found. Corea v. Higuera, 153 Cal. 451, 455, 95 P. 882, 17 L. R. A. (N. S.) 1018. Herein, in conclusion of law numbered 2, the court gave the specific reasons for lack of damage or injury, which in turn makes it clear that the alleged finding in question was but a conclusion of the court, which as hereinafter shown, was in turn contrary to the evidence.

[3-7] With this rearrangement of the decision of the trial court, there presents itself the specification assigned in appellant's bill of exceptions on this appeal, viz.: Do the findings support the conclusions of the court and the judgment as given and made?

The facts found by the court and which are controlling on this appeal reveal in clear effect that respondents breached their contract for the sale of the stock in question when they failed to comply with appellant's demand of August 23, 1929, for the issuance and delivery of the stock, accompanied by delivery of the note required by the contract and his offer to pledge the stock when issued as security thereon. The contract clearly contemplated that upon payment by appellant of the sum of $4,000 cash and the execution and delivery of the $8,500 note described therein, respondents would be obligated to issue and deliver to appellant 125 shares of stock, which were to be pledged in turn with respondents as collateral security for payment of the balance on the note after dividends had been credited thereon. Appellant had paid the $4,000 as early as December, 1927, and dividends had been credited in December, 1928, and January, 1929, but due to the relationship between the parties and mutual forbearance and waiver, no effective efforts were made by either to supply the note called for under the contract nor to issue and deliver the stock until the discharge of appellant on June 29, 1929, although the latter had made repeated requests for the stock. Thereafter he made his demand and delivered his note, thus performing all that he was required to do under the contract. Respondent took his note and retained possession thereof and did nothing further towards performance. This constituted a breach of the contractual obligation to issue and deliver the stock upon receipt of the $4,000 cash and the note with pledge agreement therein.

The court having found facts constituting a breach of the contract, it follows as a matter of right and law that appellant was entitled to damages for such breach, and therefore the conclusion of the trial court that the failure of respondent White to issue and deliver the stock on appellant's demand of August 23, 1929, was not a repudiation of the agreement of June 30, 1927, becomes surplusage and irrelevant. Repudiation, or renunciation, as the term is more generally used, is but an act or declaration in advance of any actual breach, and consists usually of an absolute and unequivocal declaration or act amounting to a declaration on the part of a promisor to the promisee that he will not make performance on a future day at which the contract calls for performance. It is in the nature of an anticipatory breach before performance is due, but does not operate as an anticipatory breach unless the promisee elects to treat the repudiation as a breach and brings suit for damages. Beach on Modern Law of Contracts, §§ 411–415; Alderson v. Houston, 154 Cal. 1, 12, 96 P. 884; Walker v. Harbor Business Blocks Co., 181 Cal. 773, 778, 186 P. 356. The facts found herein constitute a present breach without the interposition of repudiation or renunciation. The appellant, having fulfilled all conditions precedent to requirement of performance by respondents, had the right to require the latter to fulfill their obligations, and failure so to do on demand constituted a breach. Section 1439, Civ.

Code. These views render it unnecessary to further entertain or pass upon the points raised and discussed by counsel for the respective parties in their briefs relative to repudiation and waiver of breach.

[8, 9] Appellant's second point relates to damages recoverable herein. He assigns the conclusion of the trial court to the effect that no damage herein occurred, and that this presents a case of injuria absque damno, as unsupported by and contrary to the findings of fact. Also he assigns the conclusion that damages under section 3308 of the Civil Code may be regarded or considered only when full proprietary interest or ownership appears in the claimant as contrary to law.

That the conclusion first above mentioned is not supported by the evidence is manifest when comparing the statement of reasons for lack of damage contained in conclusion No. 2 with the proofs. The statement that plaintiff had to offer the 125 shares to defendant White at its then book value, had the demand of plaintiff been complied with, is contrary to the evidence, which, as hereinbefore stated in abstracting the essentials of the contract of employment, clearly showed that such offer was required on such condition imposed only in event plaintiff voluntarily left the employ of the company, or his discharge by the company had been established as done for good and sufficient cause by a board of arbitrators. Neither of these events had occurred herein; hence it follows from the terms of the contract that the stock sales contract with Julia Raquet was unaffected, and no right to terminate the same ever arose in favor of Julia Raquet or respondent White, her principal, nor did appellant ever become obligated to offer the stock to White.

As a consequence of this view of the evidence, the trial court's conclusion that appellant would not have then had full proprietary interest in or ownership of the 125 shares of stock, had the written demand of appellant been complied with, falls for lack of any support, and by the same token the conclusion that this is a case of injuria absque damno, or wrong without injury, is unsupported by the facts. The expression "full proprietary interest or ownership of personal property" used by the trial court in its conclusions, was evidently adopted and used in view of the mistaken conclusion that appellant was under obligation to offer the stock for sale to respondents at book value. It being shown that such obligation was nonexistent, the sole remaining limitation on appellant's proprietary interest or ownership in the stock was the pledge thereof as security for the balance unpaid on the $8,500 note. It has been repeatedly held that where personal property is pledged the general property and title remain in the pledgor, subject only to a lien in favor of the pledgee for the amount of his debt. Wright v. Ross, 36 Cal. 414, 428; Brewster v. Hartley, 37 Cal. 15, 25, 99 Am. Dec. 237; Cross v. Eureka Lake, etc., Canal Co., 73 Cal. 302, 306, 14 P. 885, 2 Am. St. Rep. 808; Sparks v. Caldwell, 157 Cal. 401, 108 P. 276; People v. Robinson, 107 Cal. App. 211, 220, 290 P. 470; Tracy v. Stock Assurance Bureau, 132 Cal. App. 573, 579, 23 P.(2d) 41; Civ. Code, § 2888. It is for damage resulting to him by reason of respondents' refusal to transfer this general property and title in the 125 shares of stock to him, subject to redelivery as a pledge to respondents as pledgee, that appellant herein seeks recovery.

[10, 11] There is a maxim of jurisprudence for our guidance in section 3523 of the Civil Code, in this language: "For every wrong there is a remedy." In actions for breach of contract nominal damages are presumed to follow as a conclusion of law from proof of the breach. Browner v. Davis, 15 Cal. 9, 11; Civ. Code, § 3360. Section 3281 of the Civil Code provides that every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages. Section 3308 of the same Code, as it existed at the time of the transactions and trial herein, furnished the measure of damage in such cases as this. It is the excess of value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled. The trial court herein having found that the value of the 125 shares of stock was $22,500, and that there remained $6,000 unpaid on the purchase price thereof, the excess of value is $16,500.

For the reasons above given, the judgment and order appealed from are and each of them is reversed, and the cause is remanded with directions to the trial court to enter judgment in favor of plaintiff and against the defendant Raymond E. White for the sum of $16,500.

We concur: STEPHENS, P. J.; DESMOND, J.

LE BALLISTER v. REDWOOD THEATRES, Inc., et al.

Civ. 9432.

District Court of Appeal, First District, Division 2, California.

Oct. 18, 1934.

Rehearing Denied Nov. 17, 1934.

Hearing Denied by Supreme Court Dec. 17, 1934.

1. Contracts ⇐187(1)

Contract by corporation, purchasing stock of another corporation, to retain latter's manager in suitable position for year, *held* "contract made expressly for the benefit of a third person," so as to entitle him to recover thereon (Civ. Code, § 1559).

Word "expressly," in Civ. Code, § 1559, providing that contract made expressly for third person's benefit may be enforced by him means "in an express manner; in direct or unmistakable terms; explicitly; definitely; directly."

[Ed. Note.—For other definitions of "Contract for Benefit of Third Person" and "Expressly," see Words & Phrases.]

2. Contracts ⇐187(1)

Contract, made expressly for third person's benefit, need not be made solely and exclusively for his benefit to entitle him to recover thereon (Civ. Code, § 1559).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Homer L. Le Ballister against the Redwood Theatres, Incorporated, and another. Judgment for defendants, and plaintiff appeals.

Reversed.

Maurice E. Gibson, of San Francisco, for appellant.

L. S. Hamm and B. E. Kragen, both of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff brought this action to recover as a third party beneficiary under an agreement entered into by defendant Redwood Theatres, Inc., with the owners of the controlling interest in the corporation by which plaintiff was formerly employed. Defendant Mann had guaranteed the performance of said agreement by the defendant corporation. The cause was tried by the court sitting without a jury. The findings were in favor of plaintiff upon all issues, but the court made its conclusions of law as follows: "That said contract was not made for the express benefit of plaintiff within the meaning of Section 1559 of the Civil Code of the State of California, and that solely for such reason plaintiff take nothing hereunder and that defendants have judgment against plaintiff for their costs of suit herein incurred." From the judgment entered in favor of defendants, plaintiff appeals.

[1, 2] The question presented on this appeal is whether plaintiff was entitled, under the provisions of section 1559 of the Civil Code, to recover upon the contract set forth in the complaint. Said section reads as follows: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." The agreement provided for the purchase by the defendant corporation of certain stock of the National Theatres Syndicate for the sum of $43,937.50 and contained the following provision: "It is further understood and agreed that in the event you accept this offer and control of the said corporation is taken over by us, we will retain * * * your Mr. Homer Le Ballister, now employed by you as manager, in some suitable position for a period of one year at a salary of not less than eighty-five dollars ($85.00) per week."

Appellant contends that said contract was one made expressly for his benefit within the meaning of said section 1559 of the Civil Code and that the trial court erred in denying the recovery upon the ground stated. In our opinion this contention must be sustained. While the contract was not made solely and exclusively for appellant's benefit, it was not necessary that it should have been so made in order to entitle him to recover. Stanton v. Santa Ana Sugar Company, 84 Cal. App. 206, 209, 257 P. 907; Miles v. Miles, 77 Cal. App. 219, 228, 246 P. 143. The word "expressly" means "in an express manner; in direct or unmistakable terms; explicitly; definitely; directly." Webster's New International Dictionary; see, also, McKeever v. Oregon Mortgage Co., 60 Mont. 270, 198 P. 752. Here the respondent corporation agreed in direct and unmistakable terms to employ appellant for a definite period at a salary of not less than $85 per week. It could have done nothing more than it did do to make this provision one "expressly" for appellant's benefit.

Respondent cites certain authorities from this jurisdiction, but we find none of them in point. Those from other jurisdictions cannot be relied upon as the subject is controlled

by statute in California. In the California Annotations of the Restatement of the Law of Contracts, the author deals with this subject under section 133 as follows: "The present rule is codified in Cal. Civ. Code sec. 1559: 'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind.' It is evident, therefore, that the only statutory requirement is that the beneficiary be express. Whether or not a contract is one for the express benefit of a third person is a fact sometimes difficult to determine. The test appears to be whether an intent so to benefit the third party appears from the terms of the contract." From a reading of the agreement before us, we believe that the intent to benefit appellant clearly appears from its terms.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

139 Cal.App. 200

HUNT v. JORDAN, Secretary of State.

Civ. 5192.

District Court of Appeal, Third District, California.

June 11, 1934.

1. Statutes ⇐35½

Strict construction of initiative measure is required where public interest is involved and rule of strict construction applies to statement of purposes on first page of measure, which may not exceed 100 words (Pol. Code, §§ 1197, 1197a, 1197b).

2. Statutes ⇐35½

Court is not bound by punctuations appearing on petition for initiative measure (Pol. Code, §§ 1197, 1197a, 1197b).

3. Statutes ⇐35½

In construing initiative measure, requirement as to statement of purposes in 20 words on subsequent issues of petition will be liberally construed if necessary (Pol. Code, §§ 1197, 1197a, 1197b).

4. Statutes ⇐35½

Subtitle of petition for initiative measure reading, "Chiropractic Amendment; Defining Licensing, Regulating Practice of Chiropractic and Physical Therapy; Creates State Chiropractors Association; Provides for Powers, Membership, Duties Thereof; Regulates Schools;" *held* not defective on ground that it exceeded 20 words, since words "chiropractic amendment" could be disregarded, and court could assume that signers and persons drafting petition understood "physical therapy" to be compound word (Pol. Code, §§ 1197, 1197a, 1197b).

The ordinary use of the word "therapy" is as a compound word, it being used in combination with some other word, such as "hydro-therapy."

[Ed. Note.—For other definitions of "Therapy," see Words & Phrases.]

Petition by C. O. Hunt against Frank C. Jordan, Secretary of State.

Petition granted.

The subtitle of the initiative measure, referred to in the opinion, is as follows: "Chiropractic Amendment; Defining Licensing, Regulating Practice of Chiropractic and Physical Therapy; Creates State Chiropractors Association; Provides for Powers, Membership, Duties Thereof; Regulates Schools."

Political Code, §§ 1197, 1197a, and 1197b, referred to in the opinion, require in effect a statement of the purposes of an initiative measure to be made, first, not to exceed one hundred words, and that upon each subsequent issue there shall be a brief statement not to exceed twenty words, and that whatever appears on the first page must be published by the Secretary of State, although the headings on the subsequent pages of the petition are not to be published.

Frank L. Guerena, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In looking over sections 1197, 1197a, and 1197b of the Political Code, I find reference is made to the ballot title, to the title that shall be upon the principal page of the initiative or recall petition, as the case may be, and also as to what shall appear upon the subpetitions.

Two principles are involved, strict construction and liberal construction—strict construction where the public interest is involved. So far as the ballot title is concerned and the one hundred words on the petition, the public interest is involved, because it involves the ex-

penditure of public money in printing and distributing the ballots. In so far as the subtitle is concerned, there is no public interest involved. It is a question of informing the people to whom the petition is presented as to the character of the petition and what they are about to sign. Originally one hundred words were allowed to be printed upon these subpetitions. The only conceivable reasons for the change—I do not know how it affects the minds of the other members of this court—was the fact that the one hundred words take so much time in reading that the average voter would not take the time to read the one hundred words, but if limited to twenty words the average voter would look at it, read the subtitle and come to some conclusion as to whether or not he should sign the petition.

[1] That presents two propositions. As the original one hundred words involve publishing of the title and distributing the ballots, it should be read as mandatory and the rule of strict construction applied. As to the second case it is not absolutely necessary to read it as either directory or mandatory as it appears in the last paragraph of section 1197b of the Political Code for the simple reason that the issue before us may be decided upon another question. In looking over Webster's Dictionary—I consulted an old dictionary and I consulted a new dictionary—as to the meaning of the word "therapy," I find both the old and late issues of Webster's Dictionary state the word "therapy" is used usually in combination with some other word, such as "hydro-therapy." The ordinary use is as a compound word. We may assume that in this particular case the one who drafted the title understood it to be a compound word and that the signers of the petition understood it to be a compound word.

[2] Another principle is involved in construing the title and that is whether "physical therapy" should be construed as a compound word, as it would be if it were "hydro-therapy." The court is not bound by the punctuations which appear upon the petition. It does not make any difference to us how the typesetter set the type; that is wholly immaterial.

[3, 4] For that reason the words "Chiropractic Amendment" may be disregarded as not descriptive of any purpose. Holding upon the authority of the two dictionaries which have been consulted and applying the rule of construction which I have stated would be liberal if necessary in construing the twenty words, the conclusion of the court is that this subtitle complies with the statute and that the writ should be granted. Let it be so ordered.

1 Cal.App.2d 454

McDANELS v. GENERAL INS. CO. OF AMERICA et al.

Civ. 8641.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1934.

Hearing Denied by Supreme Court Dec. 17, 1934.

1. Insurance ⇐514½

Assured under automobile indemnity policy cannot hold insurer to its liability where he violates policy by failure to co-operate in defending action by injured party.

2. Insurance ⇐311(1)

Assured's violation of clause in automobile indemnity policy by failure to co-operate in defense of action by injured party *held* valid defense in action by injured party against insurer after obtaining judgment against assured where insurer was prejudiced by assured's violation of co-operation clause.

3. Appeal and error ⇐1058(2)

Any error in court's refusal to admit court reporter's testimony that certain statement was read into evidence in another trial was cured by subsequent admission of such statement.

4. Evidence ⇐222(8), 314(1)

In action by person injured in automobile accident, who had recovered judgment against assured, brought against insurer under automobile indemnity policy, exclusion of admissions of assured made shortly after accident *held* not error, since such evidence was irrelevant and hearsay.

5. Insurance ⇐388(5)

Automobile indemnity insurer electing to proceed with defense of personal injury action against assured with knowledge that assured would not be present *held* not to have waived defense of nonliability for assured's breach of co-operation clause, and not estopped to disclaim liability on such ground, since willful neglect of attorneys to defend assured unless excused by him or order of court would have subjected them to punishment for contempt (Code Civ. Proc. §§ 284, 1209).

6. Estoppel ⇐63

"Quasi estoppel" is based on principle that person with full knowledge of facts can-

not act in manner inconsistent with former position or conduct to injury of another.

[Ed. Note.—For other definitions of "Quasi Estoppel," see Words & Phrases.]

7. Estoppel ⇐52

"Waiver" designates act or consequence of act of one person only, while "estoppel in pais" is applicable where one's conduct has induced another to take such position that he will be injured if first is permitted to repudiate acts.

To constitute "waiver" there must be existing right, knowledge of its existence, and actual intention to relinquish it, or such conduct as warrants inference of relinquishment. It is voluntary act and implies abandonment of right or privilege.

[Ed. Note.—For other definitions of "Estoppel in Pais" and "Waiver," see Words & Phrases.]

8. Estoppel ⇐52

Waiver will not be presumed or implied contrary to intention of party whose rights would be injuriously affected, unless by his conduct opposite party has been misled, to his prejudice, into honest belief that such waiver was intended or consented to.

9. Election of remedies ⇐3(1)

Basis of doctrine of election is founded on theory that party should not be allowed to occupy inconsistent position, and on proposition that where there is choice between two remedies which proceed on irreconcilable claims of right, one taken must exclude and bar prosecution of the other.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by James L. McDanels against the General Insurance Company of America and another to recover on an automobile indemnity policy. From an adverse judgment, plaintiff appeals.

Affirmed.

Prior opinion, 35 P.(2d) 394.

A. W. Brunton, of Los Angeles, for appellant.

Joe Crider, Jr., of Los Angeles, for respondents.

WILLIS, Justice pro tem.

Appellant was injured in an automobile accident and a judgment for personal injuries therein sustained was recovered by him against one Haag, who at the time of the accident was the assured in a public liability insurance policy issued by respondent companies. Many continuances of the trial of the personal injury action were obtained by counsel appearing of record for Haag, such counsel being provided for him to defend said action by respondent companies. These continuances were made to appear necessary in order to secure the presence of Haag, who was charged personally with the commission of the negligent acts for which damage was sought, as a witness at the trial, but he did not appear and the trial proceeded in his absence before a jury, which rendered a verdict in the sum of $10,000. Judgment was entered thereon which has become final and on which a writ of execution has been issued and returned nulla bona. Prior to trial the assured was repeatedly requested by counsel for respondent companies to aid them in obtaining and furnishing information, securing evidence and attendance of witnesses, and in preparing a defense in the action against him, but he failed to do so; and although he promised to be present at the trial he failed to appear and could not be found upon diligent search and inquiry. The policy issued to Haag contained the usual stipulations requiring the assured to report accidents, claims, and suits, which the insurer agreed to defend, and provided that "the assured, when requested by the company, shall aid in effecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals."

[1, 2] For his failure in these respects it is obvious that Haag, the assured, could not himself have held the company to its liability under the policy. Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.(2d) 999, 1002, 85 A. L. R. 13. In the instant case respondents pleaded such non co-operation by the assured as a defense, and, after trial, the lower court by its decision sustained the same and ordered judgment for respondents. The question of validity of the plea of such failure to co-operate as a defense under contracts of this kind has been met and settled by the Supreme Court in the case of Hynding v. Home Acc. Ins. Co., supra, wherein the lower court was reversed for error in striking such a plea from the answer and in which the law is declared in these words: "We see no escape from the conclusion that the violation of the co-operation clause by the assured was a valid defense against the injured party's action." The court further said: "We are also of the opinion, and we think most of the authorities are agreed, that the provision must be one reasonably necessary for

the protection of the insurance company, and one which can readily be complied with by the assured; and that the violation of the condition by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby. [Citing authorities.] Here these elements are all present. To require the cooperation of the assured to the extent of attendance at the trial, when he is a material and important witness, is a perfectly reasonable condition. Failure to testify may be as damaging as failure to give notice of the accident or of the suit. * * * Under these circumstances the company was clearly prejudiced by his failure to appear. In any event, the question of such prejudice should have been considered below."

[3] It is with respect to this question of prejudice that appellant herein presses the point that the court below erred in refusing admission of testimony of the court reporter offered by appellant to prove that at the trial of the personal injury action respondents' attorneys appearing for defendant Haag were permitted, by consent of appellant's attorneys, to read into evidence the statement in writing purporting to have been made by Haag immediately after the accident and to contain his version of the collision and accident. This conduct of respondents' attorneys appellant claims avoided and overcame the prejudice which would obviously result from his failure to appear and testify.

At the trial the court sustained respondents' objection to the offer by appellant of such proof, but at a subsequent period in the trial, upon request of appellant's attorneys to produce, respondents' attorneys did produce and deliver to appellant's counsel the statement in writing of Haag which appellant had previously but unsuccessfully sought to bring before the court as having been read at the personal injury trial. Thereupon counsel for appellant offered in evidence such statement, which he characterized as the statement made by Haag and which already appeared to be the one read to the jury at the previous trial, and the statement was without objection received in evidence and marked "Plaintiff's Exhibit No. 1." Any error that could be predicated on the court's refusal to admit the court reporter's testimony to the effect that such statement was read into evidence at the personal injury trial was cured by the subsequent admission of the statement under the circumstances. This at once brought before the court the fact that such statement had been used at the other trial, and it must be presumed that the lower court considered it in arriving at its decision and that it impliedly found that such proof could not and did not overcome the status of substantial prejudice resulting from Haag's non co-operation and failure to attend and testify at the trial. The statement, which was very brief and not under oath, tended to show that appellant was at fault in the accident and that a meritorious defense might be established by Haag's testimony. That such evidence could not take the place of his sworn testimony substantiating such statement with details is obvious. That it could not overcome the substantial prejudice created by his absence and failure to give his testimony in person is patent, as is somewhat demonstrated by the jury's verdict and the amount thereof.

[4] There was no error, as claimed by appellant, in the trial court's refusal to admit evidence of admissions of the assured made shortly after the accident. Such evidence was entirely irrelevant to any issue in this case and as to respondents it was clearly hearsay.

[5] Appellant's principal contention herein is that respondents are estopped to disclaim liability to appellant on the policy by their election to proceed with the trial of the personal injury case with knowledge that the assured Haag would not be present and give his testimony, thereby waiving their defense of nonliability for breach of the co-operation clause, instead of withdrawing their attorneys and refusing to go on with the trial, thus electing to stand on their defense of non co-operation of the assured. In support of this contention he cites a number of cases from courts of other states in the Union which appear to sustain it, the most favorable being the following: Daly v. Employers', etc., Corp., Ltd., 269 Mass. 1, 168 N. E. 111, 72 A. L. R. 1436; Brandon v. St. Paul, etc., Co., 132 Kan. 68, 294 P. 881, 83 A. L. R. 673; Miller v. Union Indemnity Co., 209 App. Div. 455, 204 N. Y. S. 730, 732; Reilly v. Linden, 151 Minn. 1, 186 N. W. 121; Indemnity Co., etc. v. Pitts (Tex. Com. App.) 58 S.W.(2d) 53; Glade v. General Mutual, etc., Ass'n, 216 Iowa, 622, 246 N. W. 794. The proposition contended for by appellant is succinctly expressed by the language of the Supreme Court, appellate division, of New York in Miller v. Union Indemnity Co., supra, quoted by appellant and reading thus: "When confronted with this situation [failure of insured to co-operate], assuming that the alleged defense was valid, the defendant [insurer] was put to an election. It could stand

on its defense and refuse to go on, or it could abandon such defense and conduct the insured's side of the action. It could not do both. The choice of the latter course was inconsistent with the maintenance of a claim of no liability." All the other decisions above noted are in substantial agreement on the proposition that under circumstances similar to those in this case the act of the insurer in proceeding with the trial against the assured, with notice or knowledge of his violation of the co-operation clause in a policy with the same provisions as those involved herein, constituted a waiver by the insurer of its prospective defense of breach of the co-operation clause by the assured, and the insurer was thereby estopped to assert such defense in a subsequent action by the injured party on the policy. No decisions of our own courts have been cited or found which have dealt with or determined the proposition as thus stated. We are therefore treading new territory, and before proceeding it is wise to consult the chart and use the compass provided by the established law of waiver, election, and estoppel.

[6-8] The estoppel claimed by appellant and recognized by the above-mentioned cases is that form of estoppel in pais called by text-writers and known to jurists as quasi estoppel. This class of estoppel is sometimes expressed in the language of the rule or maxim that one cannot blow both hot and cold. It is based upon the broad equitable principle which courts recognize, that a person, with full knowledge of the facts, shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another. To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another; the person invoking the estoppel must have been induced to change his position, or by reason thereof the rights of other parties must have intervened. 10 Cal. Jur. 645. The terms "waiver" and "estoppel in pais" are sometimes employed indiscriminately; but strictly speaking, the former is used to designate the act or the consequence of the act of one person only, while the latter is applicable where one's conduct has induced another to take such a position that he will be injured if the first be permitted to repudiate his acts. To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege—an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded or insisted upon. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. 25 Cal. Jur. 926–928.

[9] In the light of these propositions of the law of waiver and estoppel based thereon, we think the decisions cited by appellant are not controlling. The undisputed facts herein negative any intention on the part of the insurer to abandon its prospective defense of nonco-operation or to waive its right to assert such defense whenever its liability on the policy was charged by one having the right so to do. On the contrary, over one month prior to proceeding with the trial of the personal injury case respondents wrote to the assured urging him to be present at the trial and stating that his failure to appear would constitute a breach of his policy, declaring that he had already breached it by failing to appear at a previous date and concluding with these words: "You are advised that the insurance company does not waive any breach which you have already committed." Under a somewhat similar state of facts it was held in the case of Coolidge v. Standard Acc. Ins. Co., 114 Cal. App. 716, 300 P. 885, that waiver had not occurred. No advantage over appellant was gained for the insurer by proceeding with the trial, nor did appellant suffer any disadvantage therefrom. No change of position by appellant was caused thereby, nor did the rights of any other person intervene because thereof. Despite the fact that respondents continued to participate in the trial in the absence of the assured, who was a material witness, appellant secured a judgment for an amount double the liability of respondents as stated in the insurance policy. Surely neither disadvantage to appellant nor advantage to respondents is reflected by such result.

Nor can it truly be said that by proceeding with the trial of the personal injury case with knowledge of the breach by the insured, and by pleading such breach as a defense in the subsequent action on the policy, the insurer was blowing both hot and cold. Such acts were not of that inconsistency which required an election by respondents. The basis of the doctrine of election is founded upon the theory that a party should not be al-

lowed to occupy inconsistent positions, and upon the proposition that where there is by law or by contract a choice between two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar prosecution of the other. 10 Cal. Jur. 3. The doctrine of election, as applied to a choice of remedies, either offensive or defensive, which precludes a party from claiming repugnant rights, is but an extension of the general principles of equitable estoppel, and proceeds upon a like theory that the inconsistent attitude of the party will put his adversary to some disadvantage. Hines v. Ward, 121 Cal. 115, 53 P. 427. The facts do not bring this case within such doctrine. Here appellant lost no advantage which he had a right to claim. He was not entitled to any right to try his action for damages without opposition nor as a default case. The contract of insurance obligated the respondents to defend the suit in the name and on behalf of the assured. This duty respondents undertook to discharge when suit was brought against the assured, and continued to perform without definite knowledge of breach or intended breach until about one month before the actual trial, when they gave the notice of breach and nonwaiver to the assured as above recited. Continuing performance, subject to this reservation, and making diligent but unsuccessful search for the insured so as to procure his attendance as a witness, after many continuances the day of trial arrived and the cause was ordered by the court to proceed. At this juncture it cannot be said that respondents were free to withdraw their attorneys from the case. The defendant client was absent. A willful neglect by his attorneys or violation of the duty of the attorneys to him to continue to represent him until excused by consent of the client or by order of court would constitute contempt of court. Section 1209, Code Civ. Proc. To withdraw as attorneys for the assured required leave of court after notice to the assured. Section 284, Code Civ. Proc. Such could not be expected when the assured had not been found after long search, but whose appearance at the trial his counsel had a right to hope for if not expect. It is clear that respondents were not entirely free to abandon the defense of the case under such circumstances. We are therefore constrained to hold that their continuance up to and through the trial, in view of their express notice of nonwaiver, did not constitute waiver of their right to plead the defense of breach of the co-operation clause in the subsequent action on the policy. No parting of the ways, which is characteristic of election, confronted them in the progress of the case which required of them an election, but rather the coming together of two ways leading to the same objective, namely, protection against liability. Defending at the trial to the end of defeating the injured party's claim, if not supported by sufficient proof, or, as an alternative, to the end of minimizing the judgment for damages—which under the law would become absolute as to amount thereof against the insurer—and the pleading of the defense of breach of the co-operation clause in the suit on the policy to collect that judgment, were but cumulative or consecutive remedies employed by respondents and clearly not inconsistent. Such conduct was not based on opposite and irreconcilable claims or right, typical of the doctrine of election, but upon one and the same claim of right to defend against liability on the policy.

From the foregoing it follows that respondents were not estopped to plead as a defense herein the breach by the insured of the co-operation clause of the policy, and to enjoy the benefit thereof against the claim of appellant in the same manner and to the same extent had the claim been asserted by the assured. As decided in the Hynding Case, the assured obviously could not hold respondents liable under the facts of such a case as this. In the absence of waiver or estoppel neither may the appellant.

The judgment is affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 426

GOLDEN GATE CANDY PRODUCTS CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO. et al.

Civ. 9532.

District Court of Appeal, First District, Division 2, California.

Oct. 16, 1934.

Hearing Denied by Supreme Court Dec. 13, 1934.

1. Attachment ⇐64
Garnishment ⇐58

Generally, if money on person of one outside prison walls is not subject to seizure, it is not subject to attachment or garnishment when it passes involuntarily to officer's custody when such person enters within walls as prisoner.

2. Attachment ⇐64
Garnishment ⇐58

Money in prisoner's wallet, which was later shown to be fruits of prisoner's crime, and was taken by arresting officer as prisoner received wallet from assistant to whom he had handed it at place of arrest, *held* subject to attachment or garnishment while in custody of property clerk at police station (Pen. Code, § 476a).

3. Process ⇐1

Courts have inherent power to control and prevent abuse in the use of their process.

4. Garnishment ⇐13

Creditor which had right of action in debt or indebitatus assumpsit against debtor for goods sold and delivered *held* entitled to maintain garnishment proceedings.

Certiorari proceedings by the Golden Gate Candy Products Company to review an order of the Superior Court of the State of California, in and for the City and County of San Francisco, and Edmund P. Mogan, as Judge thereof, granting a motion by Morris Maidl to vacate, set aside, and quash a writ of attachment sued out by petitioner in action against Maidl and others.

Order annulled.

For prior opinion, see 35 P.(2d) 372.

Morris, Jaffa & Sumski, of San Francisco, for petitioner.

Alfred J. Hennessy and Byron C. Parker, both of San Francisco, for respondents.

STURTEVANT, Justice.

This is a proceeding in certiorari. Heretofore Morris Maidl was arrested on a charge of violating section 476a of the Penal Code; that is, issuing checks with intent to defraud. The arrest was made in his place of business. Before leaving the room he turned to an assistant and taking a wallet out of his hip pocket he handed it to her with directions to keep it for him. The arresting officer stated he could not do that and directed the assistant to hand the wallet back to the defendant. As she did so the officer took the wallet and when the defendant was booked at the police station the wallet and its contents were delivered over to the property clerk. The wallet contained $1,373 in cash and $500 in checks. Thereafter an action was commenced in the superior court by this petitioner against Morris Maidl et al. The complaint in that action was framed in two counts. In the first count the plaintiff alleged a cause of action as for goods sold and delivered for the agreed price of $13,076.37. The second count was for the reasonable value. After commencing the action the plaintiff took out a writ of attachment and caused it to be served on the property above mentioned in the custody of the property clerk. Later the defendant appeared in the civil action and made a motion to vacate, set aside, and quash the attachment. On the hearing of that motion much evidence was introduced. As stated above the wallet contained $1,373 in cash and $500 in checks. Of the whole, $1,200 was shown to be the fruits of the violation of section 476a of the Penal Code. No fraud, trick, or oppression was shown in obtaining or serving the writ. After a hearing had the trial court made an order granting the motion. To review that order this proceeding was commenced.

[1, 2] The petitioner contends that it was within its rights in causing the contents of the wallet to be garnished. The defendant earnestly contends that under the law the property was not subject to garnishment. In Emmanuel v. Sichofsky, 198 Cal. 713, at page 715, 247 P. 205, 48 A. L. R. 580, Mr. Chief Justice Waste states as follows: "From the authorities upon the subject it may be gathered as a general rule that, if money on the person of a prisoner when outside the prison walls is not subject to seizure, it is not subject to attachment or garnishment when it

passes involuntarily from his possession to the custody of the officer appointed by law to take it into possession, when such person enters as a prisoner within the walls. Public policy requires the adoption and maintenance of this rule. Were it otherwise, it would lead to a grave abuse of criminal process. It would tempt creditors whose debtors keep their funds upon their persons, and thus beyond the reach of civil process, to make unfounded criminal charges against their debtors, and bring about their arrest and the transfer of their funds to the custody of the arresting officers, in order to make them reachable by the process of garnishment. It needs no citation of the cases to show that the general rule, as thus broadly stated, is supported by the preponderance of authority." Shortly prior to that decision the Supreme Court of Washington handed down its decision in Kuehn v. Faulkner, 136 Wash. 676, 241 P. 290, 45 A. L. R. 571. The facts are closely akin to the facts in the instant case, but it does not appear that the moneys garnished were the fruits of the crime charged. On page 572 of 45 A. L. R., 136 Wash. 676, 241 P. 290, the court said: "As we view it, it is unnecessary to review these different decisions and the various grounds upon which they are based, but rest our conclusion that the question must be answered in the negative, upon the broad ground that to allow such garnishment would be contrary to public policy, recognizing the danger of the abuse of criminal process by the establishment of any other rule. 28 C. J. 76; 1 Freeman on Executions, § 130a; 2 Freeman on Executions, § 255; Emmanuel v. Sichofsky (Dist. Ct. of Appeals, State of California, Third Dist.) [198 Cal. 713, 247 P. 205, 48 A. L. R. 580] filed October 21, 1925; Holker v. Hennessey, 141 Mo. 527, 42 S. W. 1090, 39 L. R. A. 165, 64 Am. St. Rep. 524; Connolly v. Thurber Whyland Co., 92 Ga. 651, 18 S. E. 1004; Robinson v. Howard, 7 Cush. (Mass.) 257; Commercial Exch. Bank v. McLeod, 65 Iowa, 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36; Hubbard v. Garner, 115 Mich. 406, 73 N. W. 390, 69 Am. St. Rep. 58; Bailey v. Wright, 39 Mich. 96; Pomroy & Co. v. Parmlee, 9 Iowa, 140, 74 Am. Dec. 328; Dahms v. Sears, 13 Or. 47, 11 P. 891; Ex parte Hurn, 92 Ala. 102, 9 So. 515, 13 L. R. A. 120, 25 Am. St. Rep. 23; Richardson v. Anderson, 4 Willson, Civ. Cas. Ct. App. § 286, page 493, 18 S. W. 195; Hill v. Hatch, 99 Tenn. 39, 41 S. W. 349, 63 Am. St. Rep. 822." See, also, Williams v. Edelstein, 143 Wash. 198, 253 P. 596.

As an exception to the rule stated by our Supreme Court and restated by the Supreme Court of Washington, there are cases holding that when it does not appear that criminal process has been abused and it does appear that the property garnished was obtained by the criminal acts of the debtor from the attaching claimant that the garnishment will be enforced. Reifsnyder v. Lee, 44 Iowa, 101, 24 Am. Rep. 733; Ex parte Hurn, 92 Ala. 102, 9 So. 515, 13 L. R. A. 120, 25 Am. St. Rep. 23; Fitzgerald v. Nickerson, 43 R. I. 396, 113 A. 290, 16 A. L. R. 373; Whitney Cent. Trust & Savings Bank v. Norton, 157 La. 199, 102 So. 306. However, all of the cases last cited turn on the question as to whether the criminal process was or was not abused. When under the facts it was shown that the use of the process had been abused the service thereof was quashed. Pomroy & Co. v. Parmlee, 9 Iowa, 140, 74 Am. Dec. 328. When it was found that the use had not been abused the motion to quash was denied. Patterson v. Pratt, 19 Iowa, 358; Reifsnyder v. Lee, 44 Iowa, 101, 24 Am. Rep. 733. In Pomroy & Co. v. Parmlee, supra, the court made an extended examination of the law from the time of Lord Holt. Having done so it summarized its conclusions as follows: "The facts disclosed, show a great abuse of the law, and of the name of its process, and of the authority of its officer. Under the pretense of having a writ, one who was an officer in another county, took the property and carried it back an hundred miles, or thereabouts, in order that he might bring it within the reach of legal process. The persons concerned submitted to what they were led to believe was the command of the law. It would be a shame to the law, if such things were permitted, and even if the actors were allowed to reap a benefit from them, the same as if they had done no wrong. And so it would be, if the law could not arrest them in their progress, but must suffer the wrongdoer to complete his scheme, and turn the complaining party over to the tardy and expensive satisfaction of an action at law. It seems to us that the court is competent, of course and of necessity, to control its own process, and protect that and the law from such misuse." The distinction between the rules is further clarified in what is said in Commercial Exchange Bank v. McLeod, 65 Iowa, 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36. The facts before the court are stated as follows: "On the twenty-eighth day of August, 1883, said I. R. Kirk made and filed an information before a justice of the

peace, charging the defendant with the crime of uttering a forged promissory note. A warrant was issued, and the plaintiff was arrested by a constable and taken to the county jail. Upon his commitment to the jail, the sheriff, who was the keeper thereof, proceeded to search the defendant's person, and took therefrom one gold watch, one silver watch, and $480 in money, and having the attachment and money and property all in his hands, he made return that he had levied the attachment on the watches and money." Having stated those facts the court proceeded:

"In Reifsnyder v. Lee, 44 Iowa, 101 [24 Am. Rep. 733], the defendant stole five head of cattle and sold them to the plaintiff for $162.30. The owner of the cattle claimed and recovered them from plaintiff, and the plaintiff procured officers to pursue and capture the thief. The officers making the arrest searched his person and took therefrom certain money and a watch which was of little value. It was held that the money and watch were liable to garnishment in the hands of an officer at the suit of plaintiff. In that case the search of the person was fully approved. It is said, however, in the opinion that 'a party to a suit can gain nothing by fraud or violence under the pretense of process, nor will the fraudulent or unlawful use of process be sanctioned by the courts. In such cases parties will be restored to the rights and position they possessed and occupied before they were deprived thereof by the fraud, violence, or the abuse of legal process.' To the same effect, see Pomroy v. Parmlee, 9 Iowa, 140 [74 Am. Dec. 328], and Patterson v. Pratt, 19 Iowa, 358.

[3] "We think the sheriff was justified in making the search and in taking from the person all money or property which was in any way connected with the crime charged, or which might serve to identify the prisoner. If, however, the sheriff knew that the watches and money were in no manner connected with the crime, and that they could not be used in any way as evidence in the prosecution, we think it was his duty to return them to the defendant. If a constable or other officer takes possession of property found on a prisoner, the court will order the same to be restored, if not required as a means of proof at the trial, or which does not finally appear to be the fruits of the crime with which he stands charged. 1 Archib. Crim. Pl. & Pr. 34, 35."

Then, further on, the court said: "We think that it cannot be said that the search was unlawful. But when it was ascertained that the money and property were in no way connected with the offense charged, and were not held as evidence of the crime charged, the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and the money and property should be no more liable to attachment than if they were in the prisoner's pockets. To hold otherwise would lead to unlawful and forcible searches of the person under cover of criminal process as an aid to civil actions for the collection of debts. It does not appear that such was the purpose of the prosecution in this case, but the court was justified in finding that the money and property here taken from the defendant was by force and without his consent, and as it is not claimed that the money or property was in any way connected with the crime charged, no advantage should be taken of the defendant because the same was taken from his person by force and against his will." Some of the text-books (14 Am. & Eng. Ency. Law 827; 12 R. C. L. 812) state that the exception rests on a particular statute changing the common-law rule regarding garnishments. But an examination of the statutes and decisions discloses that the exception rests on the common-law rule that courts have the inherent power to control and prevent abuses in the use of their process. 8 Am. & Eng. Ency. Law 28. That in California the courts retain control of their own process and will protect it from misuse has been held on many occasions. No reason appears therefore why the doctrine, as announced in Commercial Exchange Bank v. McLeod, supra, does not apply in the state of California.

[4] In his last brief the claimant Maidl asserts that Golden Gate Candy Products Company had no right to garnish the contents of the wallet because, he asserts, one may not attach his own property. We think the claim is not supported by the record. As the Golden Gate Candy Products Company had a clear right to maintain an action against Maidl in debt or indebitatus assumpsit, it had the right to maintain garnishment proceedings. 13 Cal. Jur. 3; Redondo Beach Co. v. Brewer, 101 Cal. 322, 325, 326, 35 P. 896. The point is without merit.

The distinction in the rules of law applicable to this particular case was not presented to the trial court by the pleadings, the proof, nor the arguments, so far as we are advised. It was thereby led into rendering its decision under a misunderstanding of the law and exceeded its powers in making the order vacating, setting aside, and quashing the service of

the writ. The sole fact that the wallet was on the person of Morris Maidl when he was arrested did not constitute a complete ground for quashing the service of the writ. As the $1,200 was properly garnished the levy thereon should stand. The record before us does not show whether the rest of the contents of the wallet, in excess of the $1,200, was or was not the fruits of the crime above mentioned.

The order under attack is annulled, and the trial court will take such further proceedings as are not inconsistent with this decision.

We concur: NOURSE, P. J.; SPENCE, J.

CARTER v. J. W. SILVER TRUCKING CO. et al.*

PINOUT v. SAME.

VON HOUSEBROCK v. SAME.

Civ. 9238, 9355.

District Court of Appeal, First District, Division 2, California.

Oct. 18, 1934.

Hearing Granted by Supreme Court Dec. 17, 1934.

1. Motions ⇐54

Authority to make order nunc pro tunc cannot be used to amend or change order actually made.

2. New trial ⇐163(1)

Order granting new trial could not be amended by nunc pro tunc order to read that it was granted on ground of insufficiency of evidence to justify verdict, in attempt to correct judicial error and to make order that was never in fact made; hence nunc pro tunc order was invalid.

3. Automobiles ⇐245(17)

In action by passengers in automobile colliding with truck and trailer stalled on highway, conflicting evidence as to truck driver's negligence *held* for jury.

4. Appeal and error ⇐1064(1)

In action by passengers in automobile colliding with truck and trailer stalled on highway, modifying requested instruction that automobile driver's concurring negligence was not defense, to read that it was not necessary for defendants to prove that automobile driver was negligent, but important question was whether defendants were negligent and if so, whether such negligence was approximate cause of accident, *held* not prejudicial error, though defendants attempted to show that it was automobile driver's negligence, and not defendants' negligence, that caused accident.

5. Appeal and error ⇐1064(4)

That instruction used expression "approximate cause" of accident *held* not prejudicial, since expression is practically synonymous with "proximate cause" of accident.

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

6. Automobiles ⇐246(57)

In action by passengers in automobile colliding with truck and trailer stalled on highway, instruction that, to escape charge of being sole cause of accident, test was not whether automobile driver did all that was possible for him to do, but whether he acted with ordinary care and prudence, *held* properly refused, where defendants contended that they were not negligent, as well as that accident occurred because of automobile driver's negligence.

7. Trial ⇐260(8)

In action by passengers in automobile colliding with truck and trailer stalled on highway, instruction that plaintiffs were not contributorily negligent as matter of law because they did not discern unknown danger at very instant necessary to prevent impending disaster *held* properly refused as covered by other instruction.

8. Appeal and error ⇐1064(4)

In action by passengers in automobile colliding with truck and trailer stalled on highway, inadvertent use of word "other" in instruction that, if automobile driver was negligent, that might or might not determine the rights as to other defendants, where automobile driver was not party, *held* not prejudicial error, where automobile driver was not mentioned elsewhere as defendant, and correct statement of rule was given in another instruction.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Actions by Melbourne Carter, by Frank Pinout, and by Henry Von Housebrock, respectively, against the J. W. Silver Trucking Company and another. Verdict for defendants, and from an order granting a new trial and a nunc pro tunc order changing the order theretofore entered, defendants appeal.

Reversed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 47 P.2d 733.

Edmund Scott, of Redwood City, and Hadsell, Sweet, Ingalls & Lamb and George F. Wright, all of San Francisco, for appellants.

Ford & Johnson, of San Francisco, for respondents.

STURTEVANT, Justice.

To recover damages for injuries sustained in an automobile accident, three different plaintiffs commenced three separate actions against the defendants. For the purposes of the trial the actions were consolidated. The jury returned a verdict in favor of the defendants. The plaintiffs moved for a new trial on all of the statutory grounds and the motion was granted by an order which, on its face, was general. The defendants appealed under section 953a of the Code of Civil Procedure. The plaintiffs made an ex parte application for, and the trial court made, a nunc pro tunc order changing the order theretofore entered. On its face the latter order purported to limit the order granting a new trial by basing it on the ground that the evidence was insufficient. The defendants moved to set aside the nunc pro tunc order. The motion was denied and the defendants appealed from that order and have brought up a bill of exceptions. The appeals have been consolidated; but to determine them it is necessary to take up first the appeal last mentioned.

Nunc Pro Tunc Order.

[1, 2] On May 11, 1933, the jury returned a verdict in favor of the defendants and against the plaintiffs. In due time the plaintiffs served a notice of intention to move for a new trial. It enumerated thirteen statutory grounds. On June 5 the motions came on for a hearing and thereafter were submitted on the same date. On the 3d day of July, the judge of the trial court indorsed on the submission tag, "New trial before another court granted." On the same day the clerk of the court wrote out a formal minute entry in words and figures as follows:

"The motion for a new trial in the above-entitled causes having been heretofore submitted to the court for consideration and decision, and now the court having considered the same and being fully advised herein, renders the following decision:

"It is ordered that a new trial in the above entitled actions before another court be, and the same is hereby granted."

On July 10 the defendants served and filed a notice of appeal from the order granting a new trial. At the same time they served and filed a notice to prepare the record. On the 14th of August, without notice to and in the absence of the defendants or their attorneys, the judge of the trial court signed a formal order, among other things, reciting: "It is hereby ordered that the order granting said motion be and the same is hereby amended nunc pro tunc reading: New trial before another court granted on the ground of insufficiency of the evidence to justify the verdict." On August 17 the defendants served a notice of motion to vacate the order last mentioned. That notice recited that the motion would be based on the affidavit of Robert L. Lamb, a copy of which was attached to the notice. That affidavit recited that the written memorandum dated July 3, 1933, was in the handwriting of the trial judge. It also alleged that the clerk correctly entered the order made by the court in determining the motion for a new trial. Thereafter the motion of the defendants came on for hearing in open court on August 21, 1933. The defendants made their motion and introduced the affidavit of Mr. Lamb hereinafter mentioned. In reply to a question propounded by counsel the judge of the court stated that the memorandum dated July 3 was written and signed by him. He also stated that he did not include in the order all that he should have included at the time. Continuing, the court said: "* * * the order was made here in the handwriting of the court itself and it (sic) was really an oversight by the court in not including therein matters which it should have included, and it is not a correction, so much, of minutes made by the clerk * * * but that order does not set forth what the court had in mind and the grounds that the court had in mind when he made the order and I felt under the circumstances I had a right to correct it * * *."

The foregoing facts clearly show that the purported nunc pro tunc order was an attempt to correct a judicial error and to make an order that was never in fact made. As stated by the trial judge in the nunc pro tunc order, he inserted "what the court had in mind and the grounds that the court had in mind when he made the order * * *," but had failed to insert in the order made July 3. Such changes may not be made in that manner. In volume 1 of Freeman on Judgments, p. 248, the author states: "The failure of a court to act, or its incorrect action, can never authorize a nunc pro tunc entry. If a court does not render judgment, or renders one which is imperfect or improper, it has no power to remedy any of these errors

or omissions by treating them as clerical misprisions. Omitted judicial action cannot be supplied." In 42 C. J., at page 532, it is stated: "The authority to make an order nunc pro tunc cannot be used to amend or change an order actually made." In Egan v. Egan, 90 Cal. 15, at page 21, 27 P. 22, 24, the court said: "It clearly appears in the present case that the matter contained in the amendment made by the order appealed from was not omitted from the judgment by reason of any neglect of the clerk in recording the same, but was intentionally excluded therefrom by the court itself at the time it rendered the judgment. If it should be admitted that the court ought to have included the provisions of this stipulation in its decree, its failure to do so was an error resulting either from a misconception of the law applicable to the facts before it, or from a failure to give sufficient consideration to those facts. In either case it was an error of law committed at the trial, which the defendant should have sought to remedy through her motion for a new trial." That rule has since been followed by the courts of review in this state. It will not be controverted that a court has power to correct its record by nunc pro tunc orders of its own motion and without notice. However, that principle assumes that a clerical error was made in entering the order. Neither will it be contended that a court has not the inherent right to cause its record to speak the truth. But in the instant case it clearly appears that the record spoke the truth, the sole fact being that the trial judge did not say all that he had in his mind on the subject. The validity of a nunc pro tunc order does not rest on the recitals contained therein. In the instant case the attack is direct and is supported by a bill of exceptions. In Drinkhouse v. Van Ness, 202 Cal. 359, at page 369, 260 P. 869, 872, the court said: "If the order of May 8 were before us on an appeal on the judgment roll alone, the intendments and presumption of regularity, which lend support to judgments and orders of trial courts under review on appeal, would sustain it, but the matter is before us on a bill of exceptions. It is the contention of the intervener that when the lower court entered the order of May 1 granting a new trial, it exhausted its power to pass on the motion, and could not thereafter amend, revoke, modify, or otherwise disturb its judgment in that regard. The second order, that of May 8, it contends, was a nullity and in no wise affected the status of the case with respect to the first order which, in general terms, granted the motion for a new trial. The contention must be upheld."

It follows that the nunc pro tunc order was invalid and that we must disregard it in considering the appeal of the defendants from the order granting to the plaintiffs a new trial.

Order Granting Motion for New Trial.

[3] The action arose by reason of a collision in which the automobile in which the plaintiffs were riding collided with the rear end of a truck and trailer that were stalled on the highway. The accident occurred about three miles north of South San Francisco on the westerly side of the Bayshore highway. The truck and trailer were owned by the defendant corporation and were being operated by the defendant William Harris. On the trial it was the theory of the plaintiffs that between 9 o'clock and 11 o'clock at night the defendants left the truck and trailer stalled on the highway and that at the time of the accident it was wholly unlighted, unguarded, and unattended. On the other hand, it was the theory of the defendants that by reason of excessive heat generated in the operation thereof, that a certain pump attached to the motor became seized and that the effect was to stall the motor and prevent the truck and trailer from being moved until repairs could be made or until the truck and trailer could be pulled off the highway by tow cars. It was also the theory of the defendants that at all times the truck and trailer were equipped with all of the lights specified in the statute and that the same were continuously burning. The defendants cite section 657 of the Code of Civil Procedure and contend that as the order granting a new trial failed to specify that the new trial was granted upon the ground of insufficiency of the evidence, the order of the trial court can only be sustained where the verdict of the jury is against law, or there are errors of law which have resulted in a miscarriage of justice. Biaggi v. Ramont, 189 Cal. 675, 209 P. 892. In their brief the plaintiffs do not reply to the point so presented by the defendants; however, they contend that the negligence of the defendants was established by the evidence. In support of that contention they cite testimony given by some of their witnesses proving, or tending to prove, that contention. In reply the defendants claim that the witnesses for the plaintiff were not in a position to see and know the fact to which they testified. We think it is not necessary to state the testimony of the witnesses. It is sufficient to state that witnesses called by the defendants gave testimony that was in direct conflict with nearly all of the evidence produced by the plaintiffs. It is true that the evidence showed

that the truck and trailer were left where the truck stalled for approximately two hours, but it is equally true that the driver during all that time was making strenuous efforts to get the truck and trailer moved from the spot either under the power of the truck or other means. Considering all of these matters we think it is quite clear that it may not be said the evidence was insufficient as a matter of law.

In their brief the defendants attempt to enumerate every adverse ruling made against the plaintiffs during the trial on the admission or rejection of evidence, and to show that no one of the rulings was prejudicially erroneous. Their showing seems to be sufficient. Moreover, in the plaintiffs' brief we find no reply to those contentions.

[4, 5] Much is said regarding what the trial court did in refusing some instructions, modifying some others, and in giving some instructions asked by the defendants. The car in which the plaintiffs were riding was driven by A. M. Dioze. The plaintiffs requested an instruction: "It is not a defense for the defendants, J. W. Silver Trucking Company, a corporation, and William Harris to prove concurring negligence on the part of the driver of the other automobile involved in the accident in question." The trial court modified the instruction and gave it as follows: "It is not necessary for the defendants to prove that the driver Dioze was guilty of negligence. The important question is whether the defendants were or were not guilty of any negligence and if so, whether such negligence was *an approximate cause of the accident.*" (Italics ours.) The plaintiffs contend that as the defendants pleaded, and thereafter offered proof to show, that it was the negligence of Dioze and not the negligence of the defendants that caused the accident, therefore their requested instruction should not have been modified. The reason assigned is not sufficient to show prejudicial error. Nor do we find any force in the argument that the expression "* * * an approximate cause of the accident" should have been "the proximate cause of the accident." One expression is practically synonymous with the other. When considered with all of the other instructions the attack has no merit.

[6] The plaintiffs requested, and the trial court refused to give, the following instruction: "To escape the charge of being the sole cause of the accident, the test is not whether A. M. Dioze did all that was possible for him to do, such as seeing everything that was possible to see, but whether he acted with ordinary care and prudence under all the facts and circumstances." On the trial it was the contention of the defendants that they were not guilty of negligence. It was also their contention that the accident occurred by reason of the negligence of A. M. Dioze. It is apparent, therefore, that as the trial court said in one of its instructions, "The important question is whether the defendants were or were not guilty of any negligence." If not, the defendants were not liable—it was not necessary for them to continue and demonstrate that the accident was caused by A. M. Dioze or that it was an inevitable casualty.

[7] The plaintiffs requested, and the trial court refused to give, the following instruction: "I charge you that plaintiffs are not guilty of contributory negligence as a matter of law simply because they did not discern an unknown danger at the very instant necessary to prevent an impending disaster." We find no error in the ruling. Other instructions fully covered all that is material to the instant case in the instruction as requested.

[8] The trial court commenced its instructions by making some general observations. True it is that they took the form of being instruction number I. In that instruction the trial court had occasion to speak of the driver of the car in which the plaintiffs were riding. He had not been made a party to the action. However, one sentence is as follows: "If Dioze was negligent that may or may not determine the rights as to the *other* defendants." It is apparent that the word "other" should have been omitted. Nevertheless the insertion of the word could not have prejudiced the rights of the plaintiffs. Both during the trial and in the other instructions Mr. Dioze was constantly referred to as the driver of the Buick. At no place was he mentioned as, nor alleged to be, a defendant. Under these circumstances it cannot be assumed that the inadvertent use of the word "other" at all confused the jury. The exactly correct statement of the rule will be found in instruction XL. It follows that the trial court did not commit error in the giving, modifying, or refusing instructions to the prejudice of the plaintiffs. If we are correct in these views, and we think the record fully sustains us, the motion for a new trial should not have been granted and it was prejudicial error to grant it.

The nunc pro tunc order under attack in appeal No. 9355 is reversed, and the order granting a new trial under attack in appeal No. 9238 is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

1 Cal.App.2d 449

Ex parte FISHER.

Cr. 2610.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1934.

1. Criminal law ⇐1218

Statute providing that "in no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year," has same meaning as if statute read "in no case shall any person be committed for a period in excess of one year, when sentenced to confinement in a county or city jail on conviction of misdemeanor or as a condition of probation, or for any reason" (Pen. Code, § 19a, as added by St. 1933, p. 2217, § 2).

2. Criminal law ⇐1207

Prisoner who on March 10, 1933, was sentenced to county jail for two years *held* not entitled to be released on ground that more than year elapsed since effective date of statute providing that no person sentenced to confinement in county or city jail on conviction of misdemeanor shall be committed for period in excess of one year since statute did not affect penalties previously imposed as result of convictions already obtained (Pen. Code, § 19a, as added by St. 1933, p. 2217, § 2).

Habeas corpus proceeding by J. R. Fisher.

Writ discharged and petitioner remanded.

Gladys Towles Root, of Los Angeles, for petitioner.

Ray L. Chesebro, John L. Bland, and Bourke Jones, all of Los Angeles, for respondent.

DESMOND, Justice.

[1] Petitioner was convicted of failing to provide for his minor children, and on March 10, 1933, was sentenced by a judge of the municipal court of Los Angeles to be imprisoned in the county jail "for the term of two years on public work at $2.00 per day." He petitions for his release upon the ground that he is now, more than one year after imposition of sentence, illegally restrained of his liberty in view of the enactment of section 19a of the Penal Code (chapter 848, St. 1933, p. 2217, § 2). That section, enacted since the date of petitioner's incarceration, reads as follows: "In no case *shall* any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, *be committed* for a period in excess of one year. If, however, any county, or group of counties together, *should* establish a penal farm, or if there be established a State institution for long-term misdemeanants, then *commitment* to such penal farms or such State institution *shall* be for such period as the court may order within the limits prescribed by statute for the offense." We have italicized certain words in this quoted section for the purpose of indicating that the intention of the Legislature was to deal with events of the future and not of the past. The first sentence, in our opinion, has exactly the same meaning as if it read: "In no case shall any person be committed for a period in excess of one year, when sentenced to confinement in a county or city jail on conviction of misdemeanor or as a condition of probation, or for any reason." Section 3 of the Penal Code provides that no part of the Code is retroactive unless expressly so declared, and there are no words in section 19a expressly declaring that that section is to have a retroactive effect.

[2] A contention that the petitioner has now served the maximum period of imprisonment, more than one year having elapsed since August 20, 1933, the effective date of the statute, avails him nothing, because the statute, as we have noticed, relates to cases in which commitments shall be made after its passage, and does not affect or attempt to affect penalties previously imposed as a result of convictions already obtained.

The writ is discharged and petitioner remanded.

STEPHENS, Presiding Justice.

I concur. The Legislature, recognizing that long periods of imprisonment in county jails have been legally prescribed under the probation laws (Pen. Code, § 1203), effectively prohibited such future practice by limiting the imprisonment period. There is nothing in this legislation (Pen. Code § 19a, as added by St. 1933, p. 2217, § 2) indicating that any legal sentence pronounced before its enactment should be lessened or in any way affected. Should the statute bear this interpretation, questions of its constitutionality would then present themselves.

1 Cal.App.2d 759

In the Matter of the Application of Philip J. GUERTIN for a Writ of Habeas Corpus.

Cr. 2622.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1934.

Gladys Towles Root, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

DESMOND, Justice.

The facts in this case parallel those in Re Fisher (Cal. App.) 36 P.(2d) 841, this day decided, and for the reasons set forth as the basis of our decision in that case, the writ herein is discharged and the petitioner remanded.

I concur: STEPHENS, P. J.

1 Cal.App.2d 451

Ex parte EYRE.

Cr. 2620.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1934.

1. Prisons ⇐15

Prisoner sentenced to county jail for two years with six months off for good time earned *held* not entitled to be released eighteen months after imposition of sentence on ground that he earned his good time, since prisoner may not earn more than five days per month by way of reduction of sentence (Pen. Code, §§ 1614, 1614a).

2. Criminal law ⇐1001

Prisoner who was sentenced to county jail for two years with six months off for good time earned *held* not entitled to be released eighteen months after imposition of sentence on ground that reduction of six months on good behavior was condition of probation where prisoner's application for probation filed at time he entered plea of guilty was expressly denied (Pen. Code, §§ 1614, 1614a).

3. Criminal law ⇐1207

Prisoner who, on February 28, 1933, was sentenced to county jail for two years *held* not entitled to be released prior to termination of term on ground that statute provided that no person should be committed to county jail for longer period than one year where sentence was imposed before enactment of statute which did not affect sentences previously imposed (Pen. Code, § 19a, as added by St. 1933, p. 2217, § 2).

Habeas corpus proceeding by Evan Eyre.

Writ discharged and petitioner remanded.

John F. Groene, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

DESMOND, Justice.

Petitioner, having entered a plea of guilty to violating the state Narcotic Act, was sentenced on February 28, 1933, by the superior court of Los Angeles county to "be punished by imprisonment in the county jail of the county of Los Angeles for the term of two years, with six months off for good time earned." The return of the sheriff admits "that the said petitioner has earned his good time to be allowed upon said sentence, but I am advised by counsel and believe the amount of good time is limited by law to five days in each month, and consequently the defendant is not entitled to a deduction of six months from his said sentence but is only entitled to a deduction of four months from his said sentence, so that said sentence has not yet expired."

Section 1614 of the Penal Code provides, in the case of prisoners employed by order of the board of supervisors upon public works or ways in the county, as follows: "For each month in which the prisoner appears, by the record, to have given a cheerful and willing obedience to the rules and regulations, and that his conduct is reported by the officer in charge of the jail to be positively good, five days shall, with the consent of the board of supervisors, be deducted from his term of sentence." Section 1614a makes similar provision for prisoners confined in jail, the county board of parole commissioners consenting.

[1, 2] Our attention has not been called to any method by which a prisoner may earn

more than five days per month by way of reduction of his sentence, and for this reason we hold that the contention that petitioner's term expired on August 28, 1934, or eighteen months after imposition of sentence, is not well grounded. It is to be noted that petitioner's application for probation, filed at the time he entered his plea, was expressly denied; and it cannot be argued logically, therefore, that a reduction of six months upon good behavior was a condition of probation. We have recently held that where probation is denied no part of the sentence imposed may be suspended. In re Claude Taylor (Cal. App.) 34 P.(2d) 1033.

[3] Petitioner invokes section 19a of the Penal Code, as added by St. 1933, p. 2217, § 2, as an additional reason why he should be released at this time, namely, more than one year after he began to serve his sentence in the county jail. That section reads in part as follows: "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year." As has been noted, sentence in this case was imposed on February 28, 1933, several months before the enactment of the quoted section, and for that reason, as we have concluded in Re Fisher (Cal. App.) 36 P. (2d) 841, this day decided, this new statute can have no effect in the instant case.

The writ is discharged and petitioner remanded.

I concur: STEPHENS, P. J.

1 Cal.App.2d 514

WILSON v. MILLER.

Civ. 9293.

District Court of Appeal, First District, Division 2, California.

Oct. 22, 1934.

1. Appeal and error ⇐907(3)

On appeal on judgment roll coming to reviewing court without any record of evidence and without findings, court must assume that trial court heard evidence sufficient to support judgment.

2. Appeal and error ⇐931(4)

Defaulting defendant cannot secure reversal on ground that complaint for injuries to automobile "passenger" failed to state cause of action in not charging willful misconduct under guest statute, where no evidence was brought up, appeal being on judgment roll, since, if it was necessary to find passage was for hire, such finding must be implied in support of judgment (Gen. Laws, 1931, Act 5128, § 141¾).

Appeal from Superior Court, Santa Cruz County; Maurice T. Dooling, Judge.

Action by Florence Wilson against Lee J. Miller. From an adverse judgment, defendant appeals.

Affirmed.

Leslie C. Gillen, of San Francisco, Milton J. Coghlan, of Santa Cruz, and Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for appellant.

Harry J. Bias, of Santa Cruz, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages resulting from an automobile collision. The defendant defaulted and plaintiff had judgment after trial for $1,250. The defendant has appealed on the judgment roll.

The sole point raised by appellant is that the complaint fails to state a cause of action. The complaint alleges that the defendant was the owner of and was operating a certain automobile, and that "the said plaintiff was riding in said automobile as a passenger therein." Appropriate allegations covering defendant's negligence and plaintiff's injuries followed. The appellant argues that the allegation that plaintiff was a "passenger" is insufficient to charge him with willful misconduct under the "Guest Law," section 141¾ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693 [Deering's Gen. Laws, Act 5128]).

[1, 2] It may be conceded that the complaint is not a model of good pleading, but no demurrer was interposed, and no appearance was made by the appellant, either by answer or by motion to set aside the default. The appeal comes to us without any record of the evidence and, of course, without findings. We are forced to assume that the trial court heard evidence sufficient to support the judg-

ment, and this may well have been done under the allegation that plaintiff was a "passenger," because if a passenger for hire, the plaintiff was entitled to recover without a charge of willful misconduct. 10 C. J. 1000.

The appellant argues that, under these allegations of the complaint, the plaintiff may have been a passenger for hire or a "guest" passenger; and that, if the latter, she should have charged willful misconduct in express terms. There is no support for appellant's assumption that the complaint attempted to plead the guest relation under the California Vehicle Act. It is a fair assumption that as a "passenger" plaintiff had either paid her fare or had obligated herself to do so. If we give the complaint the most favorable interpretation, we have a charge of negligence in general terms directed to one who was carrying a "passenger," and, if it is necessary to find that the passage was for hire, that finding must be implied in support of the judgment. Garrison v. Hogan, 112 Cal. App. 525, 532, 297 P. 87; Alexander v. McDow, 108 Cal. 25, 29, 41 P. 24; People v. McDonald, 200 Cal. 716, 717, 255 P. 180.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

GINDRAUX et ux. v. MAURICE MERCANTILE CO. *

Civ. 9277.

District Court of Appeal, First District, Division 2, California.

Oct. 17, 1934.

Rehearing Denied Nov. 16, 1934.

1. Appeal and error ⇐1073(1)

In action for injuries received from eating salami, granting of motion for judgment non obstante veredicto *held* not error since, where undisputed evidence showed that plaintiffs were not entitled to recover as matter of law, any error in procedure was immaterial.

2. Sales ⇐274

Where dealer sells customer an article in original manufacturer's package and the customer knows as much about article as dealer and buys it without representation by dealer or reliance on his judgment, knowing dealer has made no inspection of it, there is no implied warranty although dealer knows customer buys article for food (Civ. Code, § 1735, subd. 1).

3. Sales ⇐268(1)

When liability of a vendor is based on doctrine of implied warranty, essential element of recovery is superior knowledge, or means of knowledge of vendor over vendee (Civ. Code, § 1735, subd. 1).

4. Sales ⇐284(4)

Seller *held* not liable for injuries received from eating salami where product was delivered to seller in sealed package as manufactured by producer, it contained government certificate of inspection, method used by manufacturer was only known one for control of germ alleged to have caused injuries, and presence of germ could only be detected by expert microscopic examination (Civ. Code, § 1735, subd. 1).

5. Evidence ⇐383(4)

In action for injuries received from eating salami allegedly infected with trichina germs where undisputed evidence showed that pork products when treated in accordance with federal regulations were free from trichina germs and would remain so, government certificate of inspection on product was prima facie evidence that salami was prepared in accordance with federal regulations.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Jules Gindraux and wife against the Maurice Mercantile Company. From a judgment non obstante veredicto and an order denying their motion for a new trial, plaintiffs appeal.

Affirmed.

Glensor, Clewe, Schofield & Van Dine, of San Francisco, for appellants.

Joseph E. Bien and Werner Olds, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiffs sought to recover damages for injuries sustained by them as a result of eating salami purchased by them from the defendant. The action was tried before a jury. Defendant's motion for nonsuit was denied as were defendant's and plaintiffs' motions for directed verdict. The jury returned a verdict of $1,500 in plaintiffs' favor and the court then granted defendant's motion for judgment "non obstante veredicto" on the ground that "the verdict is contrary to evidence and

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 47 P.2d 708.

there is no law in this state to sustain the verdict." Plaintiffs moved for new trial on the grounds (1) that the trial court erred in granting the motion for judgment non obstante; (2) that the verdict was against law because it was so small; and (3) that there were errors of law at the trial. This motion was denied, and plaintiffs appeal.

The testimony shows that plaintiffs bought a piece of salami on August 10, 1931, and consumed it on August 11th and 12th. Plaintiffs testified that they had eaten no pork of any kind for about a year previous to August 11th (Jules Gindraux, on cross-examination, changed his testimony to three months prior to August 11th). Mr. and Mrs. Gindraux each became infected with trichinosis within ten days after consuming the salami and Dr. Monteith testified that symptoms of infection from trichinosis usually appear in from six to ten days. Dr. Alexander testified that the only possible source of infection from which appellants could have gotten the disease was from the consumption of infected pork.

Defendant quotes other parts of the record in an attempt to discredit plaintiffs' testimony that they had eaten no pork for a year. It also states that the testimony conclusively shows that the salami was purchased by defendant from Armour & Co. and that all of the salami coming into defendant's place of business has the "Government Inspected" stamp marked "U. S. Inspected 2/B." Defendant then explains the process used by Armour & Co. in preparing salami, which process includes heating the pork to 150 degrees Fahrenheit for fifteen hours and 165 degrees Fahrenheit for six hours. Dr. Maier Brodner, United States inspector, testified that such plants as the Armour plant are supervised by the government and that 137 degrees is recognized as sufficient to kill any live trichina that may be present in the muscle tissue of the pork which may constitute part of the salami. He also testified that he had never heard of a person being ingested with trichina from government inspected meat. There is no direct testimony which shows that the salami purchased by plaintiffs on August 10th was actually infected. On the other hand, the undisputed evidence is that this salami was received from Armour & Co. in a sealed package and was sold to plaintiffs by the slicing of a portion off the end of this sealed package. The undisputed evidence further shows that defendant's place of business was sanitary in every respect and that inspection by government inspectors immediately prior to the sale reported full compliance with all sanitary rules.

[1] The appellants' first contention is that the trial court erred in granting the motion for judgment non obstante. As we view the case, this was proper, because the plaintiffs were not entitled to recover on the undisputed evidence as a matter of law. Hence any error in procedure becomes immaterial since plaintiffs are not entitled to recover even upon their own case.

[2] The liability of a vendor of foodstuffs for immediate consumption is discussed under two separate theories—liability arising from the negligence of the vendor, and liability arising from an express or implied warranty. Cases resting on the negligence of the vendor are all beside the issue involved here, because the undisputed evidence shows that there was no negligence. Liability resting on an implied warranty is discussed under two distinct classes; a distinction which is not always observed in the cited cases but which is most important to this inquiry. First, the liability of the manufacturer to the consumer of an article of food to be sold by a dealer for immediate consumption. Second, the liability of the vendor to the consumer arising from the sale of (a) manufactured articles of food sold in cans or sealed packages, and (b) articles of food prepared by the vendor or handled by him in such a way that the consumer relies upon the vendor's inspection and treatment. The case here presented is a "sealed package" case where the vendor sold the manufactured article without possibility of inspection and without negligence.

The rule of liability in such cases is fully stated in 11 Ruling Case Law, page 1124, from which we quote: "The early rules of law were formulated upon the theory that the provision dealer and the victualer, having an opportunity to observe and inspect the appearance and quality of the food products offered to the public, were accordingly charged with knowledge of their imperfections. But no knowledge of the original or present contents of a perfect appearing can or sealed package is possible in the practical use of such products. They cannot be chemically analyzed every time they are used. Accordingly, the reason for the rule having ceased, a new rule should be applied to the sale and use of packed goods that will more nearly harmonize with what is rational and just. While there is authority to the contrary, it comports better with justice to hold that where a dealer sells to his customer an article in the original

package in which it is put up by the manufacturer, and the customer knows as much about the article as the dealer, and buys it without any representation from the dealer or reliance upon his judgment, knowing that there has been no inspection of it by the dealer, there is no implied warranty, although the dealer knows that the customer buys it for food. No rule of law should imply a warranty of that which it is impossible for a defendant to know by the exercise of any skill, industry or investigation, however great. In other words, neither law nor reason should require impossibilities."

In Walters v. United Grocery Co., 51 Utah, 565, 172 P. 473, 474, L. R. A. 1918E, 519, a case involving the sale of potato salad prepared by the vendor, this distinction is recognized, the court saying: "There is a well-defined line of cases that holds that retail dealers in selling canned goods for immediate use are not liable unless they can be charged with negligence in the purchase of such food, or with knowledge that the contents were unfit for human consumption. Those cases are determined upon the well-recognized fact that the dealer is not the manufacturer of the goods sold, and is not in a position to know the contents any better than the purchaser, neither the purchaser nor the vendor having had any opportunity to examine and know the condition of the goods contained in the cans sold. To that effect are the following authorities: Tomlinson v. Armour & Co., 75 N. J. Law, 748, 70 A. 314, 19 L. R. A. (N. S.) 923; Julian v. Laubenberger, 16 Misc. 646, 38 N. Y. S. 1052; Mazetti et al. v. Armour & Co. et al., 75 Wash. 622, 135 P. 633, 48 L. R. A. (N. S.) 213, Ann. Cas. 1915C, 140."

[3] Citations could be multiplied supporting the rule that, when the liability of the vendor is based on the doctrine of implied warranty, the essential element of recovery is the superior knowledge, or means of knowledge of the vendor over that of the vendee. A well-phrased statement of this rule is found in Scruggins v. Jones et al., 207 Ky. 636, 269 S. W. 743, 744, from which we quote: "Formerly foodstuffs were generally sold direct by the producer to the consumer and the former was presumed to know its condition, and held to a strict accountability therefor if it proved to be poisonous or harmful. Also the retailer, selling goods in the open with opportunity for its examination by the sense of touch, sight, or smell, was able to detect its condition, and, in offering it for human consumption, was held to impliedly warrant both its character and condition. Under such circumstances the doctrine of caveat emptor had no application.

"But modern industry has developed a revolution in the production and marketing of food, and materially changed the status of the parties. To-day in the sale of many articles of food the retailer and consumer stand in practically the same position. Both are far removed from the producer. The article comes packed and sealed in a tin container or can. No inspection of the contents can be made without opening the can, and the public generally has learned to rely upon the character and standing of the packer and the quality of certain brands. Neither seller nor purchaser can otherwise judge of its condition and in this respect both stand upon equal footing, so that the rules of the common law relating to foods have been modified to meet the changed conditions, and it is now generally recognized that, where the article is one of general use and put up by a reputable manufacturer or packer in a sealed can, the exterior of which is in good condition, the retailer is not responsible to his customer for the defective or unwholesome condition of the contents, unless and except at the time of the sale he expressly warrants the same to be free from defects. Walden v. Wheeler, 153 Ky. 181, 154 S. W. 1088, 44 L. R. A. (N. S.) 597; R. C. L., vol. 11, § 29, p. 1124; Bigelow v. Maine Central Ry. Co., 110 Me. 105, 85 A. 396, 43 L. R. A. (N. S.) 627." See note, 90 A. L. R., p. 1269 et seq.

This same principle has been carried into our Civil Code through the adoption of the Uniform Sales Act and in section 1735, subd. 1, we find the provision reading: "Where * * * the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

[4] Here the undisputed evidence is that the salami was delivered to the retailer in a sealed package as manufactured by the producer; that it contained the certificate of inspection by the United States government; that the method used by the manufacturer was the only method known to the federal authorities and to medical science for the control of the trichina germ; and that the presence of the germ in pork products cannot be discovered by any known method of inspection other than a miscroscopic examination by one skilled in such examinations.

[5] The undisputed evidence also shows that, when pork is treated in accordance with

the federal regulations, all live trichina germs are destroyed and that they cannot again appear in the cooked product. The government certificate is prima facie evidence that this particular salami was prepared in accordance with the federal regulations. The presumption that official duties have been properly performed is evidence that the inspection was properly made before the certificate was stamped upon the product.

For these reasons it follows that, regardless of the questions of procedure argued in the briefs the judgment must be affirmed because the appellants were not entitled to recover.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

1 Cal.App.2d 516

WEIR et al. v. NEW YORK LIFE INS. CO.

Civ. 8097.

District Court of Appeal, Second District, Division 1, California.

Oct. 22, 1934.

Hearing Denied by Supreme Court Dec. 20, 1934.

1. **Appeal and error** ⇐1011(1)

Judgment rendered on conflicting evidence will not be disturbed.

2. **Evidence** ⇐96(1)

Burden of proving facts pleaded as an affirmative defense rests on the defendant.

Appeal from Superior Court, City and County of Los Angeles; Arthur Keetch, Judge.

Action by William B. Weir and others, as trustees of the trust created by the will and under the decree of distribution in the matter of the estate of W. Frank Whittier, deceased, against the New York Life Insurance Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

Hunsaker & Cosgrove, of Los Angeles, for respondents.

HOUSER, Justice.

This is an appeal presented by the defendant from a judgment rendered against it by which the defendant is required to pay the face of the amount specified in a policy of insurance that was issued by the defendant on the life of one William R. Whittier.

The case has been thrice tried. The result of the first trial was a judgment in favor of the defendant, which, on appeal therefrom, was reversed. Weir v. New York Life Ins. Co., 91 Cal. App. 222, 266 P. 996. On the second trial, again judgment was rendered in favor of the defendant, but which judgment the trial court set aside and a new trial was granted. The third trial resulted in a judgment in favor of plaintiffs; and it is from that judgment that the instant appeal is taken.

Although the bearing and the legal effect upon the judgment herein of what is designated as the "law of the case," as determined by the respective applications of pertinent principles of law set forth in the opinion filed in the case of Weir v. New York Life Ins. Co., 91 Cal. App. 222, 266 P. 996, is ably presented by respective counsel for the consideration of this court, since the ultimate question that is determinative of the instant appeal is whether the findings made by the trial court and the ensuing judgment are supported by the evidence that was adduced on the trial of the action, it becomes unnecessary to devote attention either to the "law of the case" (91 Cal. App. 222, 266 P. 996), or to any other incidental or dependent question connected therewith. Nor, since the essential facts of the case are sufficiently outlined in the opinion rendered on the hearing of the former appeal (91 Cal. App. 222, 266 P. 996), is it deemed requisite that they again be set forth herein.

[1, 2] Regarding the legal sufficiency of the facts presented in evidence on the third trial of the action to support the controverted findings of fact and the ensuing judgment, it is only necessary to state that, with the exception of one of such findings, they were all made at least on substantial evidence presented by the plaintiffs, which was in conflict with that presented by the defendant with relation to such findings. The rule is universal that a judgment rendered in such circumstances cannot be disturbed by an appellate tribunal. As to the remaining finding of fact of which complaint is made, the pleadings disclose the situation that the fact embraced within such finding of fact was pleaded

as an affirmative defense to the action that was interposed by the defendant. To establish such fact, the burden of presenting evidence in its support rested on the defendant. In that regard, the trial record fails to disclose that the defendant introduced any evidence to substantiate that particular fact—which situation amply justified the trial court in finding the ultimate fact contrary to the allegation thereof by the defendant. The principles of law applicable to the several conclusions announced herein are so thoroughly established that it is considered unnecessary to burden this opinion with their citation.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

1 Cal.App.2d 301

CLARK v. MOUNTAIN STATES LIFE INS. CO. et al.

Civ. 8611.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1934.

1. Easements ⇐19

General rule is that no right to air and light can be acquired without express grant of interest in, or covenant relating to, lands over which right is claimed.

2. Easements ⇐19

Where right to light and air claimed by tenant is appurtenance or incident of demised premises, or thing without which demised premises would become untenantable, thus resulting in eviction, right to such light and air will pass to tenant by implication.

3. Landlord and tenant ⇐48(1)

Evidence *held* to show that premises occupied by tenant suing for breach of lease because windows had been closed had not become untenantable, where tenant's business had continued at substantially same level of income.

4. Appeal and error ⇐1011(1)

On conflict of evidence as to whether tenant was given guaranty of parking space, reviewing court will not disturb finding of trial court.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Helen Clark against the Mountain States Life Insurance Company and others for damages for breach of a lease. From an adverse judgment, plaintiff appeals.

Affirmed.

D. Chase Rich, of Los Angeles, for appellant.

J. B. Irsfeld and Douglas Fawcett, both of Los Angeles, for respondent.

SCHMIDT, Justice pro tem.

On the 25th day of October, 1928, appellant and respondent entered into a temporary agreement in writing whereby appellant agreed to lease from respondent, and respondent agreed to let to appellant, 830 square feet of the second floor of a building under construction on Yucca street, near Vine street, in Hollywood, Cal., for the purpose of conducting a business known as a beauty parlor. This preliminary agreement provided for a lease to be executed when the building was completed, which lease was thereafter executed on the 15th day of July, 1929, under which appellant went into possession. Attached to said agreement was a blueprint, which showed the floor plan with one window on the east side, two windows on the west side, and eight windows on the south or front side of the building, all of which windows could be opened. The dimensions of the floor space involved were 48 feet from east to west, with a maximum depth from north to south of approximately 21 feet, and the portion thereof served by the windows was a single open area divided 21 feet from the east and 27 feet from the west by a semipartition running north and south, which did not extend to the ceiling, same being just high enough so persons could not see over it and forming two compartments, one on the east and one on the west. Of the eight windows to the south, three were in the east compartment and five in the west compartment; three doors at the rear or north side opened into a hallway of the building, and above the doors were transoms which could be opened. Elevator shafts were located in this hallway.

At the time appellant went into possession, the lands on the east and west sides of the building were unimproved. Respondent owned the land on the east, but did not own that on the west. Approximately two months after appellant went into possession, respondent constructed on its property on the east a

two-story addition to the building in which appellant had leased her space, thus cutting off the light and ventilation from that window, which window was thereafter bricked in and plastered. About fourteen months after appellant went into possession, a building on the west side was constructed, two stories in height, cutting off the light and ventilation from appellant's west windows, which were likewise bricked in.

Thereafter appellant filed a complaint against respondent, alleging that the latter had agreed that in the conduct of appellant's business it was essential that she have at all times ample air, light, and ventilation; that without the side (east and west) windows she could not successfully conduct her business; that respondent would not erect during the term of her lease any improvements on the east side; and that any improvements that might be constructed on the west would be not less than 30 feet from the premises leased to appellant; that the side windows would remain unobstructed so as to permit light and air to pass through them into her premises. It was also alleged that respondent gave appellant the use of the side windows for the term of her lease. She further alleged that as a part of said lease agreement appellant was given the right for herself and customers to use the parking space in the rear of said building so long as the same remained unimproved with buildings, and that contrary to said agreement the officers and employees of respondent continued to park their automobiles in said parking space so that appellant has been and is entirely deprived of the use and enjoyment thereof, and that by reason of which appellant and her customers were obliged to park their automobiles upon the street or within public stations. She claims damages by reason of the loss of ventilation and light from the side windows and of being deprived of the use of the aforementioned parking space.

[1] From findings and judgment in favor of respondent, appellant has appealed. She raises many questions; the principal one being whether or not a landlord may cut off the light and ventilation of his tenant without responding in damages.

It will be noted that the lease did not in so many words guarantee any easement of light and air. However, appellant claimed an easement of light and air by reason of an alleged oral agreement. Testimony of conversations from which it was claimed the oral agreement existed was permitted by the trial court over objection of respondent that same was an attempt to vary the terms of a written agreement. We are not called upon to pass on this objection. Nevertheless, it will be noted that from the evidence on that subject-matter there was a conflict, and the trial court made its findings in favor of respondent. In Kennedy v. Burnap, 120 Cal. 488, 52 P. 843, 40 L. R. A. 476, the Supreme Court discusses at length the question of implied grant of easement for light and air, and, following the decisions in other jurisdictions, adopted as the rule in this state that there is no grant of a right to air and light from any length of continuous enjoyment or the granting of such a right from the mere conveyance of a house with windows overlooking the land of the grantor; that to do so without express words would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation, and concludes that there is not any right of this character that can be acquired without express grant of an interest in or covenant relating to the lands over which the right is claimed.

[2, 3] When the relation of landlord and tenant exists between the parties, the above rule is subject to the qualification that, if the thing which is claimed by the tenant is an appurtenance or incident of the demised premises, or is the thing without which the demised premises would become untenantable, thus resulting in an eviction actual or constructive, the thing will pass to the tenant by implication. In the case at bar appellant by her own witnesses showed that the premises occupied by her had not become untenantable. Although she claimed damages for loss of business, her books produced in court showed that her business had continued at substantially the same level of income. Also numerous witnesses called by her, after testifying that the premises were not as comfortable as prior to the bricking in of the windows, stated that they continued to go to the place for scalp treatments, that being the actual business conducted by appellant.

[4] The remaining contention of appellant is that she was given a guaranty of parking space. On this issue the trial court permitted appellant to attempt to prove an oral agreement to the effect claimed by her. On a conflict of evidence the trial court found against her contention. Courts of review in this state have repeatedly held that on a conflict of evidence they will not disturb the finding of the trial court. This finding of the trial court must be upheld from express agreements of the parties; the preliminary agree-

ment states "that the party of the second part shall have the right to use the parking space at the rear of the lot so long as same shall be available for that purpose"; while in the lease we find, "Lessor hereby grants to lessee the right to the use of automobile parking space on property belonging to lessor at the rear of the building as long as lessor continues to use the same for that purpose."

In view of the foregoing, it is not necessary to discuss in detail each finding of the trial court.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

STACK v. WELDER et al. *

Civ. 1465.

District Court of Appeal, Fourth District, California.

Oct. 22, 1934.

Rehearing Denied Nov. 19, 1934.

Hearing Granted by Supreme Court Dec. 20, 1934.

1. Appeal and error ⇐356

Appeal from judgment when taken too late must be dismissed.

2. Appeal and error ⇐113(2)

Fact that judgment itself was appealable will not prevent appeal from order denying motion to set aside judgment where inspection of judgment roll discloses that judgment was void.

3. Judgment ⇐346

Judgment void on its face, which required only inspection of judgment roll to demonstrate invalidity, is nullity and may be set aside at any time on motion.

4. Judgment ⇐113

Original default of defendants will not justify judgment against them where changes made in complaint after default and without service upon or notice to defaulting defendants involves matter of substance rather than form.

5 Judgment ⇐113

Where entirely new relief was asked in supplemental complaint filed after default, change was matter of substance rather than form, and judgment should not be had against defaulting defendants without service upon or notice to them.

Original action was to foreclose a mortgage on certain land, and by the supplemental complaint one substituted as plaintiff not only claimed to have succeeded to rights of original plaintiff but asked for and was granted additional relief which should not have been given under original complaint, in that an additional evidence of debt was declared to be a lien on the property and the debt ordered paid from proceeds of sale if such were sufficient.

6. Appeal and error ⇐863

On appeal from order denying motion to set aside judgment, questions of error may be considered, as against contention that since trial court had jurisdiction, its action, even if erroneous, could not be corrected.

7. Appeal and error ⇐1138

Order denying motion to set aside judgment, in foreclosure action, because supplemental complaint filed after default asserted additional debt as lien on property without notice to defaulting defendants, will be reversed notwithstanding that property did not produce sufficient funds to allow anything to be paid on second lien; questions not being moot.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by H. D. Stack against Joseph Welder and others. From an adverse judgment and from an order denying a motion to set aside the judgment, defendants M. Kirouff and another appeal.

Appeal from judgment dismissed, and order reversed.

See, also, 137 Cal. App. 647, 31 P.(2d) 426.

Sarau & Thompson, of Riverside, for appellants.

Goodman, Bachrack & Brownstone, of Los Angeles (Herman A. Bachrack, of Los Angeles, of counsel), for respondent.

BARNARD, Presiding Justice.

The appellants were the owners of a half interest in 700 acres of land on which were many hot mineral springs, the property being suitable for a health resort. This action was brought on June 7, 1929, by Virginia L. Armstrong, to foreclose a mortgage on this land securing an indebtedness of $30,000. The appellants were served on June 18, 1929, and defaulted; their defaults being later regularly entered. In July, 1929, the appellants and the defendants Welder conveyed the property to a corporation called "Eden Hot

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 43 P.2d 270.

Springs, Inc.," receiving in payment about one-quarter of the shares of the capital stock of said corporation. At the time of this transfer $5,000 was paid upon the principal of the Armstrong mortgage, together with all interest; but this action was not dismissed. Some six months later the respondent herein acquired the remainder of the capital stock of this corporation, became its president, and assumed control thereof. About two weeks later he purchased from Virginia L. Armstrong the notes and mortgage upon which this action was based. Subsequently the respondent obtained from the corporation named a note for $13,714.96, secured by a trust deed on this real property, subject to the first mortgage.

On June 3, 1932, the respondent procured an order of court substituting himself as plaintiff in the action in the place and stead of Virginia L. Armstrong, no notice being given the appellants. The cause was tried (other defendants appearing) and taken under submission on June 24, 1932. On November 10, 1932, without service upon or notice to the appellants, the respondent filed a supplemental complaint alleging the execution and delivery of the note for $13,714.96 by the corporation referred to, that the same was secured by a trust deed on this property, that payment had not been made, and asking that the trust deed be declared to be a second lien upon the property, and that any surplus arising from the sale of the property, under decree of foreclosure be paid to the respondent to the extent of the amount named in the trust deed. On November 12, 1932, the defendants Welder filed a demurrer to this supplemental complaint, which demurrer was never ruled on by the court. No answer was filed and no further hearing had, but on November 19, 1932, the court filed its findings of fact and conclusions of law, finding in accordance with the allegations of both the original complaint and the supplemental complaint, and finding as a conclusion of law that the trust deed mentioned in the supplemental complaint was a second lien upon the property. Judgment was entered on November 22, 1932, directing a sale of the property; the proceeds to be applied to the amount due under the first mortgage and any surplus to be applied on the amounts due to the respondent under the second deed of trust. On May 8, 1933, these appellants filed notice of motion to vacate the judgment and permit them to file an answer, the proposed answer being also filed. Among other things, the proposed answer contains allegations of fraud on the part of the respondent, and alleges that he used funds of the corporation, in part, in purchasing the Armstrong mortgage, that he had the same assigned to himself, that he obtained the note and trust deed from the corporation at a time when the amount thereof was not due from the corporation or owing to him, and that the corporation had become a necessary party to the action. The motion last referred to was based upon the ground that the amendment to the complaint substituting the respondent as plaintiff, and the supplemental complaint, changed the complaint in matters of substance and added new and different issues affecting the rights of these appellants and that said changes were made without service upon or notice to the appellants. This motion was denied by the court on May 17, 1933, and the appellants filed notice of appeal from the judgment and from the order denying this motion.

[1-4] The appeal from the judgment was taken too late and must be dismissed. Schainman v. Kierce, 199 Cal. 249, 248 P. 905; Lawson v. Guild, 215 Cal. 378, 10 P.(2d) 459. The respondent argues that the appeal from the order should also be dismissed since the judgment itself was appealable, citing De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, and similar cases. While it is held in such cases that to allow an appeal from an order refusing to set aside a judgment, where the judgment itself was appealable, would be virtually to allow two appeals from the same ruling and have the effect of extending the time for taking an appeal, these cases have no application if, as contended by the appellants here, an inspection of the judgment roll discloses that the judgment itself is void. A judgment which is void upon its face and which requires only an inspection of the judgment roll to demonstrate its invalidity is a nullity and may be set aside at any time upon motion. Luckenbach v. Krempel, 188 Cal. 175, 204 P. 591; In re Estate of Pusey, 180 Cal. 368, 181 P. 648; Reichert v. Rabun, 89 Cal. App. 375, 265 P. 260. The changes here made in the complaint, upon which this judgment is based, were made after the default of these appellants and without service upon or notice to them. If these changes are matters of substance rather than mere matters of form, the original default of the appellants would not justify the judgment as against them. In Cole v. Roebling Construction Co., 156 Cal. 443, 105 P. 255, 257, the court said: "It is settled by a long line of decisions that where, after the default of a defendant has been entered, a complaint is amended in matter of substance as distinguished from mere matter of form,

the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default. See Thompson v. Johnson, 60 Cal. 292; Reinhart v. Lugo, 86 Cal. 399, 24 P. 1089, 21 Am. St. Rep. 52; Witter v. Bachman, 117 Cal. 319, 49 P. 202; Woodward v. Brown, 119 Cal. 304, 51 P. 2, 542, 63 Am. St. Rep. 108; Linott v. Rowland, 119 Cal. 452, 453, 51 P. 687; Riverside County v. Stockman, 124 Cal. 224, 56 P. 1027; Tappendorff v. Moranda, 134 Cal. 421, 66 P. 491. The reason for this rule is plain. A defendant is entitled to opportunity to be heard upon the allegations of the complaint on which judgment is sought against him. His default on the original complaint is limited in its effect to that complaint; and, if by amendment a matter of substance is added, he should be given the opportunity to contest the same before any judgment is given against him on account thereof. The law, therefore, requires that the amended pleading shall be served on all the adverse parties, including defaulting defendants."

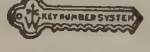
[5] In our opinion, the matter set up in this supplemental complaint and included in the judgment entered was a matter of substance and not merely of form, which added to the original cause of action and materially affected the rights of the appellants. The supplemental complaint asked for an entirely new relief, which was accorded in the judgment. The respondent, as substituted plaintiff, not only succeeded to the rights of the original plaintiff but asked for and was granted additional relief, which could not have been given under the original complaint. An additional evidence of debt was declared to be a lien upon the property and the debt ordered paid from the proceeds of sale, if such were sufficient. Only one judgment was entered, which included the additional matter in which the appellants had had no opportunity to appear and defend, and yet the entire judgment purported to bind them and foreclose their rights in the property. If the matters set up in the proposed answer are true, no court would give this same judgment in favor of the respondent. The appellants are entitled to their day in court and particularly should this be true in an equity case.

[6] The respondent relying upon the case of Zierath v. Superior Court, 35 Cal. App. 788, 171 P. 112, contends that since the court had jurisdiction in this matter, this action, even though erroneous, cannot now be corrected. In that case, a writ of review was sought and the court was limited to the question of jurisdiction. We are here concerned with an appeal from an order and questions of error may be considered as well.

[7] It is finally urged by the respondent that the questions raised by this appeal are now moot because the record shows that the sale of the property did not produce sufficient funds to allow anything to be paid upon the second lien. It is not a question of what happened later, or whether any money was actually applied upon the additional part of the judgment based upon the supplemental complaint, but whether the judgment itself was erroneous when entered. That question has not become moot and the error complained of is not affected by this subsequent development.

The appeal from the judgment is dismissed, and the order denying the appellants' motion to set aside the judgment and permit them to file an answer is reversed.

We concur: MARKS, J.; JENNINGS, J.



1 Cal.App.2d 560

In re HOWARD'S ESTATE.

MORRISON et al. v. KATZ et al.

Civ. 9610.

District Court of Appeal, First District, Division 2, California.

Oct. 23, 1934.

Hearing Denied by Supreme Court

Dec. 20, 1934.

1. Constitutional law ⇐70(1, 3)

Where statute specified manner of distribution of property upon death of surviving spouse and property had been separate property of previously deceased spouse and had passed to surviving spouse, court could not inquire into policy of statute or deviate from language used by Legislature to determine distribution upon death of surviving spouse (Probate Code, §§ 228–230).

2. Descent and distribution ⇐33

Sisters of deceased and daughter of predeceased brother, constituting blood heirs of deceased husband, *held* entitled over cousins of predeceased wife, constituting wife's blood heirs, to deceased husband's entire estate which came to him by descent from separate estate of his predeceased wife (Probate Code, §§ 228–230).

Appeal from Superior Court, San Francisco County; Frank H. Dunne, Judge.

In the matter of the estate of Charles James Howard, deceased. From an amended decree of partial distribution by which all property involved was distributed to Jane Morrow McDougall and others, Adelaide Rowe Morrison and another appeal, naming Phil C. Katz administrator, etc., and others as respondents.

Order affirmed.

I. F. Chapman, of San Francisco, for appellants.

Brobeck, Phleger & Harrison, of San Francisco, for respondents Jane Morrow McDougall and Clara Louisa Kirchoffer.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for respondent Clare M. Howard.

STURTEVANT, Justice.

This is an appeal from an amended decree of partial distribution on the judgment roll alone. There is no controversy over the facts.

[1, 2] The facts, taken from the amended decree of partial distribution, are these: Charles James Howard and Adelaide Rowe Howard were husband and wife up to the 22d day of February, 1922, when Adelaide Rowe Howard died intestate in San Francisco, she being a resident thereof at the time of her death and left estate therein. There never were any children born as the result of the marriage of Charles and Adelaide Howard. All the property involved in this appeal came to Charles James Howard by descent from the estate of his wife, Adelaide Rowe Howard. It was her separate property at the time of her death. Charles James Howard died intestate leaving the property which he had acquired by descent from his deceased wife, Adelaide Rowe Howard.

The blood heirs of Charles James Howard, the decedent, are the respondents, Jane Morrow McDougall, and Clara Louisa Kirchoffer, sisters of deceased, and Clare M. Howard, a daughter of a predeceased brother.

The blood heirs of Adelaide Rowe Howard, the predeceased wife of Charles James Howard, are the appellants, her cousins, Adelaide Rowe Morrison and Lilly Flageollet.

By the amended decree of partial distribution from which this appeal is taken all the property involved was distributed to respondents and nothing to appellants.

The respondents claim the entire estate to the exclusion of appellants and the appellants the entire estate to the exclusion of respondents.

Section 228 of the Probate Code deals with the descent of community property. In the instant case none was involved.

Section 229 of the Probate Code provides: "If the decedent leaves no issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, *such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation.*" (Italics ours.) Under the facts which we have recited the decedent's wife, Mrs. Howard, left no kith or kin coming within any one of the classes named in that section. It follows that no one of the claimants may rely on that section.

Section 230 of the Probate Code provides: "If there is no one to succeed to any portion of the property in any of the contingencies provided for in the last two sections, according to the provisions of those sections, *such portion goes to the next of kin of the decedent in the manner hereinabove provided for succession by next of kin.*" (Italics ours.)

The respondents quote the statutes and then they cite Davis v. Hart, 123 Cal. 384, at page 387, 55 P. 1060, 1061, as follows: "A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable. In such case it cannot be argued that the result is unjust or against policy. It is itself conclusive upon these subjects." Continuing, they claim that the decree appealed from was framed in strict accordance with the provisions of the statute and that it should be affirmed. We think the claim is entirely sound. The appellants quote some isolated sentences from In re Estate of Page, 181 Cal. 537, 185 P. 383; In re Estate of Davidson, 21 Cal. App. 118, 131 P. 67; In re Estate of Ross, 187 Cal. 454, 202 P. 641; In re Estate of Edwards, 202 Cal. 130, 259 P. 440; In re Estate of Watt, 179 Cal. 20, 175 P. 415; In re Estate of Brady, 171 Cal. 1, 151 P. 275; In re Estate of Mercer, 205 Cal. 506, 271 P. 1067. Thereupon they argue that section 229 of the Probate

Code and other sections of the Code show that the policy and reason of our statutes is that upon the death of the survivor of the marriage without issue, such property as is involved in this litigation should go to the family or families of the spouse or spouses through whose efforts the estate was accumulated. With the policy of the statute the court has nothing to do. As to the division of such property between the families of both spouses the Legislature has spoken. In speaking it has limited the persons who are entitled to receive. As the whole subject is one falling within the legislative power, the courts are not entitled to deviate from the language used by the Legislature.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

1 Cal.App.2d 520

WILEY v. SILSBEE.

Civ. 8845.

District Court of Appeal, Second District, Division 2, California.

Oct. 22, 1934.

1. Contracts ⇐111

Contract whereby wife agreed to pay attorney 10 per cent. of amount finally accepted by her as property settlement for services rendered in connection with divorce and property settlement with husband *held* void as against public policy.

2. Attorney and client ⇐143

Where contract to render wife services in connection with divorce and property settlement was void because compensation was based on contingent fee, attorney could recover reasonable value of services in quantum meruit.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by E. E. Wiley against Kathleen Silsbee. Judgment for plaintiff, and defendant appeals.

Affirmed.

David H. Cannon, of Los Angeles, and Thomas G. Nairn, of Phœnix, Ariz., for appellant.

Arthur S. Guerin, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Respondent, an attorney, brought this action against appellant to recover for professional services. He stated three causes of action in his complaint, one on quantum meruit, one on stated account, and one on open book account. Judgment was entered in his favor on the first cause on quantum meruit, on findings sustaining that cause, but adverse to the other two causes.

At the trial it was established by evidence that on February 24, 1930, appellant in writing retained respondent as her attorney for the purpose of effecting a property settlement with her husband and also obtaining a divorce. No compensation was at that time fixed or agreed upon. On March 12, 1930, a new contract in writing was executed by appellant and respondent, wherein appellant agreed to pay respondent, as her attorney, for services rendered in connection with divorce and property settlement with her husband, 10 per cent. of the amount finally accepted by her as a property settlement. Under his employment, respondent performed numerous services, and appellant does not herein question the justification of the court in finding under the evidence that the reasonable value of services rendered was the amount stated in the judgment.

Appellant does contend, however, that, the contract between the parties as above stated being void, quantum meruit will not lie, and recovery of the reasonable value of such services may not be had.

[1] That the contract here in question was void as against public policy is certain. Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L. R. A. 548; Parsons v. Segno, 187 Cal. 261, 201 P. 580; Ayres v. Lipschutz, 68 Cal. App. 134, 228 P. 720, 721; Theisen v. Keough, 115 Cal. App. 353, 1 P.(2d) 1015, 1018.

[2] It is likewise now established as a proposition of substantive law that, in a case of a contract to pay for services which is void as against public policy, there arises an implied contract to pay for services rendered thereunder, and the remedy of action sounding in quantum meruit is available to recover the reasonable value thereof. In Ayres v. Lipschutz, supra, on hearing by the Supreme Court, it was stated: "The contract being void as against public policy afforded no basis for a recovery which could have been had only upon a quantum meruit."

In Theisen v. Keough, supra, plaintiff sued on a contract very similar to the one here involved in one cause of action, and joined therewith a second cause on quantum meruit. The trial court adjudged the contract void as against public policy, and as to the quantum meruit cause found that plaintiff had been fully paid. On appeal, the court, after quoting from the case of Ayres v. Lipschutz, supra, the same paragraph as hereinabove quoted, said: "We therefore find the parties with no agreement or contract regulating the compensation to be paid; the attorney proceeding with the cause under the implied contract that he will be compensated in a reasonable amount for services performed."

In concert with the foregoing authorities, it has also been held that for benefits received under a void contract, not prohibited by law, the recipient will be held responsible on an implied contract for payment of the reasonable value thereof. Higgins v. San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670; Brown v. Bozeman (Cal. App.) 32 P.(2d) 168.

The judgment is affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

YOUNG et al. v. THREE FOR ONE OIL ROYALTIES et al.

L. A. 12648.

Supreme Court of California.

Oct. 11, 1934.

Rehearing Denied Nov. 8, 1934.

1. Licenses ⇐18½

At time of purchase in 1923 of beneficial interests in oil lease from national bank acting as trustee, national banks were subject to federal control, and hence were not subject to operation of Corporate Securities Act as corporations not subject to other supervisory powers (St. 1917, p. 673, § 2, subd. 3; p. 675, § 3; 12 USCA § 248 (k).

2. Statutes ⇐230

Essential change in phraseology of statutory provision indicates intention to change meaning of provision rather than to interpret it.

3. Licenses ⇐8(2)

Amendments to Corporate Securities Act making state and national banks subject to act except when issuing their own direct obligations *held* to essentially change act in respect to such corporations, as against contention that amendments interpreted act, and hence national bank selling beneficial certificates in oil leases before such amendment was excluded from operation of act (St. 1917, p. 673, § 2, subd. 3; p. 675, § 3; St. 1923, p. 87, § 2 (c); St. 1929, p. 1251, § 2 (b) (3).

4. Constitutional law ⇐46(1)

Where suit involved validity of national bank's sale as trustee of beneficial interests in oil leases made without permit of corporation commissioner before amendment to Corporate Securities Act subjected state but not national banks to its operation, alleged unconstitutionality of amendment in giving national banks preference over state banks would not be considered (St. 1917, p. 673, § 2, subd. 3; p. 675, § 3; St. 1923, p. 87, § 2 (c).

5. Licenses ⇐18½

National bank acting as trustee in selling certificates of beneficial interests in oil leases without permit of corporation commissioner was not subject to operation of Corporate Securities Act so as to permit purchaser's recovery of amount paid for certificate (St. 1917, p. 673, § 2, subd. 3; p. 675, § 3).

6. Appeal and error ⇐843(2)

Supreme Court would not decide whether claims for recovery of purchase price of certificates of beneficial interests in oil leases were barred by limitations, where such decision was not necessary for disposition of case and might be prejudicial to persons not parties to action.

7. Appeal and error ⇐959(3)
Pleading ⇐236(5)

Permitting amendment of complaint to conform to proof is largely discretionary, and trial court's determination will not be set aside unless abuse of discretion clearly appears.

In Bank.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Harry T. Young, as trustee for Ralph R. Martin and others, against the Three for One Oil Royalties and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

For prior opinion, see 31 P.(2d) 789.

W. C. Dalzell, of Los Angeles, for appellant.

G. C. DeGarmo, W. M. Crane, Glen Behymer, Earle M. Daniels, Ralph J. Brown, Paul W. Forker, Young & Young, Milton K. Young, Wilbur D. Finch, Dryer, Castle & Richards, Horton & Horton, Joseph K. Horton, Russell A. Barker, Desser & Bokofsky, Knight & Reynolds, A. Noah Borah, Leon K. Jonas, Joseph W. Aidlin, and Laurence W. Beilenson, all of Los Angeles, amici curiæ.

Edmund J. Lauro, Lauro & Boone, Philip N. McCaughan and McCaughan & McCaughan, all of Long Beach, Virgil G. Lewis, Francis D. Adams, Howard Waterman, Walter F. Haas, Haas & Dunnigan, H. G. Johnston, and Robert Clifton, all of Los Angeles, Louis Ferrari, of San Francisco, and Gerald E. Kerrin, Edmund Nelson, O'Melveny, Tuller & Myers, Louis W. Myers, and Freston & Files, all of Los Angeles (Overton, Lyman & Plumb and Ralph E. Lewis, all of Los Angeles, of counsel), for respondents.

Laurence W. Beilenson, of Los Angeles, amicus curiæ.

CURTIS, Justice.

The facts of this case are adequately and correctly stated in our former opinion (31 P.(2d) 789) as follows:

"This appeal is from a judgment in favor of the defendants in an action brought to recover the amounts paid for certain certificates of beneficial interests in a common-law trust, it being the theory of the complaint that the sales of the interests were in violation of the Corporate Securities Act (St. 1917,

p. 673, as amended), and that defendants had falsely and fraudulently represented that they had secured a permit from the corporation commissioner to sell the certificates and had fully complied with the law respecting the sale of securities. Briefly, the facts are as follows: On January 3, 1923, the respondents R. G. Welch, W. J. Dallas, and E. J. Boland, as lessees, assigned to the Long Beach National Bank as trustee three oil leases and formed a common-law trust for the purpose of apportioning any production arising from the operation of wells to be drilled upon the property to the lessors, to purchasers of beneficial interests, and to themselves as owners of the interests not sold. The respondent Bank of Italy, by reason of a change of ownership of the Long Beach National Bank, became trustee to succeed the latter on May 14, 1924. The complaint was filed May 20, 1929, by appellant as trustee for Ralph R. Martin, Albert H. Bailey, and C. P. Wiand (assignee of E. D. Lindley), who purchased certificates of beneficial interests on the following dates, paying therefor the sums set after their names: February 10, 1923, Ralph R. Martin, one unit, $1,600; March 1, 1923, Albert H. Bailey, one unit, $1,800; and April 12, 1923, E. D. Lindley, two units, $3,200. The money was paid to R. G. Welch as agent for the Long Beach National Bank as trustee and the other defendants, the bank as trustee issuing to the purchasers the certificates of beneficial ownership. In other words, the action was not commenced until more than six years after the sales were made and the money paid in. Unattacked findings of the court reveal that Martin, Bailey, and Lindley each knew at the time of his purchase he was buying an 'interest or unit in the proceeds and avails arising out of said trust known as the "Three for One Oil Royalties"'; that during the period when the sales were made the defendants did not have any permit from the corporation commissioner authorizing them, or the trustee, to sell beneficial interests in the trust. Another finding, supported by a stipulation of counsel, is to the effect that inquiry was made of the corporation commissioner concerning whether a permit for the 'Three for One Oil Royalties' was necessary and the commissioner ruled that it was not necessary. Other findings are in substance that none of the defendants represented that a permit had been issued, or concealed any facts from the purchasers, or practiced any fraud upon any of them. The defendants interposed the plea that the complaint was barred by the statute of limitations and the court concluded that this defense was well grounded."

As the basis for recovery by the appellant, he contends that the certificates of beneficial interests acquired by the original purchasers thereof and now owned by the appellant are void for the reason that the Long Beach National Bank, to whom the trust property had been conveyed, and who, as trustee under said conveyance, issued and sold said beneficial certificates, had no permit from the corporation commissioner, at the several times when said certificates were issued and sold, authorizing the sale or issuance of said certificates, or any of them. The answer to this contention depends upon certain provisions of the Corporate Securities Act which it is conceded controls in such matters, and which expressly prohibit the sale or issuance of securities of the character of those herein involved unless such a permit is issued by the corporation commissioner of the state. These provisions of the act except certain corporations from their requirements, and the question presented on this appeal is whether the Long Beach National Bank, in issuing and selling said certificates as trustee of said trust, came within the general provisions of said act or of the aforesaid exceptions.

At the time said certificates were purchased by plaintiff's assignors in the months of February, March, and April, 1923, subdivision 3 of section 2 of the Corporate Securities Act (St. 1917, p. 673, § 2, subd. 3) read in part as follows:

"The word 'company' includes all domestic and foreign private corporations, associations, joint stock companies, and partnerships, of every kind, and also trustees, as hereinafter defined; excepting therefrom:

"(a) All national banking associations and other corporations organized and existing under and by virtue of the acts of the congress of the United States;

"(b) * * *

"(c) All corporations now or hereafter organized under the laws of this state for the purpose of conducting the business of banking within this state and all corporations transacting insurance business within this state;

"(d) * * *

"(e) * * *." (As amended by St. 1921, p. 1115.)

Subsection (b) excepts public utilities; subsection (d) excepts building and loan associations; and subsection (e) excepts certain nonprofit corporations. We are not particularly concerned with the last named class of corporations. In later subdivisions of said section 2, a trustee is defined as any person or com-

pany executing a voluntary trust expressly created by an instrument in writing—with certain exceptions not material to any question herein. By section 3 of said act (St. 1917, p. 675, § 3), it is provided that no company shall sell its securities without first obtaining a permit from the corporation commissioner authorizing such sale. Reducing these provisions of the act to simple terms, we have company defined to include every domestic or foreign corporation or association of individuals, including trustees, except five specified types of corporations, one of which is national banks, with the prohibition against any company so defined issuing securities without first securing a permit from the corporation commissioner authorizing the sale of such securities. It will thus be noted that in defining companies which are required to secure a permit from the corporation commissioner before issuing securities, national banks are expressly excepted from said definition. Appellant concedes that national banks when issuing their own securities—that is to say, securities against their own assets—are not subject to the provisions of the act requiring a permit, but he contends that when a national bank issues securities other than its own, that is, as in the present instance, when it acts in the capacity of a trustee in issuing securities of other corporations or individuals, the exception above noted does not apply. On the other hand, the respondents contend that the section of the act is clear and unambiguous, and means just what its plain language imports—that is, that a national bank as such is excepted from the definition of "company" and that while acting as such, either in issuing its own securities, or as a trustee in issuing those of other persons or corporations, it is not required to secure a permit before taking such action.

[1] It was held in the case of In re Flesher, 81 Cal. App. 128, 252 P. 1057, 1059, in construing the Corporate Securities Act, that it was "the legislative intent to exclude from the definitive words of the section all corporations subject to some other supervisory power of the state." Under this construction of the act, national banks were assumed to belong to those classes of corporations excepted from the operation of the act. Appellant and some of the amici curiæ supporting the position of appellant in an exhaustive argument make the contention that under the laws of the United States as they were in effect at the date of the enactment of the Corporate Securities Act, national banks acting in the capacity of trustees were not under the regulation of any other power. This contention we think cannot be sustained. The present Corporate Securities Act was enacted in 1917, and the provisions with which we are now dealing were in the original act. They were not amended until 1923. They were, therefore, in force at the dates when the securities herein involved were issued. National banks were then subject to federal regulation under a statute enacted in 1913. 38 Stats. at Large, p. 262, U. S. Stats. 1913, chap. 6, § 11 (see 12 USCA § 248(k). By this statute the Federal Reserve Board is given power, "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe." It may be true that at the date of the passage of the Corporate Securities Act no detailed set of rules and regulations had been prescribed by the Federal Reserve Board in pursuance of the power given by said statute concerning or regulating the sale or issuance of securities by a national bank acting in the capacity of a trustee, yet by this statute national banks in such transactions were made subject to the regulation of the Federal Reserve Board. When, therefore, the Legislature in 1917 enacted the Corporate Securities Act, and excepted from its terms, national banks, it may well have considered, and we think it did so consider, that national banks were subject to federal control and regulation, and for that reason should be excluded from the requirements of the legislative act then under consideration.

[2, 3] Respondents call our attention to the amendment of the Corporate Securities Act in 1929 (Stats. 1929, pp. 1251, 1253, § 2(b) (3), as indicating a belief by the legislature at that time that national banks when acting as trustees were not subject to the Corporate Securities Act prior to said amendment. By the amendment in 1929, national banks were expressly made subject to the Corporate Securities Act except when issuing their own securities, or to express it more accurately, the provisions of the act as amended in 1929 requiring a permit shall not apply to any security issued by and representing an interest in or a direct obligation of a national bank. It is conceded that after this amendment a national bank when acting as trustee in the sale of securities not its own is required to have a permit from the corporation commissioner to issue such securities. Respondents contend that such amendment would have been entirely unnecessary and useless had the act as originally enacted required such a permit from

a national bank when issuing securities as a trustee for other parties. Appellant's reply to this contention of respondents is that the amendment of 1929 was enacted simply for the purpose of interpreting the act or clarifying any uncertainty or ambiguity that might exist in the original draft of the act. The history of the act since its enactment in 1917 does not in our opinion bear out appellant's contention. The Corporate Securities Act as first adopted excepted both state and national banks from its provisions requiring corporations before issuing certificates to secure a permit from the corporation commissioner. In 1923, but after the sale of the certificates now owned by appellant, the Legislature amended said act so as to except state banks from the terms of said act only "when such corporations are issuing securities of their own issue against their own assets." Stats. 1923, p. 87, § 2(c). The terms of the act in so far as they applied to national banks were left as originally enacted. In 1929, however, the act was amended as above indicated. Had the Legislature by these amendments intended simply to clarify the provisions of the act relative to state and national banks, it seems most reasonable to suppose that it would have in 1923, when it amended the act as it affected state banks, also made the same amendment of the act as it affected national banks. The same uncertainty or ambiguity, if any such existed, was present in each provision of the act affecting the two classes of banks. Why clear up one uncertainty and leave the other, particularly so when they both are found in the same section of the act and deal with similar subjects? Evidently the Legislature had some other purpose than merely clarifying the provision of the act relating to state banks by its amendment in 1923. It evidently intended to place upon state banks a requirement not theretofore imposed upon them by the Corporate Securities Act. So when the Legislature in 1929 placed practically the same restriction upon national banks that it had previously imposed upon state banks, we think the conclusion is irresistible that it was done with the same intent as that which actuated it in amending the act in 1923 relative to state banks. In each case there was in our opinion an essential change in the terms of the act as it applied respectively to these two classes of corporations. The rule of interpretation in such cases has been stated as follows: "Ordinarily, it would seem that any essential change in the phraseology of a statutory provision would indicate an intention on the part of the legislature to change the meaning of such provision rather than to interpret it." 23 Cal. Jur. 778. We are, therefore, of the opinion that the amendment of the Corporate Securities Act in 1929 in the respect above indicated was not for the purpose of interpreting it, but to change the meaning of the act as claimed by respondents.

[4] A large part of the briefs both of the parties hereto and of the amici curiæ has been devoted to the question of the constitutionality of those sections of the Corporate Securities Act herein involved, governing the issuance of securities by national and state banks without a permit from the corporation commissioner. These arguments are evidently predicated upon a misapprehension of the law as it existed at the respective dates when the certificates now owned by the plaintiff were acquired by the original purchasers. The contention is made with much earnestness that if the provision as to national banks is construed so as to exempt a national bank from the duty of securing a permit when issuing certificates as a trustee, such a preference is given national banks over state banks as to render the act unconstitutional in that respect. This question does not arise in this proceeding as the Corporate Securities Act in force at the time said securities were purchased applied equally to each of these two classes of banks, as will readily be seen from the provisions of said act hereinbefore set forth. After said certificates were purchased, as we have stated, the act was amended so as to limit the right of state banks when operating without a permit from the corporation commissioner to the issuance of their own securities, leaving the provisions as to national banks the same as originally enacted. But with the provisions of the act in force after such amendment we are not concerned as the rights of the parties herein are governed by the terms of the act before such amendment.

[5, 6] A second contention is made by appellant, and that is, that the trial court erred in finding in defendants' favor on their plea of the statute of limitations. As we are of the opinion that the certificates now held by the plaintiff were legally issued for the reason that no permit was required of the bank at the time of their issuance, the question as to the bar of the statute of limitations is not necessary to the decision herein. Nevertheless, we are urged by the respondents and a number of amici curiæ appearing herein to decide this question as a large number of cases involving state trust companies are now pending in the courts awaiting a decision of this question. Notwithstanding this request, we have decided to leave this question for future action. We have reached this conclusion for

the reason that any decision that we might render herein, if adverse to the respondents, would be dictum pure and simple. It hardly seems fair that we should pass upon this important question and possibly prejudice the rights of litigants in other pending actions except when the conditions are equal and the decision binding upon all parties to the litigation. We therefore express no opinion upon this question and leave the same to be determined in some future proceeding in which all parties therein will be upon equal footing.

[7] Lastly, the appellant complains of the denial by the trial court of his motion to amend his complaint to conform to the proof. It has repeatedly been held that such matters are largely in the discretion of the trial court and its determination thereof will not be set aside unless it clearly appears that there has been an abuse of such discretion. No such showing has been made by appellant in respect to the trial court's denial of his said motion.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; PRESTON, J.; SEAWELL, J.

1 Cal.2d 712

In re CAZAURANG'S ESTATE.

LEES v. CARREY.

L. A. 14564.

Supreme Court of California.

Oct. 31, 1934.

1. Attorney and client ⇐75(1)

Client may change attorneys notwithstanding contingent fee has been agreed on, irrevocable power of attorney has been given, or attorney has performed labor and expended money in behalf of client (Code Civ. Proc. § 284).

2. Attorney and client ⇐75(1)

Contract whereby client agreed to pay attorneys 30 per cent. of amount to be recovered, and assignment to attorneys of 30 per cent. of client's recovery *held* ineffectual to create power coupled with an interest so as to deprive client of right to substitute attorneys (Code Civ. Proc. § 284).

3. Attorney and client ⇐75(1)

Supreme Court *held* proper forum in which to seek substitution of attorneys where appeal was then pending in Supreme Court (Code Civ. Proc. § 284).

4. Attorney and client ⇐75(1)

Substitution of attorneys during pendency of appeal before Supreme Court affected only matters involved in proceeding on appeal, and if client desired substitution in other matters, client would be required to seek order of court in which such matters would be pending (Code Civ. Proc. § 284).

In Bank.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

In the matter of the estate of Jean Cazaurang, also known as J. Cazaurang, also known as John Cazaurang, deceased, wherein Marie Lees, contestant, appeals from a ruling in favor of Robert P. Carrey, contestee. On appellant's motion for substitution of attorneys.

Motion granted.

A. E. Paonessa, of Los Angeles, C. A. Ruby, of Lynwood, C. E. Burch and Gray, Cary, Ames & Driscoll, all of San Diego, and A. G. Reily, of Los Angeles, for appellant Marie Lees.

Jerome O. Hughes, of Los Angeles, and C. G. Selleck and Fitzgerald & Selleck, all of San Diego, for respondent Martin L. Haines.

Adam Thompson, Renwick Thompson, and Gordon Thompson, all of San Diego, for respondent Robert P. Carrey.

CURTIS, Justice.

Motion for substitution of attorneys. Petitioner has moved this court in the matter of an appeal pending herein for a substitution of A. G. Reily as attorney in the place and stead of her present attorneys, Gray, Cary, Ames & Driscoll. Her affidavit contains a long recital of alleged grievances not necessary to here repeat. The attorneys of record have filed herein affidavits and exhibits in opposition to the motion for substitution of attorneys herein, apparently with the idea of refuting the charges contained in the papers filed by petitioner. We are not at liberty to weigh the reasons which may have prompted petitioner to ask for a change of her attorneys. Our only duty is to pass upon her legal right to make such change.

[1] By section 284 of the Code of Civil Procedure, petitioner is given the right to change her attorneys at any stage in the action unless the attorney has a vested interest in the subject-matter of the litigation. This right

of discharge exists even though a contingent fee has been agreed upon, or an irrevocable power of attorney has been given. The fact that said attorney has performed labor and expended money for and in behalf of the client does not change the rule. Gage v. Atwater, 136 Cal. 170, 172, 68 P. 581, 582; Woodbury v. Nevada, etc., Ry. Co., 121 Cal. 165, 53 P. 450; Todd v. Superior Court, 181 Cal. 406, 184 P. 684, 7 A. L. R. 938; Scott v. Superior Court, 205 Cal. 525, 271 P. 906, 909. The reason for the rule is well stated in Gage v. Atwater, supra, wherein the court said: "In the absence of any relation of the attorney to the subject-matter of the action, other than that arising from his employment, the client has the absolute right to change his attorney at any stage in the action. The interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest. The relation between them is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney."

The attorneys of record, however, are of the opinion that their contract of employment with petitioner and the assignment by her of an "undivided thirty per cent. (30%) of all my right, title and interest in, to and of the estate of the above named decedent," creates in them a power coupled with an interest in the subject-matter of the action, and that by reason of this interest petitioner may not substitute them out of the case. The exact language of the agreement, pertinent to the present motion, is as follows:

"Now, therefore, it is agreed as follows:

"1. First party (petitioner) hereby employs second party as her attorneys to represent her in connection with any and all proceedings for the recovery on behalf of first party of any and all property or things of value to which she may be legally entitled as legatee under the said will of said decedent, or otherwise.

"2. As consideration for the professional services to be rendered by said attorneys, first party agrees and hereby binds herself, her heirs and legal representatives, to pay second parties, their heirs and legal representatives, a fee equal in amount to thirty per centum (30%) of the value of whatever sums of money or property, or evidences of indebtedness, or securities, or other things of value which may be awarded to first party, her heirs or legal representatives, either by judgment or decree, or by compromise or settlement, from the estate of Jean Cazaurang, deceased; said amount of thirty per centum (30%) to be computed upon the net amount of money or property, or other things of value which may be distributed to said first party, her heirs or legal representatives, after deducting therefrom all taxes, fees, charges and court costs levied or imposed upon her said interest.

"3. First party does by these presents, assign, transfer and set over to said attorneys, a thirty per centum (30%) interest in and to such portion of the estate of Jean Cazaurang, deceased, as said first party now has or hereafter may acquire; provided, however, that there shall be first deducted from the interest of the said first party, her heirs or legal representatives, all taxes, fees, charges and court costs.

"4. It is mutually understood and agreed by and between the parties hereto that said attorneys shall have control of the prosecution of said claim to final determination. * * *

"5. It is further understood and agreed that in no event shall first party sell, assign, transfer, compromise or otherwise encumber or dispose of said claim or any part thereof without the written consent of the attorneys, nor revoke, or abridge, the rights and powers of the attorneys hereunder, and this agreement shall not be affected in any particular by any revocation of the authority conferred upon said attorneys, nor by any services rendered or which may be rendered by other attorneys, or by the first party.

"6. It is likewise understood and agreed that second parties have the power to compromise or settle the claim of first party, with power to receive and receipt for any deed, negotiable instrument, security or other thing of value, which may be issued in settlement of said claim, and to endorse, deposit and collect in the name of the first party any check or draft, certificate of stock or promissory note, which may be received in said settlement, and to receive and retain from the proceeds of the same the amount of the fee herein stipulated to be paid.

"7. Second parties agree to diligently prosecute said claim to its final determination to the best of their professional ability."

The assignment upon which the attorneys place considerable reliance reads in part as follows: "I, Marie Lees, for valuable consideration, do hereby grant, bargain, sell, assign, transfer and set over unto E. W. Brew-

er, Jr. and Gordon Gray, Walter Ames and J. G. Driscoll, Jr. attorneys at law, an undivided thirty per cent. (30%) of all my right, title and interest in, to and of the estate of the above-named decedent, and I do hereby authorize the Superior Court of the State of California, in and for the County of San Diego, to make distribution to said attorneys of said undivided interest in and to all the property of said estate and interest in property of said estate to which I would, but for this assignment, be entitled. To Have And To Hold The Same unto the said E. W. Brewer, Jr. and Gordon Gray, Walter Ames and J. G. Driscoll, Jr., their heirs, executors, administrators, and assigns forever."

[2] Despite the language of said contract and assignment, evidently framed with the idea in mind and for the express purpose of creating a power coupled with an interest which would render said employment as attorneys irrevocable, we are of the opinion that petitioner herein is entitled to an order of substitution. In the case of Todd v. Superior Court, supra, and Scott v. Superior Court, supra, contracts of employment and assignments similar in purport, although not identical in language with those of the instant case, were held to be ineffectual to create a power coupled with an interest, and in both of those cases substitution of attorneys was granted.

[3, 4] In Scott v. Superior Court, supra, the assignment contained the following language: "Know All Men By These Presents that Marion Scott * * * does by these presents grant, bargain, sell, assign, transfer and set over unto the said party of the second part, one-half of the net recovery of all money and property received by said party of the second party from the above named estate." The court in a careful analysis of the legal effect of the contract of employment and assignment held that the interest which the attorney gained by virtue of said assignment in the money and property secured for his client, a part of which he was to get as compensation for his services, was "an interest in that which was to be produced by the exercise of his power as attorney for his client, and did not amount to an interest in 'the subject of the agency' within the meaning of section 2356 of the Civil Code," which acts to prevent the revocation by the principal of the power of any agency coupled with an interest in the subject of the agency.

We can see no difference in the legal effect of the contract of employment and assignment in the above cases and the contract of employment and assignment involved herein. In each case the assignment was given as security for the payment of the contingent fee and reimbursement only and in neither case was there any relation of the attorney to the subject-matter of the action, other than that arising from his employment. While there may be considerable doubt as to the wisdom of the petitioner in seeking such substitution inasmuch as it is possible that she may ultimately, by reason of several substitutions of attorneys, find herself in the position of having transferred and assigned away to the respective attorneys all of her right, title, and interest in said estate, as contingent fees, nevertheless she is entitled as a matter of right to such substitution. As the appeal is now pending in this court, this is the proper forum in which to seek substitution. Jacobus v. Jacobus, 208 Cal. 562, 563, 282 P. 796. The substitution, however, will only affect the matters involved in the proceeding here on appeal, and if she desires substitution in other matters, it will be necessary for her to seek an order of the court in which such matters are pending.

It is, therefore, ordered that A. G. Reily be substituted as attorney of record for petitioner herein in the proceeding involved in this appeal in the place and stead of the firm of Gray, Cary, Ames & Driscoll.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.

1 Cal.2d 747

WALSH et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 15146.

Supreme Court of California.

Nov. 1, 1934.

Rehearing Denied Nov. 30, 1934.

1. Master and servant ⇐417(8)

Mere error in procedure is not ground for annulling Industrial Accident Commission's award.

2. Master and servant ⇐405(4)

Physician's report to Industrial Accident Commission that condition of employee's lumbar vertebræ was fracture and of traumatic, not congenital, origin *held* sufficient to support award of compensation, though controverted by other physicians' reports.

3. Master and servant ⇐417(8)

Industrial Accident Commission's award of compensation, supported by one physician's report, should stand, though referee acted improperly in not giving employer and insurer opportunity to controvert such report, where they offered controverting reports of other physicians in petition for rehearing (St. 1917, p. 848, § 19 (c) (7).

In Bank.

Proceeding by James Kenney, employee, for adjustment of his claim for compensation under the Workmen's Compensation Act, opposed by Thomas Walsh, employer, and the Ocean Accident & Guarantee Corporation, insurer. Compensation was awarded by the Industrial Accident Commission, and the employer and insurer petition for review of the award.

Award affirmed.

Redman, Alexander & Bacon, of San Francisco, for petitioners.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

LANGDON, Justice.

This is a petition to review an award of the Industrial Accident Commission. Respondent Kenney, the employee, fell from a ladder while engaged in his work as a painter, sustaining various injuries. Petitioners, the employer and his insurance carrier, admitted liability, and gave medical treatment and compensation. Kenney filed an application before the commission for an adjustment of claim, and a hearing was had. The sole question was as to the nature and extent of the disability. Among other conditions, the medical report submitted by petitioners showed a "spondylolisthesis" of the fifth lumbar vertebra, which the examining doctor asserted was congenital and not related to the accident. The applicant sought leave to secure a medical report on his behalf, and an order was made permitting him to file a report of Dr. Sonnenberg within five days; the case to be submitted five days later unless further proceedings were requested. Nearly a month later, Kenney filed a report, not by Dr. Sonnenberg, but by Dr. Cleary, who stated that the condition described above was a fracture, and of traumatic and not congenital origin.

Upon receiving a copy of this report, petitioners requested a further hearing to present evidence in contradiction thereof, but were advised by the referee that he had already decided to rule in favor of the applicant, and that any attack that they desired to make on the report could be embodied in a petition for rehearing. Thereafter the commission made its findings and award. Petitioners sought a rehearing and offered reports of Drs. McChesney and Ruggles to the effect that the alleged fracture was a congenital anomaly. Rehearing was denied and a review was sought.

Petitioners contend that the award constitutes a denial of due process of law, in that it was rendered upon evidence received in the record after the hearing and without notice or opportunity to controvert it. They also contend that the award was made in violation of section 19 (c) (7) of the Workmen's Compensation Act (St. 1917, p. 848) for the same reason, said section providing that reports shall be served upon other parties to the proceeding and opportunity be given to produce testimony in rebuttal before the decision is rendered.

[1-3] It may be conceded that the referee acted improperly in reaching his decision upon the report without giving petitioners an opportunity to controvert it. But a mere error in procedure is not a ground for annulling the commission's award. Massachusetts Bonding & Ins. Co. v. Industrial Accident Commission, 176 Cal. 488, 168 P. 1050; Frankfort Gen. Ins. Co. v. Pillsbury, 173 Cal. 56, 159 P. 150. Petitioners were eventually in a position to present to the commission, in their petition for rehearing, all the evidence deemed by them necessary to controvert the showing of the applicant. The commission, in ruling on that petition, was able to reach a decision on the merits upon a consideration of all of the evidence. The report of Dr. Cleary,

though controverted by several reports submitted by petitioner, is sufficient to support the decision. If we were to annul the award and remand the proceeding to the commission, that body could make the same award on the same evidence, and we would then be bound to affirm it. It thus appears that the irregularity in the proceeding, while not commendable, did not deny any substantial right of petitioners, and that if petitioners were to prevail in this proceeding in review, they would gain nothing but delay. Under these circumstances we think that the decision of the commission should stand.

The award is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; TYLER, Justice pro tem.

1 Cal.2d 681

SPENCER et al. v. CALIFORNIA NAT. BANK OF LONG BEACH et al.

L. A. 14360.

Supreme Court of California.

Oct. 22, 1934.

Rehearing Denied Nov. 1, 1934.

1. Judgment ⇐850

Evidence *held* to sustain finding that judgment creditor had not assigned part of judgment to his attorney.

2. Assignments ⇐48

Equitable prior assignment may be created under such circumstances that to deny its existence would be to permit fraud to be perpetrated by subsequent assignee on persons claiming under equitable assignment.

3. Judgment ⇐850

Evidence *held* to justify court in refusing to find that equitable assignment of judgment existed to knowledge of judgment debtor; hence satisfaction of judgment executed by judgment creditor had full operation as to claimants under alleged equitable assignment.

In Bank.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by A. B. Spencer, Floyd S. Sisk, as trustee in bankruptcy of the estate of Andrew M. Strong, a bankrupt, and others against the California National Bank of Long Beach and others. From an adverse judgment, Floyd S. Sisk, as trustee in bankruptcy of the estate of Andrew M. Strong, a bankrupt, and others appeal.

Affirmed.

Newlin & Ashburn, A. W. Brunton, and Koenig & Brunton, all of Los Angeles, for appellants.

Dana R. Weller and C. F. Culver, both of Los Angeles, and G. M. Spicer, W. O. Wanzer, and Doyle, Clark, Thomas & Johnson, all of Long Beach, for respondents.

SHENK, Justice.

Appeal from a judgment for the defendant Barnes. The action was brought to recover the sum of $7,906.02 on deposit with the defendant bank, and levied upon under execution to satisfy partially a judgment of the plaintiff, Spencer, against the defendant Barnes.

Prior to 1909 Spencer and Barnes were copartners in the sale of certain mining properties. Barnes sold the properties and collected the proceeds. Spencer engaged Messrs. Andrew M. Strong and Lewis R. Works as his attorneys to prosecute his claim against Barnes for an accounting and a share of the proceeds of the sale, under a written agreement to pay his attorneys 40 per cent. of any recovery. In an action commenced in 1909 in the superior court in Los Angeles county, in which an amended complaint was filed by said attorneys in 1912, the plaintiff recovered a judgment for $69,325 against Barnes. Suit on the judgment was brought in the state of Oregon under an agreement with Oregon attorneys, Messrs. Oscar Hayter, W. T. Slater, and F. M. Etheridge, to pay them 55 per cent. of any amounts recovered in Oregon. There is evidence indicating that there was also an oral agreement by Spencer to pay the California attorneys an additional 15 per cent. of the amounts recovered on the California judgment. The California and Oregon attorneys agreed among themselves respecting a division of their percentages of any proceeds from both judgments. At various times moneys aggregating some $9,000 were collected pursuant to levies of execution and divided 45 per cent. to Spencer and 55 per cent. to the attorneys.

In December, 1926, in California, an execution was issued and levied upon a credit of $7,906.02 in the name of Legene S. Barnes

with the defendant California National Bank of Long Beach. The defendant Elbe Oil Land Development Company claimed the fund. In April, 1928, the present action was commenced by Spencer, represented by Newlin & Ashburn and Arthur T. George, as his attorneys, against Barnes, the bank, and the development company, to determine the ownership of the fund. While the action was pending, and on June 19, 1930, Spencer settled the claim against Barnes for the sum of $20,000. In the settlement Spencer was represented by F. D. R. Moote, and Barnes by G. M. Spicer. Spencer executed and delivered to Grace D. Barnes, wife of the defendant Barnes, an assignment of the California judgment. Mrs. Barnes executed a satisfaction of said judgment which was filed and entered the next day.

Subsequently on motion the five California and Oregon attorneys, or their representatives, who claimed an interest in said judgment and in the fund held under the garnishment, were substituted as parties plaintiff in the action and filed a supplemental complaint. On the trial the Elbe Oil Land Development Company disclaimed any interest in the fund. The issues framed by the supplemental complaint and answer thereto left for determination the main question in this case, viz., whether there existed an assignment by Spencer to the substituted plaintiffs of 55 per cent. of the California judgment and whether the defendant Barnes and his wife had such notice or knowledge of any assignment as to prevent the effect of the satisfaction of the judgment in so far as the interest of the substituted plaintiffs was concerned.

The trial court found that Spencer did not assign any part of the California judgment to any of the substituted plaintiffs, and that the latter had no right, title, or interest therein or in the fund, and rendered judgment for the defendant Barnes. The principal assignment of error on this appeal by the substituted plaintiffs is that there is no support in the evidence for that finding.

[1] The appellants predicate their ownership of 55 per cent. of the judgment and their right to recover in this action on an alleged written assignment to the California attorneys of 40 per cent. of the California judgment in 1912, when the judgment was rendered, and an additional 15 per cent. in 1913, when the Oregon action was commenced, and of which the defendant Barnes, Mrs. Barnes and their attorney, Spicer, had knowledge. No such assignment was ever recorded, and no written assignment was produced; but proof of the circumstances of its alleged loss was furnished. There is nothing in the findings of the trial court to negative the existence of an understanding between Spencer on the one hand and the attorneys on the other that the latter were to have 55 per cent. of any amounts recovered on the California judgment, as well as on the Oregon judgment. There is evidence in the record however, to support the conclusion of the trial court, furnished by the testimony of both the plaintiff, Spencer, and the appellants, that the only written agreement between the parties was the agreement made before or about the time the amended complaint was filed, which fixed a contingent fee of 40 per cent. of any recovery. The plaintiff testified that such a written agreement or "assignment" was made. Also, in a written statement made by Lewis R. Works and received in evidence, he said: "I remember that Mr. Strong and Mr. Spencer came together to me to enlist my services in the trial of the case. After a conversation between us it was agreed that Mr. Spencer should make written assignment to Mr. Strong and myself of a certain percentage of any judgment to be procured, the amount of which percentage I do not now remember. My recollection is that I was told, but do not know when, that this assignment had been executed, but I do not recollect ever having seen it and it is possible, and in fact probable, that I never did see it. If it was ever in my possession it was turned over in 1913, when I went on the superior bench, to my then partner. * * *" In view of this testimony and the inferences and deductions which the trial court could reasonably draw from the whole evidence, we may not declare that the finding that there was no assignment of an interest in the judgment is without support in the record.

It is contended that nevertheless the trial court should have found that an equitable assignment was created which operated to effect a transfer to Mrs. Barnes only of Spencer's 45 per cent. share. In this respect reliance is placed on the proof of the lost written agreement for a contingent fee of 40 per cent., the oral understanding for the additional 15 per cent., the conduct of the plaintiff based thereon, together with sufficient evidence, so it is claimed, in the record that the understanding respecting the 55–45 per cent. division of the proceeds of the judgment was known at least to defendant Barnes and Attorney Spicer, who acted for both Mr. and

Mrs. Barnes in the settlement, assignment, and satisfaction of the judgment.

[2] That an equitable prior assignment may be created under such circumstances that to deny its existence would be to permit a fraud to be perpetrated by the subsequent assignee upon the persons claiming under the equitable assignment is, perhaps, not open to question. Reliance is placed upon La Fetra v. Hudson Trust Co., 203 App. Div. 729, 197 N. Y. S. 332, as a case involving circumstances similar to those presented here, and for that reason an authority that in the present case an equitable assignment existed of which the defendant Barnes and Mrs. Barnes had notice. In that case the plaintiff had prosecuted to judgment a claim in behalf of one Springer, under a contract of employment pursuant to which the plaintiff attorney was to receive 40 per cent. of the recovery. In a certain loan transaction between Springer and the defendant in that action, the latter demanded additional security. Springer offered to put up an assignment of the judgment, but stipulated with Lewis, the defendant's treasurer, that he was the owner of but 60 per cent. of the judgment, and that the plaintiff was the owner of the remaining 40 per cent., and he could therefore assign but the 60 per cent. interest owned by him. Lewis, however, in order to make a showing to the directors of the bank, insisted on a transfer of the whole judgment in form, on the assumption that there would be sufficient security without applying the assignment, or at least the plaintiff's interest in the judgment, to the satisfaction of the debt. Lewis himself then so prepared the assignment and had Springer execute it. The defendant in that case applied the whole of the proceeds of the judgment to Springer's indebtedness to it. The trial court directed a verdict for the defendant. On appeal, the judgment entered on that verdict was reversed and judgment directed for the plaintiff on the ground of the existence of an equitable assignment to the plaintiff of which the defendant had notice. What was stressed in that case as giving basis to the conclusion that an equitable assignment existed which was binding on the defendant was not so much the fact of the understanding between the attorney and his client, which, standing alone, constituted no transfer of any interest in or, under the facts of that case, any lien on the judgment, but the fact that the client had informed the defendant that he had "assigned" 40 per cent. of the judgment to the attorney, and himself owned but 60 per cent. which was available as collateral security.

[3] There is no comparable evidence in the case before us. It may be assumed that the defendant Barnes supposed that some understanding existed as between Spencer and the appellants, based on a contingent fee arrangement, for a division of the proceeds of the judgment, but this is far different from saying that the defendant's knowledge was that an assignment of a partial interest in the judgment existed. Without some further notice to the defendant, such as existed in the case of La Fetra v. Hudson Trust Company, supra, or in the case of McGown v. Dalzell, 72 Cal. App. 197, 236 P. 941, of facts showing an intent to transfer an interest in the judgment to the appellants, there is nothing in the defendant's supposed knowledge of an arrangement for a contingent fee based on a percentage necessarily to inhibit his activities to obtain a settlement and satisfaction of the judgment and thus a release of the garnishment. Mansfield v. Dorland, 2 Cal. 507; Gage v. Atwater, 136 Cal. 170, 68 P. 581; 3 Cal. Jur. p. 682. It may be argued and it may be assumed that notice of only such facts as actually existed would not have affected the final result in the La Fetra Case. But it must be remembered that the present case is not an action against a third person having knowledge of the facts, to whom the proceeds of the judgment were paid, for a partial recovery thereof. Here the attempt is to bind the judgment debtor, after the judgment has been settled and satisfied, to respond to the appellants' claim of an interest in the judgment. The question of the defendant's knowledge was primarily one for the trial court. The record shows that the trial court was justified in concluding inferentially either that Barnes had no actual knowledge of the arrangement between Spencer and his attorneys, or that the knowledge possessed by him, in the absence of any notice or knowledge of an actual assignment to the appellants of an interest in the judgment, would serve only to give rise to a belief that the extent of the appellants' rights was to a percentage of the proceeds of the settlement in the hands of Spencer. The fact of the assignment of the judgment by Spencer to Mrs. Barnes is not sufficient to affect the conclusion in that respect. We cannot say on the whole record that the court erred in failing to find that an equitable assignment existed so as to prevent the full operation of the satisfaction of the judgment in this case and

permit a recovery against the judgment debtor Barnes.

Other questions presented do not require discussion. We perceive no prejudicial error in any of the rulings of the trial court.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; IRA F. THOMPSON, J.; SEAWELL, J.

PUREFOY v. PACIFIC AUTOMOBILE INDEMNITY EXCHANGE.*

Civ. 8859.

District Court of Appeal, Second District, Division 2, California.

Oct. 23, 1934.

1. Insurance ⇐311(1)

Right of action of injured party against automobile liability insurance carrier is not absolute, but subject to lawful terms and limitations of policy which are reasonably necessary for protection of insurer and can be readily complied with by assured, if violation of condition by assured caused substantial prejudice to insurer (St. 1919, p. 776).

2. Insurance ⇐311(1), 539(5)

Automobile liability insurance carrier *held* excused from liability, in action by injured party, by assured's violation of policy by failing to notify insurer of accident and failing to co-operate in preparing and presenting defense (St. 1919, p. 776).

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by J. W. Purefoy against the Pacific Automobile Indemnity Exchange, a reciprocal and inter-insurance exchange. From an adverse judgment, plaintiff appeals.

Affirmed.

Bordwell, Mathews & Wadsworth, of Los Angeles, for appellant.

Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff had recovered judgment in a prior action against one W. S. Austin and his son, Jack Austin, by reason of injuries to plaintiff caused by the automobile of said Austin. This action is predicated upon the judgment in the former case and is brought against defendant as liability insurance carrier for Austin. The contention was made that defendant was not liable on its insurance contract because insured had failed to notify this defendant of the accident and had failed to co-operate with defendant in preparing and presenting a defense, contrary to the requirements of the contract, and that by reason thereof this defendant was unable to defend the action. From judgment for defendant, the plaintiff appeals on grounds that assured did not violate his insurance contract, and any breach that did occur would not preclude recovery by this plaintiff against the insurer.

The contract required that assured shall give "immediate written notice of any accident, claim, loss or suit hereunder with fullest information obtainable, especially the names and addresses of all witnesses to the accident or other occurrence, under which liability arises or might arise, and shall immediately deliver to the attorney every summons or any other papers served on him on behalf of third persons, and shall also render all assistance necessary for the proper defense of said action, as requested by the attorney or its legal representatives; and shall also be and appear in court upon and at all times during the trial of any action at law arising out of, or involving, any accident, claim, loss or suit hereunder. * * * The assured shall aid in securing information and evidence. * * *" It further provides that the duty imposed by the foregoing terms of the contract "is a condition subsequent and immediately upon a failure or refusal to perform any one or more of said conditions this policy and the liability of the exchange, if any, thereunder shall automatically terminate."

The insurance contract was dated December 15, 1929. The accident occurred the next day, December 16th. No notice of the accident was given this defendant by assured or otherwise prior to March 15, 1930, when the former action was instituted against the Austins. On March 31, 1930, September 20, 1930, and April 10, 1931, insurer was advised of pendency of that action and was requested by attorneys for plaintiff, upon the last two dates, to appear on behalf of assured. On March 18, 1931, a year and three months after the accident, Austin was served with summons and complaint and transmitted them with a note to the broker or agent through whom the insurance had been placed, saying, "please ad-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 155.

vise procedure." The latter answered on behalf of insurer disclaiming liability for lack of notice of the accident, and advising Austin to secure private counsel. The evidence indicates that Austin was out of the state for about a year immediately following the commencement of the action, and insurer was not informed of his address.

The court found that the contract contained in substance the terms above set forth; that neither Austin nor any one acting for him had given the information or notice required thereby except as above outlined, and that the same constituted a violation of the contract; that by reason thereof defendant was "unable to properly or otherwise or at all defend the action mentioned."

[1, 2] The right of action of an injured party against an insurer (St. 1919, p. 776) is not absolute, but is subject to lawful terms and limitations of the policy when the latter are reasonably necessary for the protection of the insurer and can be readily complied with by assured. It must be shown, of course, to establish a valid defense based on a violation of the condition by assured, that such violation caused substantial prejudice to insurer. Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P. (2d) 999, 85 A. L. R. 13. The findings, amply supported by the evidence, conform to the above rule so as to render effectual the defense relied upon by respondent.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 510

SOUTHERN GLASS CO. v. CONSOLIDATED INV. CORPORATION.

Civ. 8816.

District Court of Appeal, Second District, Division 2, California.

Oct. 20, 1934.

1. Banks and banking ⇨315(1)

That president of investment company orally agreed with seller that investment company would guarantee payment of merchandise sold to customer, and that directors authorized by resolution president and secretary to guarantee such obligation, did not make investment company answerable for customer's default, because investment company was not party to transaction, did not receive any consideration, and its officers did not sign resolution or exercise authority conferred (Civ. Code, §§ 1624, 2794).

2. Frauds, statute of ⇨103(1)

Resolution of board of directors of investment company authorizing president and secretary to guarantee certain obligation was not binding obligation or note or memorandum of special promise by investment company to answer for debt of another (Civ. Code, §§ 1624, 2794).

Appeal from Superior Court, Los Angeles County; V. N. Thompson, Judge.

Action by the Southern Glass Company against the Consolidated Investment Corporation. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Howard F. Shepherd and John F. Bender, both of Los Angeles, for appellant.

Lindsay & Gearhart, of Fresno, for respondent.

STEPHENS, Presiding Justice.

In an action for the value of merchandise sold by the plaintiff, based upon an alleged guaranty, a demurrer to the complaint was sustained and judgment entered in favor of the defendant, from which the plaintiff appealed.

The sole question presented is as to whether or not facts sufficient to state a cause of action within the intent of section 1624 of the Civil Code were alleged.

The appellant and its defaulting customer, not respondent herein, had for some time previously negotiated sales and purchases by means of promissory notes which the respondent corporation indorsed. On the occasions in controversy appellant sold and delivered quantities of goods to the customer on credit and for which neither note nor money was received. Suit was instituted against the respondent by a complaint wherein it was alleged in part that its president had agreed prior to such sales that he would cause his company to guarantee payment therefor, that he had a meeting of the directors convened and by them a resolution passed reciting "that the president and secretary of this corporation be, and they are hereby authorized to endorse and guarantee payment of each obligation as hereinafter described," setting

forth in detail the proposed transactions, and that a copy of such resolution was certified by the second assistant secretary as having been "duly and regularly passed," and delivered to the appellant. It was further alleged that such resolution was intended by the corporation and its president as a guaranty of said order for merchandise and that it was so accepted and relied upon, pursuant to the oral agreement of said president to obtain the guaranty by said corporation.

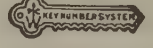
[1, 2] The appellant cites authorities wherein oral promises to answer for the debt or default of another were enforceable because made by corporations receiving the property purchased or some consideration amounting to a ratification of previous proposals by agents. It does not, however, appear in the instant case that respondent company was a party to the transaction, received any consideration from either of the parties thereto, or that its officers appended any signature to said resolution or copy, or exercised the authority conferred thereby by personally indorsing or guaranteeing payment of the obligation in suit. Section 1624 of the Civil Code requires that "a special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 2794," must be in writing and subscribed by the party to be charged, or agent, or that there be some note or memorandum thereof. The section last mentioned provides that such a promise need not be in writing if made by one who has received property, or under circumstances not here of consequence. It is not alleged that the president of the respondent company did more than agree to obtain the resolution authorizing the two officers to guarantee the account, nor is it alleged that they did so guarantee the same. If, as stated, it be assumed that the resolution was in fact intended as a binding obligation, its language failed so to state, and it remained unsigned. It was not claimed to have been accepted as a note or memorandum of a special promise by said corporation, nor could the transaction be so construed. The principles underlying the facts in Edge Moor Bridge Works v. County of Bristol, 170 Mass. 528, 49 N. E. 918, are similar. See, also, Postlethwaite v. Minor, 168 Cal. 227, 142 P. 55. A municipality having by its legislative body "voted that the cumulated bid of Edge Moor Bridge Company be accepted and that the contract thereon be awarded to said party," said company claimed that the corporation was bound thereby; but, since the contemplated contract had not been executed as authorized, relief by way of damages was denied.

For the reasons stated, it must be held that the demurrer was properly sustained.

No question regarding the possible enforcement of the authorization given by defendant to its officers, or any possible defense thereto, is presented in this appeal.

The judgment is affirmed.

We concur: DESMOND, J.; SCOTT, Justice pro tem.



1 Cal.App.2d 504

AZEVEDO v. AZEVEDO.

Civ. 9553.

District Court of Appeal, First District, Division 1, California.

Oct. 20, 1934.

1. Deeds ⇐56(2)

Valid delivery of deed is accomplished when conduct and acts of grantor manifest present intent to dispose of title conveyed thereby.

2. Deeds ⇐56(1)

No particular form of delivery of deed is necessary, and any act or thing which manifests present intent to dispose of title is sufficient to establish it.

3. Deeds ⇐56(3)

Manual tradition of deed alone is not enough; but transfer of possession must be with intent of presently passing title and must not be hampered by any reservation of right of revocation or recall.

4. Deeds ⇐66

Whether there was intent to pass present title in delivery of deed is question of fact.

5. Deeds ⇐56(4)

Deed executed by grantor with intention of having it take effect only after his death and retained in his possession and under his control will be ineffectual to pass title for want of delivery.

6. Gifts ⇐17, 18(1)

Delivery is essential to make valid gift of personal property, and such delivery must be completed in donor's lifetime.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

7. Deeds ⇐194(5)

In action to quiet title, where deed was placed on record by defendant grantee after grantor's death, burden was upon plaintiff to establish nondelivery.

8. Deeds ⇐208(1)
Gifts ⇐49(1)

Evidence *held* to support finding of nondelivery by father of deed to farm and that father did not make gift of personalty to son (Code Civ. Proc. § 2055).

9. Trial ⇐54(3)

In action to quiet title, grantee's contradictory testimony on two former occasions could be used as foundation for finding of nondelivery of deed, though purpose thereof was impeachment, having effect of excluding all grantee's testimony from case, where such testimony also served as declarations against interest (Code Civ. Proc. § 2055).

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action to quiet title by J. F. Azevedo, as administrator of the estate of Manuel Francisco Azevedo, deceased, against Manuel Francisco Azevedo, Jr. From a decree for plaintiff, defendant appeals.

Affirmed.

Manuel F. Sylva, of San Francisco, for appellant.

E. H. Christian, of Oakland, for respondent.

KNIGHT, Justice.

This is an appeal by defendant from a decree in plaintiff's favor quieting title to certain real and personal property and granting other relief. Defendant claimed title to the real property under a deed executed by the decedent about two and a half years prior to his death and recorded by defendant a few days after decedent's death; and his asserted title to the personal property was based on a verbal gift inter vivos. The decision in the trial court turned on the question of delivery; and insufficiency of evidence to support the findings and judgment is the ground of appeal.

[1-6] It is held generally with respect to deeds that a valid delivery is accomplished when the conduct and acts of a grantor manifest a present intent to dispose of the title conveyed by the deed. No particular form of delivery is necessary, and any act or thing which manifests such intent is sufficient to establish it. However, manual tradition alone is not enough; the transfer of possession must be with the intent of presently passing title, and must not be hampered by any reservation of right of revocation or recall (Follmer v. Rohrer, 158 Cal. 755, 112 P. 544); that is, in parting with the possession of the conveyance, the grantor must intend thereby to divest himself of title. If he does, there is an effective delivery. If he does not, there is no delivery; and the solution of the question is to be determined from a consideration of all the evidence in the case. Moreover, whether there was such intent to pass present title is purely a question of fact to be determined by the trial court or jury. Hansen v. Hansen, 82 Cal. App. 736, 256 P. 290; Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703. Accordingly, it is held that a deed executed by a grantor with the intention of having it take effect only after his death and which he retains in his possession or under his control will be ineffectual to pass title for want of delivery. Fisher v. Oliver, 174 Cal. 781, 164 P. 800; Hayden v. Collins, 1 Cal. App. 259, 81 P. 1120. Likewise, it is held with reference to personal property that, in order to make a valid gift thereof, delivery is essential; and such delivery must be completed in the lifetime of the donor. If, therefore, there be no delivery and the subject of the gift remains in the possession or under the control of the donor, the gift is incomplete. 13 Cal. Jur. pp. 36, 37–40.

[7, 8] The evidence in the present case, in our opinion, shows sufficient conflict upon the issue of delivery to preclude interference with the conclusion reached thereon by the trial court. The essential facts appearing therefrom are as follows: The decedent was the father of plaintiff and defendant and two daughters; namely, Mrs. Inez Andrade and Mrs. Isabel Perry. He was predeceased by his wife, and consequently his next of kin at the time of his death were his four children. He owned and lived upon the real property in question for many years. It was a farm near Mission San Jose containing eight and a fraction acres, which were cultivated to the raising of vegetables, and through such farming activities decedent accumulated considerable money. For a number of years preceding, and at the time of the decedent's death, the defendant was the only child residing on the farm with his father. The others had long since taken up their abodes elsewhere; and defendant operated the farm for his father without receiving any regular wages therefor. The personal property consisted of a small amount of household furniture, farming implements, some live stock, and ap-

proximately $150 in cash, all of which was located on the farm. About two and a half years before his death the decedent expressed his intention of giving the farm to defendant, saying that in doing so he would be carrying out the wishes of his wife, who died only three months before, and that defendant was entitled to the place because he had worked upon it all his life without receiving anything out of it except a living; and he expressed the fear that after his death plaintiff would in some way get the place away from defendant. For the purpose of carrying out such intention the decedent consulted an attorney in San Francisco. He was accompanied by Mrs. Andrade and her husband. The attorney advised him that he could dispose of the property either by will or by deed, and he explained to the decedent the legal effect of each, particularly with respect to the matter of passing title. After being so advised, the decedent stated he desired to make a deed of gift. Accordingly such an instrument was prepared, and the decedent signed and acknowledged the same before a notary. Both the attorney and the notary instructed the decedent that, in order to complete the gift and make it valid, it would be necessary for him to deliver the deed to his son. He said he would do so.

As stated, following the decedent's death, the deed was placed on record by defendant. The burden was upon the plaintiff, therefore, to establish nondelivery. This he sought to do by calling defendant as a witness pursuant to the provisions of section 2055 of the Code of Civil Procedure. He testified in substance that upon the return of his father to the farm a few days after the execution of the deed his father called him into the house, and in the presence of Mrs. Andrade took the deed from his pocket, handed it to him, and said: "Here is this deed; and everything inside of the gate is all yours"; that his father then said he wanted his daughter Mrs. Andrade to "take charge of the papers and have that deed of gift recorded after his death." Continuing, defendant testified that, after receiving the deed, he laid it on the table and then went about his chores; that thereafter his father took the deed and placed it in his trunk in the house, where it remained until his death; that his father kept the trunk locked, but that he had access to the keys; that after his father's death he took the deed from the trunk and filed the same for record. Mrs. Andrade was called later as a witness for defendant, and testified substantially to the same effect. However, before counsel for plaintiff concluded his cross-examination of defendant, it was shown that defendant on two former occasions had testified with reference to the transaction involving the delivery of the deed, first, at the hearing of a contest between plaintiff and Mrs. Andrade over the issuance of letters of administration, and again in giving his deposition in the present action; and it appears that the testimony given by him on those former occasions as to the details of the transaction was at variance with that given by him at the present trial. In this regard he stated in substance on both of those former occasions that his father did not hand him the deed; that the deed did not come into his hands until after his father's death; that, when his father took the deed from his pocket, his father said that "after his death it was" defendant's, that he wanted defendant "to have the property after he died." Moreover, the evidence shows that following the transaction there was no change whatever in the exercise of acts of ownership over the property. It continued to be assessed in his father's name, and his father continued to pay the taxes and insurance and to hire and pay whatever additional labor was needed to operate the place; and the decedent also disposed of the crops and collected and retained the money therefor.

By way of explanation of the foregoing contradictory statements, counsel for defendant calls attention to evidence showing that defendant was a man of very limited education; that he was unable to read or write much more than his own name; and counsel contends that it is apparent from the record that, in the course of a severe and skillful examination to which defendant was subjected on those former occasions, he did not understand the real purport and meaning of many of the questions propounded to him. Even conceding all of this to be true, the contention presented thereby is one beyond the power of a reviewing court to entertain, for the reason that it involves the credibility of a witness and the weight of the testimony given by him, of which the trial court, as the fact-finding body, is the sole and exclusive judge.

[9] Counsel for defendant contends also that in any event the testimony given by defendant on the two former occasions cannot be used as the foundation for a finding of nondelivery, because, as he argues, the limited purpose thereof was impeachment, and that therefore, if it be concluded that the witness were impeached thereby, the effect of such impeachment would be to exclude all of his testimony from the case, thereby leaving an entire absence of evidence on the part of plaintiff to overcome the presumption of de-

livery and the affirmative testimony given on that subject by Mrs. Andrade. We are unable to sustain such contention, for the reason that the testimony heretofore given by defendant, if accepted as true by the trial court, doubtless served also as declarations against interest, and therefore were legally sufficient to support the trial court's adverse finding on the issue of delivery.

The evidence as to nondelivery of the deed is controlling also on the issue relating to the validity of the alleged gift of the personal property.

Inasmuch, therefore, as the decision of the trial court rests on a disputed issue of fact and there is evidence legally sufficient to sustain its finding thereon, the judgment must be affirmed. It is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

YORK, Justice.

[1] Plaintiff appeals from the judgment entered herein in favor of the defendants. The evidence and pleadings are in a very involved state, as are the briefs of the parties filed herein. The question raised by appellant is one that is answered by the general rule that where there is any evidence to support a finding, an appellate court cannot set up its judgment in lieu of that of the trial court. This is so as to the objections made by appellant to each of the findings to which he takes exception.

[2] No appeal lies from an order denying motion for a new trial; therefore the appeal from that order is dismissed.

The judgment is affirmed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

1 Cal.App.2d 647

SHULTZ v. O'ROURKE et al.

Civ. 8002.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1934.

1. Appeal and error ⇐1010(1)

Where there is any evidence to support a finding, appellate court cannot set up its judgment in lieu of that of trial court.

2. Appeal and error ⇐110

Order denying motion for new trial is not appealable.

Appeal from Superior Court, City and County of Los Angeles; Thomas C. Gould, Judge.

Action by Mabel L. Schultz against Miss L. O'Rourke and others. From a judgment for defendants, and from an order denying motion for new trial, plaintiff appeals.

Appeal from order denying motion for new trial dismissed, and judgment affirmed.

John J. McMahon, of Los Angeles, for appellant.

Holland & Holland, of Los Angeles, for respondents.

1 Cal.App.2d 492

SMITH et al. v. BROWN et al.

Civ. 1470.

District Court of Appeal, Fourth District, California.

Oct. 19, 1934.

Hearing Denied by Supreme Court Dec. 17, 1934.

1. Mortgages ⇐280(3)

Grantee of property incumbered by mortgage or trust deed is personally liable for deficiency judgment resulting therefrom, where he assumes and agrees to pay debt, and his promise to pay may be established by appropriate language in deed, by independent writing, or by verbal contract.

2. Exchange of property ⇐5

Where agreement for exchange of properties provided that grantee in deed should assume and agree to pay certain indebtedness, one of grantees originally named who had his name stricken as grantee *held* released from personal obligation to pay such indebtedness.

3. Exchange of property ⇐5

Grantor's consent that name of one of grantees be stricken from deed requiring grantee to pay certain indebtedness must be implied from fact that such grantor enabled escrow to be closed by conveying property to sole remaining grantee.

4. Escrows ⇐8(1)

Escrow holder was agent of grantor, and agent's knowledge of change in contract must be imputed to principal.

5. Exchange of property ⇐5

In action against alleged grantee of incumbered land to recover deficiency judgment after foreclosure, whether defendant was real party in interest in exchange of property is immaterial, where exchange contract was so changed as to relieve him from any agreement to pay debt.

6. Exchange of property ⇐5

Parties to exchange of properties had right to agree on change of grantees after making agreement that grantee should assume and agree to pay certain indebtedness.

7. Mortgages ⇐559(4)

While mortgagees trying to collect deficiency judgment from stranger to original loan would be entitled to benefit of any contract by original debtors that stranger should assume debt and agree to pay it, they had burden to show that stranger agreed to pay debt.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Walker Smith and another against Robert W. Brown and others. From an adverse judgment, defendant Albert Beck appeals.

Reversed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Sarau & Thompson, of Riverside, for appellant.

R. J. Welch, Jr., of Riverside, for respondents.

BARNARD, Presiding Justice.

The plaintiffs were the owners of a promissory note for $1,000 signed by the defendants Brown and secured by a trust deed covering certain real property then owned by them. Thereafter the Browns exchanged this real property for other property owned by the defendants Beck. Subsequently the plaintiffs foreclosed this trust deed and, after bidding in the property for $600, brought this action seeking a deficiency judgment against all of the defendants for $1,038.53. The defendants Brown defaulted, a nonsuit was granted as to the defendant Helen K. Beck, and judgment for the plaintiffs was entered against the defendant Albert Beck, from which he has appealed.

The several points raised may be treated together as one, namely, that the evidence does not sustain the findings to the effect that the appellant assumed and agreed to pay the indebtedness in question.

Examining the evidence, we find an escrow agreement dated May 2, 1930, signed by the appellant and the defendant Robert W. Brown, in which these parties agreed to exchange their respective properties. This agreement refers to the above mentioned encumbrance on the Brown property and contains this clause: "Deed from Brown to recite, grantee herein assume and agree to pay present encumbrances of record." The agreement also provides that the deed of the Brown property shall be made to "Helen K. Beck Albert Beck," with a line drawn through the name "Albert Beck" in that provision. The escrow officer of the title company which handled the escrow testified that after the appellant signed the escrow agreement he asked that his name be stricken from the clause above quoted, leaving Helen K. Beck as the sole grantee, and that thereupon the appellant struck out the words "Albert Beck" in that clause. The deed from the Browns, which was also executed on May 2, 1930, and later recorded, was introduced in evidence. In this deed Helen K. Beck appears as the sole grantee and the deed recites that the same is subject to "a trust deed securing a note for $1,000 as of record, which the grantee herein assumes and agrees to pay." There was evidence that the deed was in the appellant's possession after the deal was closed and Helen K. Beck testified that she knew nothing about the transaction, that she had never received the deed, and that she had not been informed that the property had been conveyed to her.

[1] It is well settled that a grantee of property then encumbered by a mortgage or trust deed is personally liable for any deficiency judgment resulting therefrom where he has assumed and agreed to pay the debt, and that his promise to pay may be established by appropriate language in the deed to him, by an independent writing or by a verbal contract. Fishback v. J. C. Forkner Fig Gardens, Inc., 137 Cal. App. 211, 30 P.(2d) 586. Assuming that this rule applies to a person interested in the mortgaged property which is conveyed, although not named as a grantee in the deed conveying the same, it necessarily follows that the promise of such a person to pay the debt must be established in a similar manner. A mortgagee claiming the benefit of such a contract between his debtor and another must establish the fact that the other party has agreed to pay the debt.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[2-4] In the case before us, there is no evidence of any verbal agreement on the part of the appellant to pay this debt and the respondents rely entirely upon the escrow agreement and the other evidence above referred to. The only reference to the subject in the agreement of exchange is the provision that the deed shall contain a recital to the effect that the grantee assumes and agrees to pay the indebtedness. While the appellant was one of the grantees originally named in the agreement and while he would have been bound had the exchange been concluded in that form, his agreement was to the effect that the grantee named in the deed should be bound rather than an independent agreement that he would pay the debt regardless of whether or not he was a grantee. After the appellant made the change, calling for the elimination of his name as a grantee, the escrow was closed in the manner then provided. While the appellant would have no right to make this change without the knowledge and consent of the other party to the agreement, the only evidence before us indicates that the other party had such knowledge through his agent, and his consent must be implied from the fact that he then enabled the escrow to be thus closed by conveying the property to the sole remaining grantee. The escrow holder was also the agent of Brown and the agent's knowledge of the change in the contract must be imputed to the principal. Early v. Owens, 109 Cal. App. 489, 293 P. 136. Moreover, Brown consented to the change and confirmed the same by executing and delivering a deed in which Helen K. Beck was named as the sole grantee. Under these circumstances, we think that Brown released the appellant from any personal obligation to pay the debt and the respondents' rights are dependent upon those of Brown.

[5, 6] The respondents argue that the fact that the appellant's wife had no knowledge of the transaction discloses that the appellant was the real party in interest and that he was, in fact, the real grantee. Although this might be material as to the wife's liability it is immaterial as to the appellant because he had been eliminated as a grantee, the only basis for holding him at all under the contract, with the implied, if not the actual, consent of the other party thereto. Whether or not he was the real party in interest is immaterial when the contract was so changed as to relieve him from any agreement to pay the debt. While it is argued that the real intention of the parties was that the appellant should assume and agree to pay the amount of this encumbrance, there is no evidence to show this except the escrow agreement itself which, in its final stage, was to the contrary. The parties had a right to agree on a change of grantees, and a court may not make a new contract for them.

[7] The respondents are trying to collect a deficiency judgment from a stranger to the original loan. While they would be entitled to the benefit of any such contract which was made by their original debtors, they must show that one was entered into by the party sought to be charged. The burden was upon them to show that the appellant agreed to pay this debt and we think this burden has not been met by the evidence here produced.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

1 Cal.App.2d 463

SMITH v. CITY OF GLENDALE et al.

Civ. 1157.

District Court of Appeal, Fourth District, California.

Oct. 18, 1934.

Hearing Denied by Supreme Court Dec. 17, 1934.

1. Municipal corporations ⇐79

Under constitutional amendment giving chartered cities right to control their municipal affairs, charter of city availing itself of that right is supreme law of city on its municipal affairs (Const. art. 11, § 6).

2. Municipal corporations ⇐66

Furnishing of domestic water to its citizens is "municipal affair" of chartered city

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

3. Municipal corporations ⇐873

City chartered under constitutional amendment giving it right to control its municipal affairs was not restricted by constitutional restriction that Legislature could not authorize political subdivision of state to subscribe for stock or become stockholder of any corporation, since city's powers were not derived from Legislature (St. 1921, p. 2204, as amended; Const. art. 4, § 31; art. 11, § 6).

4. Municipal corporations ⇐873

Under constitutional amendment giving chartered city right to control its municipal

affairs, city authorized by its charter to furnish any public utility service could secure portion of its domestic water supply through ownership of stock in private water company (St. 1921, p. 2207, art. 3, §§ 1, 2, and p. 2212, art. 6, § 4; Const. art. 4, § 31; art. 11, § 6).

Appeal from Superior Court, City and County of Los Angeles; Emmet H. Wilson, Judge.

Action by Sidney Smith against the City of Glendale and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Andrew M. Strong, of Los Angeles, for appellant.

Bernard Brennan, City Atty., Aubrey N. Irwin, Asst. City Atty., and A. L. Lawson, Deputy City Atty., all of Glendale, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after sustaining a demurrer to plaintiff's second amended complaint without leave to amend.

The city of Glendale is a municipal corporation organized and existing under a freeholders' charter adopted under authority of sections 6 and 8 of article 11 of the Constitution. This charter reserved to the city complete control of its municipal affairs. The individual defendants are officers of the city of Glendale.

The plaintiff is a citizen and resident of the city of Glendale and the owner of property assessed in and subject to taxation by the city.

This action is brought to enjoin the defendants from expending $20,000 from its water rights purchase fund, or any other of its funds, for the purchase of stock in the Verdugo Canon Water Company. While it only may be inferred from the complaint, it is not questioned in the briefs that the purpose of acquiring the stock is to furnish the city of Glendale an additional supply of domestic water for distribution to its citizens. We will therefore assume this to be true.

The charter of the City of Glendale (Stats. 1921, p. 2204, Stats, 1923, p. 1646, Stats. 1931, p. 2693) contains the following provisions:

"The City of Glendale shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter: * * *

"To acquire by purchase, bequest, devise gift, condemnation or other manner sanctioned by law, within and without the limits of said City, property of every kind and nature for all purposes;

"To acquire by said means, and to establish, maintain, equip, own and operate, either within or outside of the City * * * waterworks, filtration plants, * * * or any other works necessary to a public utility; and to join with any other city or cities or county in the acquisition, construction and maintenance of same; * * *

"To furnish the City or its inhabitants or persons without the city, any public utility service or commodity whatsoever. * * *" St. 1921, p. 2207, art. 3, §§ 1, 2.

"General Powers of the Council: Subject to the provisions and restrictions in this charter contained, and the valid delegation by this charter of any powers to any person, officer, board or committee, which delegation of power, if any, shall control, the Council shall have the power, in the name of the City, to do and perform all acts and things appropriate to a municipal corporation and the general welfare of its inhabitants and which are not specifically forbidden by the Constitution of the State or which now or hereafter it would be competent for this charter specifically to enumerate. No enumeration or specific statement herein of any particular powers shall be held to be exclusive of, or a limitation of, the foregoing general grant of powers." St. 1921, p. 2212, art. 6, § 4.

[1] It is well settled in California that since the amendment in 1914 of section 6 of article 11 of the Constitution giving the right to chartered cities to control their municipal affairs, the charter of a city availing itself of that right is the supreme law of the city on its municipal affairs. Civic Center Ass'n v. Railroad Commission, 175 Cal. 441, 166 P. 351; Cole v. City of Los Angeles, 180 Cal. 617, 182 P. 436; Hayes v. Handley, 182 Cal. 273, 187 P. 952; In re Nowak, 184 Cal. 701, 195 P. 402, 403; City of Pasadena v. Charleville, 215 Cal. 384, 10 P.(2d) 745; Bank v. Bell, 62 Cal. App. 320, 217 P. 538, 542. In Re Nowak, supra, it is said: "By 1914 amendment to section 6 of article 11 of the Constitution of California a new scheme for city charters was adopted, in that it was provided that—'Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters * * * so

as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws.' * * * The net result of this situation is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers."

After extensive citation of authorities, the court in Bank v. Bell, supra, said: "To recapitulate, it appears that, since the 'municipal affairs' amendments of 1914 to the Constitution for such cities as have brought themselves within the condition of the amendments, the law is firmly established as follows: The powers of the cities are not derived from the Legislature but from a freeholders' charter directly provided for by the Constitution. The city in its charter may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by the general laws. The powers of the city are all-embracing, restricted and limited by the charter only, and free from the interference of the state by general laws. The result is that the city has become independent of general laws upon municipal affairs."

[2] It cannot now be doubted that the furnishing of domestic water to its citizens is a municipal affair of a chartered city. City of Pasadena v. Charleville, supra; In re Orosi Public Utility District, 196 Cal. 43, 235 P. 1004; City of South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 P. 490; 18 Cal. Jur. p. 785, § 96, and cases cited.

[3] Plaintiff urges that section 31 of article 4 of the Constitution provides that the Legislature shall not have power to authorize the state or any political subdivision thereof "to subscribe for stock or to become a stockholder in any corporation"; that whatever the people, through the Constitution, have prohibited the state from doing cannot be done by a subdivision of the state; that constitutional restrictions imposed upon the Legislature of a state rest with equal force upon the legislative bodies of instruments of government created by the state. In support of these rules he cites: Cooley on Constitutional Limitations (7th Ed.) p. 278; 8th Ed. of same, p. 412; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 S. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276; New Orleans Water-Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 8 S. Ct. 741, 31 L. Ed. 607; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; U. S. ex rel. Ranger v. New Orleans, 98 U. S. 381, 25 L. Ed. 225, and Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760.

Regardless of the eminent authority relied upon by plaintiff to support his views, we have a somewhat isolated situation in California where the Constitution places a limitation on the power of the state Legislature and at the same time contains a broad grant of power to chartered cities that avail themselves of it. The question seems to have been decided adversely to the contention of plaintiff by the Supreme Court of this state in the case of Los Angeles Gas & Electric Corp. v. City of Los Angeles, 188 Cal. 307, at page 317, 205 P. 125, 129, where it is said:

"As already stated, appellant contends that the contract violates section 31 of article 4 of the Constitution. * * *

"This provision of the Constitution is in the article regulating the powers of the legislative department of the state government, and is a limitation upon the power of the state Legislature. The powers of the city of Los Angeles are not derived from the Legislature, but from a freeholders' charter directly provided for by the Constitution. That is to say, the people of the state, through the Constitution, authorize the people of the city to regulate its affairs by a charter to be framed by a board of freeholders and voted upon by the people of the city, and approved by a resolution of the Legislature. Section 31 of article 4 has no application to a city charter." See, also, Bank v. Bell, supra.

[4] As we have been cited to no constitutional or charter provision prohibiting the city of Glendale from securing a portion of its domestic water supply through the ownership of stock in a private corporation and as the charter of that city gives to it the right to establish, maintain, equip, own, and operate waterworks and furnish its inhabitants with any public utility service or commodity, besides other broad powers, we can see no reason why that city cannot acquire part or all of its domestic water supply through ownership of stock in a private water company and use its surplus funds with which to purchase such stock.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.App.2d 468

PETERSON et al. v. TAGGART et al.
Civ. 1137.

District Court of Appeal, Fourth District, California.

Oct. 18, 1934.

Hearing Denied by Supreme Court Dec. 17, 1934.

Waters and water courses ⇐187

Where city having right to be stockholder of private water company held majority of company's stock and voted it at annual stockholders' meeting by duly authorized officer, directors elected by such vote were duly elected.

Appeal from Superior Court, City and County of Los Angeles; William Frederickson, Judge.

Action by H. W. Peterson and others against Frank P. Taggart and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Andrew M. Strong, of Los Angeles, for appellants.

Bernard Brennan, City Atty, Aubrey M. Irwin, Asst. City Atty., and A. L. Lawson, Deputy City Atty., all of Glendale, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after sustaining a demurrer to plaintiffs' amended complaint without leave to amend.

The complaint alleged that the Verdugo Canon Water Company is a corporation with a capital stock of $10,000 divided into 10,000 shares of the par value of $1 each, with seven directors; that each plaintiff was a shareholder; that at a regular stockholders' meeting held on April 5, 1932, the defendants, other than the city of Glendale, were declared elected directors of the corporation and are acting as such; that as a matter of fact they were not so elected by a vote "of a majority of the shares entitled to vote in said meeting"; but that plaintiffs were elected as such directors and are entitled to serve as such. Plaintiffs sought to have the court determine the directors actually elected at the stockholders' meeting.

From the statement of facts in plaintiffs' opening brief it appears that the Verdugo Canon Water Company had issued 7,625 shares of its stock; that the city of Glendale owned 6,142 of such shares and private persons owned 1,483 shares; that the defendants, other than the city of Glendale, were elected by the votes of the stock purportedly owned by the city of Glendale; that the city had no right to own such stock; that it could not be voted and therefore plaintiffs were elected by the votes of the privately owned stock.

The right of the city of Glendale to own stock of the Verdugo Canon Water Company is decided in the case of Smith v. City of Glendale (Cal. App.) 36 P.(2d) 1083, the opinion in which case is filed this date. We there held that the city of Glendale had the right to purchase and own the stock for the purposes there set forth. It follows that her duly authorized officer had the right to vote the stock in an annual stockholders' meeting and that the defendants, other than the city of Glendale, were duly elected as directors of the Verdugo Canon Water Company.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.App.2d 478

VALENTE v. SICA.
Civ. 5139.

District Court of Appeal, Third District, California.

Oct. 19, 1934.

Hearing Denied by Supreme Court Dec. 17, 1934.

1. Executors and administrators ⇐227(3)

Verification of claim against estate, made by claimant's attorney on absence of claimant from county and which contained positive statement that amount was justly due and that there was no offset to attorney's knowledge, *held* sufficient (Code Civ. Proc. § 1494 [now Probate Code, § 705]).

2. Executors and administrators ⇐228(3)

Mailing of claim against estate to attorneys for administrator at their office as specified in notice to creditors *held* sufficient without personal presentation (Code Civ. Proc. § 1490 [now Probate Code, § 700]).

3. Evidence ⇐71

Upon satisfactory proof of mailing of claim to office of administrator designated in notice to creditor, administrator is presumed to have received claim in regular course of mail (Code Civ. Proc. § 1963, subd. 24; § 1490 [now Probate Code, § 700]).

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by V. Valente against Thomas Sica, as administrator of the estate of Gerardo Sica, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Lindsay & Gearhart, of Fresno, and Nathan F. Coombs, of Napa, for appellant.

Wallace T. Rutherford, of Napa, for respondent.

Mr. Presiding Justice PULLEN, delivered the opinion of the court.

The question here presented has to do with the sufficiency of a creditor's claim against the estate of a decedent. The trial court, upon conflicting evidence, has found that the claim was duly presented to the administrator of the estate of Gerardo Sica, deceased, which finding is binding upon us.

[1] The first point urged by appellant is that the claim is insufficient in that the affidavit thereto is defective. The claim sets forth in sufficient detail items of the account, and attached to the claim is the following affidavit, duly verified:

"State of California, County of Napa,—ss.

"Wallace Rutherford, Attorney for V. Valente, whose foregoing claim is herewith presented to the administrator of the estate of said deceased, being duly sworn, says that the amount thereof, to-wit: The sum of Four Thousand three hundred fifty and 31/100 Dollars is justly due to the said claimant; that no payments have been made thereon, which are not credited, and that there are no offsets to the same, to the knowledge of said affiant.

"Affiant makes this affidavit on behalf of said claimant because of his absence from the County of Napa.

"(Signed) Wallace Rutherford."

Appellant contends as a ground of insufficiency that this affidavit is not made by the claimant, but by a third person, and the reason the same is not made by claimant personally is insufficient.

Section 1494 of the Code of Civil Procedure, in effect, at the time the claim was verified, the provisions of which are now found in section 705 of the Probate Code, is as follows: "Every claim which is due, when filed or presented must be supported by the affidavit of the claimant or someone in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. * * * When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason therefor."

An examination of the verification reveals the fact that affiant is the attorney for claimant, and contains a positive statement the amount is justly due and that there are no offsets to the same to his knowledge. We believe the verification substantially complies with section 705 of the Probate Code. Our courts have in the past refused to be technical in ruling upon matters of this sort. Estate of Swain, 67 Cal. 637, 8 P. 497; Guerian v. Joyce, 133 Cal. 405, 65 P. 972; Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 P. 496.

In case of Doolittle v. McConnell, 178 Cal. 697, 174 P. 305, 310, it was held a claim against an estate of a deceased person verified by an attorney for the creditor, the latter being out of the state, could not be attacked on the ground the attorney did not have actual knowledge of the facts supporting the claim when, as is true in the instant case also, vouchers and proofs were not called for, and the attack on the claim was not made until after the time had expired for presentation of claims, and suit had been brought on the rejected claim. The affidavit in that case by the attorney was very similar in language to the affidavit at bar, except in the Doolittle Case there appeared, after the reason for affiant making the affidavit, the statement, "and deponent is familiar with the facts of this claim." Such a statement could add nothing to the strength of the affidavit in the instant case, as, affiant having made a positive assertion under oath, we must assume he was familiar with the facts set out in the claim.

[2, 3] Appellant next urges that there was no filing or presentation of the claim as required by section 1490 of the Code of Civil Procedure (section 700, Probate Code). This section provides for the publication of notice to creditors, requiring all persons having claims against decedent to file them with the necessary vouchers in the office of the clerk of the court from which letters were issued or to present them to the executor or administrator at his residence or place of business specified in the notice within the time required by law. Here the claim was addressed to and mailed to the attorneys for the administrator at their office in Fresno, being the place designated in the notice to creditors where claims might be presented.

We believe that, upon satisfactory proof of mailing to the designated office of the administrator, he is presumed to have received the claim in the regular course of the mail. Section 1963, subd. 24, Code Civ. Proc. Appellant concedes if a claim were presented in person at the office of the administrator it would be a proper compliance with the statute, and we can see no distinction between personal presentation and mailing. The conduct of our business affairs is so dependent upon the use of the mails that to hold otherwise would be a step backward. Although appellant points out certain differences between the case at bar and Sime v. Hunter, 50 Cal. App. 629, 195 P. 935, nevertheless that case is ample authority for the conclusions we have reached.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

1 Cal.App.2d 470

MILLER et ux. v. CITIZENS' NAT. TRUST & SAVINGS BANK OF LOS ANGELES et al.

Civ. 8584.

District Court of Appeal, Second District, Division 2, California.

Oct. 19, 1934.

Hearing Denied by Supreme Court Dec. 17, 1934.

1. Estoppel ⇐72

Where crime was proximate cause of injury, maxim that, where one of two innocent persons must suffer from wrongful act of another, loss must fall on one making act possible, had no application.

2. Principal and agent ⇐160½

Liability of principal does not extend to willful or malicious acts of agent done while engaged in principal's service, but independent of that service and for agent's own benefit, even where agency furnishes opportunity for wrongdoing (Civ. Code, §§ 2338, 2339).

3. Principal and agent ⇐160½

Where manager of bank's escrow department had by means of forged documents obtained reconveyance from trustee of his own property which he had placed under deed of trust as security for note, bank *held* not liable for loss sustained by payees of note through acts of manager, since acts were outside scope of employment, were not done in performance of principal's business, and, even though committed while manager was engaged in principal's service, had not been committed as part of transaction of principal's business (Civ. Code, §§ 2317, 2330, 2334, 2338, 2339).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Cassius L. Miller and Bertha I. Miller, husband and wife, against the Citizens' National Trust & Savings Bank of Los Angeles and another. From a judgment that plaintiffs take nothing from the named defendant, plaintiffs appeal.

Affirmed.

James P. Mackel, of Los Angeles, for appellants.

Mills, Hunter & Dunn and Edward C. Mills, all of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Appellants, plaintiffs below, brought suit against respondent bank and Paul A. Wickham to recover damages resulting from wrongful and fraudulent acts of Wickham. The case was submitted on the pleadings and a written stipulation of facts which the lower court adopted as its findings, and thereon made its conclusion that plaintiffs were entitled to take nothing from respondent bank.

At the time of the acts complained of herein, Wickham was the employee and agent of the bank, and was given the title of "Manager Escrow Department" in its Larchmont avenue branch in Los Angeles. While so employed and engaged in such service, and without any escrow having been opened or any instructions of any party given in or to such escrow department of the bank, he conceived and executed a plan to secure a reconveyance from the trustee in a deed of trust on property which belonged to him, title to which stood in his sister's name, and which deed of trust was existing of record as security for a note belonging to, and in the possession of, appellants. To accomplish his design and plan, he forged a copy of the note as it appeared in the deed of trust and an indorsement showing adjustment of interest, a request for reconveyance, and an affidavit, each purporting to be signed by appellants; and to the latter he affixed his jurat and seal as a notary public, for which he was at the time commissioned. He then wrote a letter on the letterhead of respondent bank, ad-

dressed to the trustee named in the deed of trust, signing it "Paul A. Wickham, Manager Escrow Department," and inclosing therewith the forged note, request for reconveyance, the affidavit, a copy of the deed of trust certified by the county recorder, and a cashier's check for $2.50, which he purchased with his own money, although provided by the bank with prenumbered blank voucher checks for use in paying such fees. Relying on the authenticity of these documents and believing the same to pertain to bona fide business of the bank, the trustee marked the note as paid and canceled, and executed its deed of reconveyance, which it mailed to respondent with the notation, "Attention of Paul A. Wickham." Upon its receipt by Wickham, he signed his name to the formal receipt for it, and returned that to the trustee. Thereupon he recorded the deed of reconveyance and at once incumbered the property, through his sister who held the legal title, with two new deeds of trust, as security for notes aggregating $7,500. Default was subsequently declared on one of these trust deed notes, and at the time of trial herein the trustee was prosecuting a sale under the trust deed.

For the loss of their security on their note, and because the makers thereof are insolvent, appellants herein seek to recover from the bank, as employer of Wickham, the damages resulting therefrom, to wit, $6,482.63, unpaid principal on the note, together with interest at the legal rate from February 24, 1931; it being stipulated herein that the real property described in the original deed of trust securing their note was, during all the times herein involved, of the value of $6,500. Upon the facts stipulated and found, the following conclusions or ultimate facts appear which are pertinent and significant on this appeal: (1) That respondent bank was not negligent in any respect in the matter of employment of Wickham as manager of its escrow department; that it has never ratified his wrongful acts, and that these acts were done for his sole benefit and not for the bank; (2) that under his employment he had authority to forward necessary documents to trustees to secure reconveyances, and accept them on behalf of trustors, only when an escrow was opened in the bank and instructions filed therein for such purpose; (3) that the wrongful acts committed by Wickham in this case were not within the scope of his employment by respondent bank.

The stipulation of facts from which it follows that the bank was not negligent in placing Wickham in the position of manager of its escrow department eliminates from consideration herein the question of liability of respondent under the law of negligence.

The conclusions numbered 2 and 3 above may be read together, and, when so read, absolve the bank from any liability under the doctrine of respondeat superior, as it operates on the relationship of master and servant, and renders it unnecessary to consult or review those cases, whose number are legion, which deal with that doctrine as it affects the master for his servant's acts.

As a consequence of these stipulations, with their resultant eliminations, and appellants' contention that their case is to be determined under the law of agency, there remains but one question herein, and that a question of fact, because the law is settled in its application and effect once that fact is determined. That question is: When Wickham committed and performed the wrongful acts herein stipulated and found, were they committed by such agent in and as a part of the transaction of the business of his agency with respondent bank? Obviously the trial court concluded that they were not, although that ultimate fact was not found as such in the lower court's decision. In its conclusions of law and judgment, however, the court concluded and adjudged that plaintiffs were not entitled to judgment against the bank on the stipulated facts. It is a necessary implication therefrom that the trial court found, under the probative facts stipulated, that Wickham did not commit the wrongful acts in question in and as a part of the transaction of the business of his agency. If that finding is supported by the stipulated facts, then the judgment appealed from is correct under the law. If not supported, the judgment should be reversed.

Section 2330 of the Civil Code provides in part: "An agent represents his principal for all purposes within the scope of his actual or ostensible authority." Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess (Civ. Code, § 2317); and the principal, under merely ostensible authority, is bound only to those persons who have in good faith and without want of ordinary care incurred a liability or parted with value upon the faith thereof (Civ. Code, § 2334). Eliminating, as obviously not pertinent herein, the subject of ostensible authority, we turn to the law as declared in Civil Code, §§ 2338 and 2339, respecting responsibility of the principal for wrongful acts of his agent.

Section 2338 reads as follows: "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal." Section 2339 reads: "A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service."

Section 2338, supra, may be divided into two parts, one providing for liability of the principal for negligence of his agent in the transaction of the business of the agency, the other providing for liability of the principal for the wrongful acts committed by the agent in and as a part of the transaction of the business of the agency. It has been held that the word "including," between the two parts, is equivalent to "and also," or "as well as," and, thus construed, the part relating to wrongful acts is separated from the part relating to negligence, making the two independent parts above stated. Johnson v. Monson, 183 Cal. 149, 190 P. 635. The charge herein not being based on negligence of the agent, the sole remaining ground of liability of respondent must be found in the facts as affected by the second part of the section quoted, read in connection with section 2339.

Appellants contend that upon the facts of this case the principle that, where one of two innocent persons must suffer for the wrongful acts of the agent of one of them, the principal, who put it in the power of the agent to do such acts, must sustain the loss occasioned by their commission, controls. In support they cite the so-called "telegraph company cases," relying chiefly on Pacific Postal Tel. Cable Co. v. Bank of Palo Alto (C. C. A.) 109 F. 369, 54 L. R. A. 711. In that case the Circuit Court of Appeals, Ninth Circuit, at the beginning of its opinion, announced that the general rule as to liability of a corporation for the acts of its agents, servants, or employees acting within the scope of their authority, and in the performance of duties regularly intrusted to them, was not called into question, but that in a certain sense the court was called upon to deal solely with exceptions to the general rule; and that in another sense it might be said that telegraph corporations stand upon a different plane from that of other corporations engaged in other kinds of business, and in some particulars stand in a position of their own. Therein the court held the telegraph company liable for the fraudulent acts of its employee operator in sending a false telegraphic order for money, and in so holding expressly declared that such liability was based on a rule of law which was founded on the principle that, if one of two innocent persons must suffer loss by the act of a third, he who put it in the power of the third person to do such act should be compelled to sustain the loss occasioned by its commission. But in deciding that case, and before applying this principle, the court expressly declared that, in the case of a telegraph company agent or employee sending a false or forged telegram over his employer's lines, he would be acting in the direct course of his employment, viz., transmitting messages, although outside of the scope of his authority, saying: "The company is held liable because it has placed its agent and operator in charge of its appliances and instruments for the transmission of dispatches over its lines, and authorized them to use the same." In that connection that court cited the case of Bank of California v. Western Union Tel. Co., 52 Cal. 280, wherein the Supreme Court of this state said: "If an agent of a telegraph company, whose duty it is to send genuine messages, shall willfully and fraudulently send a dispatch in the name of another, this wrong act is as much done 'in the course of his employment,' as if he had negligently sent a forged message. * * * The agent is authorized to transmit messages, and the transmission of a false message—whether contrived by himself or contrived by another, and negligently sent by him—is within the course of his employment." Therein is also cited the case of McCord v. Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 317, 1 L. R. A. 143, 12 Am. St. Rep. 636, where the Minnesota Supreme Court, citing the above-mentioned California case, said: "The defendant selected its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons receiving dispatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message. * * * If the corporation fails in the performance of its duty through the neglect or

fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send dispatches of a similar character, and such acts were within the scope of his employment."

Appellants cite the case of Henry Cowell Lime & Cement Co. v. Santa Cruz County Nat. Bank, 82 Cal. App. 519, 255 P. 881. Therein the court held that the evidence supported the finding that the bank's bookkeeper had ostensible authority to receive and indorse checks of customers. Under such authority he had indorsed and cashed certain checks and appropriated the proceeds to his own use. The main issue in that case was that of ostensible authority, and all that was said by the court in respect to liability of the principal was predicated on the proposition that the wrongful acts of the agent were committed in and as a part of the agency.

The case of Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 P. 704, 707, 41 L. R. A. (N. S.) 529, cited by appellants, presents clearly a case wherein estoppel to deny responsibility for wrongful acts of an agent was sustained as a defense offered by the bank in justification of its cashing of forged checks, thus overcoming the effect of the general rule that banks pay forged checks at their peril. The court quotes the substance of section 2338 of the Civil Code, and from Story on Agency, § 452, quotes the following: "In all such cases the rule applies respondeat superior, and it is founded upon public policy and convenience, for in no other way could there be any safety to third parties in dealings either directly with the principal or indirectly through the instrumentality of agents. In every such case the principal holds out the agent as competent and fitted to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency." The court then referred with approval to the so-called telegraph cases, in the particular already herein mentioned.

The case of Blair v. Guarantee Title Company, Inc., 103 Cal. App. 260, 284 P. 719, is an escrow proceeding in which the title company was held liable on the ground that the act of the escrow man was within the scope of his duty. The case of Imperial County v. Adams, 117 Cal. App. 220, 3 P.(2d) 953, cited by appellants, is not in point, and National Bank of San Mateo v. Whitney, 181 Cal. 202, 183 P. 789, 8 A. L. R. 298, was decided upon the "scope of duty" principle.

The foregoing review of the cases relied upon by appellants has been deemed necessary in order to show that in this case there is no basis for invoking the principles relied on by them to affix liability on respondent bank. The basis of liability herein is to be found in sections 2338 and 2339 of the Civil Code above quoted, and it is clear from the analysis of the cited authorities that therein the same basis was used, for in all of them the relief granted was grounded on the fact that the wrongful acts complained of were done in and as part of the transaction of the principal's business.

[1] Herein a crime was the proximate cause of the injury to appellants. In such a case the maxim that, where one of two innocent persons must suffer from the wrongful act of another, the loss must fall on the one making the act possible, has no application. Walsh v. Hunt, 120 Cal. 47, 52 P. 115, 39 L. R. A. 697.

[2, 3] The acts committed by Wickham were not only admittedly outside the scope of his employment, but were outside the scope of his authority, and were not done in performance of any part of his principal's business. Even though such wrongful acts were committed while he was engaged in his principal's service, the principal is not responsible unless they were committed in and as a part of the transaction of the principal's business. Civ. Code, §§ 2338, 2339. "The liability of the master does not extend to willful or malicious acts of the servant done while engaged in the master's service, but independent of that service and for the servant's own benefit. And this is true even where the employment furnishes the opportunity for the wrongdoing." Copelin v. Berlin Dye Works, etc., Co., 168 Cal. 715, 144 P. 961, 963, L. R. A. 1915C, 712. To the same effect are Stephenson v. Southern Pacific Co., 93 Cal. 558, 29 P. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223, and Riordan v. Gas Consumers' Ass'n, 4 Cal. App. 639, 88 P. 809. Such is the rule as affecting the relationship of master and servant. Precisely the same rule is attached to and governs the relationship of principal and agent, being clothed only in different language as it is written in sections 2338 and 2339 of the Civil Code.

The judgment is affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

1 Cal.App.2d 581

DADY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9895.

District Court of Appeal, Second District, Division 1, California.

Oct. 24, 1934.

Hearing Denied by Supreme Court Dec. 20, 1934.

1. Prohibition ⇐3(2), 10(2)

In prohibition proceeding, superior court *held* to have jurisdiction in probate proceeding to require superintendent of Indian agency to appear to be examined as to whether he had moneys of decedent's estate in his possession, since court in prohibition proceeding cannot anticipate that superior court's decision will be contrary to law and facts and such decision, if erroneous, may be reviewed by certiorari (Probate Code, § 615).

2. Evidence ⇐82

As against contention in prohibition proceeding to restrain superior court from proceeding with hearing on order to show cause, that such order was issued without filing of pleadings, court will assume order was issued on proper petition or affidavit where order recited that it was made on application of administratrix (Probate Code, § 615).

Petition for writ of prohibition by John W. Dady, as superintendent of the Mission Indian Agency at Riverside, Cal., against the Superior Court in and for Los Angeles County.

Alternative writ discharged and peremptory writ denied.

Peirson M. Hall, U. S. Atty. for Southern District of California, and Howell Purdue, Asst. U. S. Atty., both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Ernest R. Purdum, Deputy Co. Counsel, both of Los Angeles, for respondent.

HAHN, Justice pro tem.

[1] This is an application for a writ of prohibition to restrain the Superior Court in and for the county of Los Angeles from proceeding with a hearing upon an order to show cause issued by said court, in the matter of the estate of Jackson Barnett, deceased. The order was issued pursuant to the provisions of section 615 of the Probate Code, and was for the purpose of examining petitioner as to whether or not he had certain moneys in his possession belonging to the estate of Jackson Barnett. From the petition it appears that petitioner himself did not appear, as directed by the order to show cause, but his counsel did specially appear for the purpose of raising the question of the jurisdiction of the court. On this point it was urged that, inasmuch as respondent was the superintendent of the Mission Indian Agency at Riverside, he was an officer of the United States, and that the money he had in his possession belonging to Jackson Barnett was not subject to administration under the law of California, but was subject to disposition according to the regulations of the Department of the Interior of the United States. While other points are raised in the petition and the amendment to the petition, and are discussed in petitioner's brief, we deem it necessary to consider but one question, namely, Is it within the power and jurisdiction of the court to require petitioner to appear and be examined as directed in the order to show cause?

Section 615 of the Probate Code provides for the issuing of the order to show cause and the proposed examination. It is not contended that the court has no jurisdiction to administer upon the estate of Jackson Barnett located in California. If, as contended for by petitioner, the money in his hands is not subject to administration under the laws of California, we must presume that upon the hearing of the order the court will make its ruling in accordance with the facts as they are made to appear, and the law applicable thereto. While the petition alleges that the court has indicated what its decision will be upon the examination, this allegation is denied in the answer filed to the petition. We may not in a proceeding of this character anticipate that the court's decision will be contrary to the law and the facts as they appear at the examination. Boca, etc., R. Co. v. Superior Court, 150 Cal. 153, 88 P. 718; Grinbaum v. Superior Court, 189 Cal. 741, 209 P. 1005.

If upon the hearing of the order to show cause the court makes any order not supported by the facts, or in conflict with the law pertaining thereto, the petitioner has an adequate remedy for review by certiorari.

[2] There is no merit in the contention that the order to show cause was issued without the filing of any pleading therefor. The order itself recites that it is made "upon the application of Anna Laura Barnett, Administratrix of the Estate of Jackson Barnett, deceased, and good cause appearing therefor." In a proceeding of this character,

and in the state of the record before us, we must assume from this recital that the order was issued upon a proper petition or affidavit.

There is no doubt in our minds as to the jurisdiction of the court to issue the order to show cause and conduct the examination in accordance with the order.

The alternative writ is discharged and the peremptory writ is denied.

We concur: HOUSER, Acting P. J.; YORK, J.

1 Cal.App.2d 512

CHAPMAN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9911.

District Court of Appeal, Second District, Division 2, California.

Oct. 20, 1934.

Hearing Denied by Supreme Court Dec. 17, 1934.

1. Prohibition ⇐3(3)

Where court had jurisdiction to deny contestant's motion for dismissal of will contest without prejudice, prohibition is not available to restrain further proceedings and require court to grant such motion, but remedy by appeal must suffice aggrieved party (Code Civ. Proc. § 581).

2. Wills ⇐326

Superior court *held* to have jurisdiction to deny contestant's motion for dismissal of will contest without prejudice (Code Civ. Proc. § 581).

Petition for writ of prohibition by Wilson Chapman against the Superior Court of the State of California in and for the County of Los Angeles.

Alternative writ discharged, and peremptory writ denied.

Lynden Bowring, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Beach Vasey, Neil S. McCarthy, Earl L. Banta, Hawkins & Hawkins, and E. A. Hawkins, Jr., all of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

The petitioner, having proceeded to trial upon the contest of a will, in which proceeding he was the contestant, after examination of two witnesses, declined to proceed and orally moved for a dismissal without prejudice. The court denied the motion and proceeded with the case and thereafter ordered the will admitted to probate. A writ of prohibition was thereupon sought to restrain further proceedings and to require the superior court to grant such motion.

Relief is sought by this petition to avoid delay through appeal.

Section 581, Code of Civil Procedure, provides that an action *may be* dismissed (1) by written request of the plaintiff to the clerk, (2) by written consent of the parties (in either case bearing written consent of counsel), (3) by the court when either party fails to appear on the trial, (4) by the court if abandoned by the plaintiff before submission, or (5) by the court upon motion of the defendant.

[1, 2] The real issue here is the jurisdiction of the trial court to deny petitioner's motion to dismiss. If it had such jurisdiction, however erroneous its decision may have been, prohibition is not available, but the remedy by appeal must suffice the aggrieved party. That such jurisdiction existed has been held in Huntington Park Imp. Co. v. Superior Court, 17 Cal. App. 692, 121 P. 701, 702, (certiorari) and in Boca, etc., R. Co. v. Superior Court, 150 Cal. 153, 88 P. 718. Quoting from the first case just mentioned: "While plaintiff had an absolute right to dismiss the action, such right could be exercised only in the mode or manner prescribed by the statute; in other words, the right is measured by the mode provided for its exercise. When, instead of pursuing the statutory mode, it, by motion made in open court, invoked the inherent power of the court in the exercise of which it was asked to make an order dismissing the case, the making of an order either granting or denying the motion was within the exercise of the jurisdiction of the court."

The alternative writ of prohibition is discharged, and a peremptory writ is denied.

We concur: DESMOND, J.; SCOTT, Justice pro tem.

1 Cal.App.2d 441

CREAMER v. CERRATO et al.

Civ. 9116.

District Court of Appeal, First District, Division 1, California.

Oct. 18, 1934.

Rehearing Denied Nov. 17, 1934.

1. Automobiles ⇐246(60)

In action for injuries sustained when truck driver, attempting to avoid hitting child, swerved across street into plaintiff's parked car and injured plaintiff, instruction making doctrine of res ipsa loquitur inapplicable *held* proper, where plaintiff had attempted to explain collision on basis of truck's excessive speed.

2. Appeal and error ⇐216(2)

Plaintiff, having failed to request special instructions, could not complain on appeal that instructions were not as full as she now desired.

3. Automobiles ⇐246(57)

In action for injuries sustained when truck driver, attempting to avoid child, swerved across street into plaintiff's parked car and injured plaintiff, instruction on unavoidable accident *held* proper, where issue was raised by pleadings and evidence.

4. Trial ⇐296(12)

Instruction that there are no degrees of contributory negligence, and that, if plaintiff was guilty of any contributory negligence, however slight, she could not recover, *held* not error, where contributory negligence was properly defined in next preceding instruction.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Mary Belle Creamer against John Cerrato and another, doing business as the South San Francisco Bakery Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

George K. Ford, of San Francisco, for appellant.

Ross & Ross, of Redwood City, for respondents.

GRAY, Justice pro tem.

Appellant sued to recover damages for personal injuries, received by her as the result of a collision between her automobile, parked on its right side of an avenue, and an automobile truck owned by respondent V. Boido, and operated, on its wrong side, by respondent John Cerrato, his employee. After trial, the jury returned its verdict in favor of respondents. From the judgment entered thereon, she appeals, assigning as error six instructions given at respondents' request.

The following summary of the material testimony will suffice for a proper consideration of her criticism of these instructions. Appellant stated that she had parked her automobile, headed easterly, on the south side of Park View avenue about 30 feet westerly of its southwest corner with Miriam street and had visited a friend residing on the north side of the avenue; that, as she stepped off the north curb, on her return to her automobile, she saw respondents' truck 416 feet easterly of her automobile, coming westerly on its right side of the avenue, down a grade at a pretty rapid rate; that, as she got to her automobile door, she heard the screeching of a machine and saw the truck in the center of the avenue, distant 110 feet from her and 25 or 30 feet from a little girl, who was 4 feet from the northerly curb; that the truck swung out in a zigzag course, struck the front fender and spare tire in the fenderwell of her automobile and overturned, striking her in the back and skidding 27 or 30 feet past the rear of her automobile. This girl's mother, called by appellant, testified that her child had taken two or three steps into the avenue from its north curb when she saw the truck approaching at a speed of 30 to 35 miles per hour; that, in response to her command, the child turned back; that the driver of the truck applied his brakes, swerved first to his left, as if to turn southerly into Miriam street, and then to his right, when he struck the automobile and overturned. Appellant's second witness said that he heard a scream and, upon looking east, saw the truck traveling at a speed of 25 to 30 miles per hour, on its right side 5 or 6 feet from the curb, and the child apparently standing 10 or 15 feet west of the right front of the truck; that the driver turned suddenly to his left, going as if to turn toward the southwest corner and then, to his right, hitting the front end of the automobile and upsetting 27 feet beyond. Respondent Cerrato testified that, intending to turn south into Miriam street, he was driving west on his right side of Park View avenue, 5 or 6 feet from its north curb, at a speed of 15 miles per hour; that due to the steep grade, he had his foot on the brake; that he first saw the little girl standing on the north curb; that suddenly, when he was 10 or 15 feet

from her, she ran in front of his truck; that then he took his foot off of the brake, stepped on the gas, turned to his left, missed the child, tried to straighten his truck, swerved in a semicircle, and tipped over; that he did not feel the impact of the collision.

[1] The court instructed the jury "that the mere happening of an accident in which plaintiff is alleged to have been damaged raises no presumption of negligence on the part of the defendant, John Cerrato." Appellant correctly contends that the instruction advised the jury that the doctrine of res ipsa loquitur was inapplicable, and therefore prohibited it from considering, as evidence, an inference of negligence from the happening of the accident. The doctrine would have been applicable if the evidence had merely shown that the truck, traveling on its wrong side, had struck the automobile, parked on its right side, and such facts would have raised an inference that the truck driver was negligent. Bauhofer v. Crawford, 16 Cal. App. 676, 117 P. 931; Slappey v. Schiller, 116 Cal. App. 274, 2 P.(2d) 577. Under such circumstances, it would have been error to have given the instruction. Davis v. Brown, 92 Cal. App. 20, 267 P. 754; Morris v. Morris, 84 Cal. App. 599, 258 P. 616. But, since the testimony of appellant and of her witnesses explained the reason for the accident by showing that the truck's speed caused its driver to lose control in attempting to avoid the child, the doctrine is not applicable and the inference of negligence, raised by an unexplained collision, disappeared. Binns v. Standen, 118 Cal. App. 625, 5 P.(2d) 637; Johnson v. Ostrom, 128 Cal. App. 38, 16 P.(2d) 794; Gritsch v. Pickwick Stages System, 131 Cal. App. 774, 22 P.(2d) 554. Under the evidence, the instruction was proper.

[2] Appellant complains of three instructions stating, in abstract terms, the rule as to the amount of care required, when acting in a sudden emergency or peril, claiming that the first placed upon her the burden of proving that the operation of the truck on its wrong side was inexcusable and the other two denied the jury the right of considering whether the driver's failure to have his truck under control was the proximate cause of the collision. She makes no claim either that the rule was incorrectly stated or that it was not applicable under the driver's testimony. Each of these instructions contained the qualification that the rule could not be invoked by a person who was negligent. Appellant did not request nor did the court give any instruction as to the operator's duty to drive on his right or to keep his machine under control. These instructions did not specifically treat of these duties, but merely, in general terms, advised the jury that what might be negligent under ordinary conditions could be excused by a sudden emergency. The effect of these instructions, therefore, was not as appellant claims. In absence of a request, she cannot now complain that the instructions were not as full as she now desires. Comstock v. Morse, 107 Cal. App. 71, 290 P. 108.

[3] At respondents' request, the jury was instructed that appellant could not recover for damages, caused by an unavoidable accident, which was defined as one which occurs despite the exercise of reasonable care upon the part of all concerned to avoid it. Appellant argues that, since the evidence presented the sole issue of respondents' negligence and not of an unavoidable accident, this instruction erroneously invited the jury to speculate upon matters not in issue. But, since appellant requested an instruction, which was given, stating the converse, she did, at the trial, consider this issue raised by the evidence. The driver's testimony, which, if believed, excused his acts, negligent under ordinary conditions, because of the sudden peril, raised this issue, for, if he was not negligent, the accident was unavoidable. Raymond v. Hill, 168 Cal. 473, 143 P. 743; Leslie v. Catanzaro, 272 Pa. 419, 116 A. 504. The instruction could not have been harmful to appellant, for she had the burden of proving that the collision was occasioned by the negligence of respondents, which would exclude an unavoidable accident. Pearce v. Elbe, 98 Cal. App. 101, 276 P. 389. The general denial, in the answer, of the general allegation of negligence, in the complaint, permitted respondents to rely upon the defense of unavoidable accident. Pearce v. Elbe, supra. Since the issue was raised by respondents' pleading and evidence, they were entitled to this instruction. Graham v. Consolidated Motor Transport Co., 112 Cal. App. 648, 297 P. 617.

[4] The court instructed the jury as follows: "There are no degrees of negligence or contributory negligence in this case. In other words, if you find that the plaintiff was guilty of any contributory negligence, *however slight*, which proximately contributed to cause the injury and damage complained of, you are not to weigh and balance such contributory negligence against any negligence on the part of the defendant John Cerrato, but it is your duty, if you find that there was any contributory negligence on

the part of the plaintiff which proximately caused her injuries to return your verdict in favor of the defendants." (Italics ours.) By unduly emphasizing and transposing the adjective "slight," appellant reasons that the court erroneously told the jury that slight negligence, that is, the omission to exercise great or extraordinary care, would bar her recovery. The instruction as a whole, particularly the first sentence, clearly negatives any such strained construction. The same argument as to the effect of the use of the adjective "slight" in a similar instruction was demonstrated to be untenable in the well-reasoned opinion of Metcalfe v. Pacific Electric R. Co., 63 Cal. App. 331, 218 P. 486, and again in Meredith v. Key System Transit Co., 91 Cal. App. 448, 267 P. 164, and in Botti v. Savill, 97 Cal. App. 524, 275 P. 1029. See, also, 45 C. J. 978, for additional authorities. Any doubt as to the meaning of this instruction was removed by the definition of contributory negligence as the want of ordinary care in the next preceding instruction.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

1 Cal.App.2d 556

PEOPLE v. DUNN et al.

Cr. 169.

District Court of Appeal, Fourth District, California.

Oct. 22, 1934.

Hearing Denied by Supreme Court Dec. 17, 1934.

1. Riot ⇐6

Evidence as to relief applicants threatening to destroy food depot in various ways *held* to support conviction of riot, where mob had power to rush depot and take food by force, though defendants did not make identical threats and it was not shown that matches, axes, or dynamite were at hand to carry out some of threats (Pen. Code, § 404).

2. Riot ⇐6

In prosecution for riot, evidence need not show immediate power to execute all threats made if there is shown power to execute some of them (Pen. Code, § 404).

3. Criminal law ⇐1044

In prosecution against three relief applicants for riot at food depot, defendants could not complain of introduction of evidence of statement of one defendant, objected to because none of other defendants were shown to have been present, where no request was made for instruction confining application of such evidence to defendant making statement.

4. Criminal law ⇐1030(1)

Reviewing court is not required to search for errors where none are pointed out.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Lillian Dunn, M. L. Harding, and Frances Hicks were convicted of riot, and they appeal.

Affirmed.

George R. Anderson, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., Walter C. Haight, Dist. Atty., of Visalia, and Sherrill Halbert, Deputy Dist. Atty., of Porterville, for the People.

MARKS, Justice.

By an indictment returned by the grand jury of Tulare county the defendants, and Lillian Monroe, were charged with the crime of riot. They were accused of committing the offense in that they did, "acting together, threaten to use force and violence upon the food depot of the County of Tulare, located in the town of Pixley in said County, and upon the persons in authority therein, the threat to use such force and violence being accompanied by the immediate power of execution, and being without the authority of law." The case against Lillian Monroe was dismissed during the trial. The other defendants were found guilty by the jury and judgment was pronounced upon them by the trial court.

As grounds for a reversal of the judgment it is urged: (1) That the verdict and judgment are not supported by and are contrary to the evidence; (2) errors of law occurring during the trial in ruling on objections to the introduction of evidence; (3) misconduct of the trial judge; (4) misconduct of the district attorney; (5) errors in giving, and refusing to give, instructions to the jury.

We have studied the entire record and believe it unnecessary to detail any considerable portion of the extensive evidence. That portion supporting the verdict and judgment may be summarized as follows: A supply depot was maintained in the town of Pixley in Tulare county where food was distributed to those on the county relief rolls on each

Thursday. On March 22, 1934, the depot was opened at about 9 o'clock in the morning by Jap Ellege and several assistants. There were several peace officers present. Applicants for food, numbering between seventy-five and one hundred fifty, were also present. To save time and congestion, the county authorities had decided to give food to each applicant once every two weeks instead of once each week. The three defendants, and others, were told by Ellege to return on the next Thursday for food, as the rule applied to them. The defendants cursed Ellege and his assistants; said they were going to have food if they stayed all day to get it; they would smash the place down and get it; would chop it down; would burn it; that they ought to rush the depot; that they would dynamite it; that they would take the food. These identical threats were not all made by all the defendants, but each defendant made some of them, and generally in the presence and hearing of the others. Threats of personal violence were made against Ellege. The three defendants circulated through the groups of indigents outside of the depot, talking to them, and late in the afternoon they (the defendants), with about thirty or forty others, gathered outside the closed door of the depot and engaged in shouting, cursing and threatening those inside. Jap Ellege said of this occurrence: "There was a terrible noise outside. To be frank, it put you in mind of an Indian wahoo dance. As I say, it was a terrible noise." Ellege and his assistants, escorted by officers, left the depot by a small door on the opposite side from the crowd. Another officer locked the main door to the depot from the outside. No one was injured except Mrs. Dunn, who had her foot smashed as she attempted to force her way through this main door.

[1] Defendants urge that this evidence is insufficient to support the verdict and judgment for the reasons that they did not make identical threats and so were not shown to be working together, and that it was not shown that there were any matches, axes or dynamite at the food depot. From this they argue that it was not shown that there were "two or more persons acting together" in making the threats, and that the evidence does not establish that they had an "immediate power of execution" of the threats, as required by section 404 of the Penal Code.

[2] We do not so construe the evidence. Neither do we understand the law to require the evidence to show an immediate power to execute all the threats made if there is shown the power to execute some of them. Threats may be made by actions as well as by words. Many of the verbal threats may well have been uttered by defendants to inflame their auditors to violence. That they succeeded, at least in part, is shown by the mob which gathered outside of the main door of the food depot at the time it was closed. It should be evident to anyone that this mob certainly had the power to rush the depot and take food by force. That these things were not actually accomplished should not relieve the defendants from the results of their efforts to incite those engaging in the demonstration.

The following quotation from People v. Bradley, 137 Cal. App. 225, 30 P.(2d) 438, 439, may be adopted to express our conclusions on the question of the sufficiency of the evidence to sustain the verdict and judgment: "The evidence is ample to sustain the judgment. Section 404 of the Penal Code defines a riot as 'Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.' While there is no proof of the use of actual force or violence on the part of appellant or his associates, there was a disturbance of the public peace, and conduct on their part which indicated threats to use force or violence. They certainly possessed the immediate power to put their threats into execution. All of the necessary elements of the offense were thoroughly established in this case."

[3] On March 15, 1934, Harding and a number of others were at the food depot. Three times that day he said to those assembled: "I think it would be a good time to pull a little demonstration here. If you will get up forty or fifty men, I will lead them and we will go in and help ourselves. If he (Ellege) undertakes to make a gun play, some of you take it away from him and pass it down the line, and then help yourselves." Defendants complain of the introduction of this evidence. The only objection made to it was that none of the other defendants were shown to have been present. The objection as made was properly overruled. No request was made for an instruction confining the application of this evidence to Harding. There is no merit in the contention that there was error in any of the other rulings of the trial court on objections of defendants to questions propounded to witnesses.

The record discloses no misconduct on the part of the trial judge. He was patient with

the defendants and their counsel in situations which were trying.

[4] Defendants have apparently abandoned their last two assignments of error, as they do not point out in their briefs any instances of misconduct on the part of the district attorney, or errors in instructions given or refused. We are not required to search for errors where none are pointed out.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

1 Cal.App.2d 545

SAMUELS v. SINGER et al.*

Civ. 8781.

District Court of Appeal, Second District, Division 2, California.

Oct. 22, 1934.

As Modified on Denial of Rehearing Nov. 20, 1934.

Hearing Denied by Supreme Court Dec. 20, 1934.

1. Pleading ⇐49, 72

In considering sufficiency of complaint, court is not concerned with question of proper designation of action, nor with prayer for relief, but must determine from allegations whether complaint states cause of action entitling plaintiff to any relief at law or in equity.

2. Judgment ⇐251(1)

Court has jurisdiction to grant any relief consistent with case made by complaint and embraced within issue (Code Civ. Proc. § 580).

3. Landlord and tenant ⇐285(3)

Allegations that plaintiff elected to terminate lease when defendant failed to pay rent, and served notice terminating lease and demanding possession, which was not delivered, and alleging rental value of such premises, *held* to state cause of action for recovery of possession of real property and rents or value of use thereof, commonly called ejectment, and prayer for such relief as might appear proper to court embraces relief which may be granted in such action (Code Civ. Proc. § 427, subd. 2).

4. Forcible entry and detainer ⇐11(1)

Three days' statutory notice is essential to employment of summary process of unlawful detainer for recovery of possession of real property (Code Civ. Proc. §§ 1161, 1162; Civ. Code, §§ 791, 793).

5. Election of remedies ⇐2
Landlord and tenant ⇐108(1)

Termination of lease *held* effective on service of notice of termination for default in rent payment, upon which lessor had election of remedies to proceed in unlawful detainer or seek one of general remedies offered by law (Civ. Code, §§ 791, 793; Code Civ. Proc. §§ 1161, 1162).

6. Landlord and tenant ⇐291(1)

Lessor cannot maintain unlawful detainer without service of statutory notice, under statute relating to cases where tenant continues in possession after expiration of term, where in present case lease was terminated by act of lessor before expiration of term (Code Civ. Proc. § 1161, subd. 1).

7. Landlord and tenant ⇐285(3)

Landlord's pleadings stating cause of action for recovery of possession of real property and value of use thereof *held* not subject to general demurrer, though proceedings were commenced for recovery of possession under guise and designation of summary provisions of unlawful detainer statute without service of statutory notice (Code Civ. Proc. §§ 1161, 1162; Civ. Code, §§ 791, 793).

8. Pleading ⇐129(1)

Where specific allegations of pleading were denied, all other allegations *held* admitted by reason of failure to deny.

9. Appeal and error ⇐907(3)

Where appeal is on judgment roll alone, reviewing court must presume that facts as found by trial court were treated by all parties as issues properly before court at trial, that pleadings were treated as sufficient to raise issues on which findings were made, and that evidence in support of such issues was introduced and went in without objection.

10. Action ⇐28
Use and occupation ⇐10

One wrongfully occupying real property of another is liable to owner for damages in tort, but owner may waive tort and sue on contract implied in law as resulting from such tort, and such contract obligates wrongful occupant to pay reasonable value of use of property during period of such occupancy (Civ. Code, § 3334).

11. Landlord and tenant ⇐286

Where tenant held possession after termination of lease by act of lessor, damage for breach of implied legal obligation to pay reasonable value of use of property during such period was not certain nor capable of being rendered certain by calculation, but amount thereof could only be settled by process of law or by accord between parties, and

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 37 P.(2d) 1050.

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